

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: Local Government Act 1995
File No/s: SP 37 of 2008 (DLGRD 20080335)
Heard: Determined on the documents
Considered: 8 September 2009; 5 November 2009; 17 December 2009
Corams: 17 December 2009 & 5 November 2009:
Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)
8 September 2009:
Mr B. Peyton (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint SP 37 of 2008
Complainant: (Mr) Kelvin John MATTHEWS
Council member complained about: (Councillor) Timothy Wynn HARGREAVES
Local Government: Shire of Shark Bay
Regulation alleged breached: 2 x regulation 7(1)(b)

FINDINGS AND REASONS FOR FINDINGS

DEFAMATION CAUTION

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SUMMARY OF FINDINGS

The Panel found that Councillor Hargreaves:

- (a) did not commit a breach of regulation 7(1)(b) in sending his email of 21 September 2008 to the Department of Local Government and Regional Development; and
- (b) committed a breach of regulation 7(1)(b) on or about 21 September 2008 by sending copies of the email to some unnamed persons of his local community who he believed had voted for him in his election as a Council member.

BACKGROUND AND PROCEDURAL MATTERS

The material in **Attachment A** is incorporated here as if set out in full.

AVAILABLE INFORMATION

The information before the Panel in relation to this matter (“the available information”) is the information and documents described in the table under the heading ‘Available information’ in **Attachment A**. These documents are referred to below, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. [*Doc B3*] refers to the document that is Doc ID B3 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. [*pp3-4Doc B3*] refers to pages 3 - 4 of Doc ID B3.

FINDING AND REASONS FOR FINDING

Conduct complained about and alleged minor breaches

1. In the complaint Mr Matthews alleges:

- (1) That on 21 September 2008 Councillor Hargreaves contravened regulation 7(1)(b) by sending his email of that date [*Doc B1*] to two named Officers of the [then] Department of Local Government and Regional Development) to cause detriment to the Shire and to Mr Matthews in his capacity as the Shire’s CEO (“allegation (1)”).
- (2) That on 21 September 2008 Councillor Hargreaves contravened regulation 7(1)(b) by providing copies of that email to other unnamed persons to cause detriment to the Shire and to Mr Matthews in his capacity as the Shire’s CEO (“allegation (2)”).

Facts

2. The Panel notes that:

- (1) In the latter half of the email Councillor Hargreaves makes a number of serious allegations about Mr Matthews’ alleged extreme wrong-doing before he was employed by the Shire as its CEO. The allegations are not repeated here as, in the Panel’s view, they are unsavoury and clearly defamatory (as they have a tendency to lower Mr Matthews in the estimation of his fellow persons by making them think less of him). However, to indicate the seriousness of Councillor Hargreaves’ allegations about Mr Matthews, it is sufficient to say that they include allegations of an alleged conviction for embezzlement, and alleged charges of embezzlement, indecent exposure and sexual assault.
- (2) In the email Councillor Hargreaves said:

“For the benefit of those to whom I am sending a c.c. of this letter I would add these observations.” [*p2Doc B1*]

- (3) In Councillor Hargreaves' email of 25 October 2009 in response to the *Notice of Complaint* sent to him he said, relevantly:

"I am being asked to whom else I sent a copy of [the] email. ... that email was sent to [the Department] in September of last year. I can't begin to remember whom I sent a copy to but I reckon copies would have certainly been sent to such people as Mr. David Morris, Jenni Law, Mr. Peter Hay and the like. Plus the CCC and certain of my community who voted me in to curb what was perceived as a corrupt Shire." [p1Doc E]

- (4) In Councillor Hargreaves' email of 25 October 2009:

- (a) his reference to "Mr. David Morris, Jenni Law, Mr. Peter Hay" is understood to be a reference to David Morris, Jenni Law and Peter Hayes, Department employees; and
- (b) his reference to "the CCC" is understood to be a reference to the Corruption and Crime Commission.

3. In the Panel's view the available information is sufficient evidence to conclude, as the Panel does, that the material facts in this matter are more likely than not that:

- (1) Councillor Hargreaves sent the email to the Department on 21 September 2008.
- (2) On or about 21 September 2008 Councillor Hargreaves sent copies of the email to others - including some unnamed persons who he believed had voted for him in his election as a Council member.

Panel view on allegation (1)

4. Attachment B sets out the provisions of regulation 7(1) followed by the Panel's views and material in relation to it. In relation to allegation (1), on the available information and in the light of the available information and the Panel's views and the material in Attachment B, it is the Panel's view that:

- (1) Despite being requested to do so, the complainant, Mr Matthews, has *not* provided the Panel with any information that supports the view that when Councillor Hargreaves sent the email to the Department:
- (a) he was in breach of any standard of conduct required to be adhered to by him as a Council member; or
- (b) he sent the email *with the purpose of* causing damage to the respective reputations of the Shire and the CEO.
- (2) Rather, the contents of the email indicate that Councillor Hargreaves' main purpose in sending it to the Department was to draw attention to his concerns about the Shire's affairs.

- (3) Councillors have a duty to raise and pursue issues, with the appropriate regulatory agency or by otherwise following the applicable protocol, about the proper administration of their local government, including any inappropriate or dishonest conduct by its officers. There is no material before the Panel which indicates that, in sending the email to the Department, Councillor Hargreaves was motivated by any factor other than the best interests of the Shire or that he did not genuinely believe that the allegations to which he refers requires investigation.
- (4) Viewed objectively, Councillor Hargreaves' conduct did not constitute making improper use of his office as a Council member, because a council member's actions in bringing concerns about his or her local government to:
 - (a) the Department as the regulatory body responsible for Local Government matters; or
 - (b) the Minister for Local Government as the Minister of the Crown to whom the administration of the Act is for the time being committed by the Governor; or
 - (c) the Corruption and Crime Commission,is not an improper use of the council member's office.
- (5) To hold or endorse any view contrary to those expressed in (3) or (4) above would be against the spirit and intent of the Act, and could hinder the free flow of information to the Department for Local Government as the current appropriate regulatory body for local government matters.

Panel finding on allegation (1)

5. In the light of the contents of paragraph 4 above the Panel finds that Councillor Hargreaves did not breach regulation 7(1)(b) in sending his email of 21 September 2008 to the Department of Local Government and Regional Development.

Panel view on allegation (2)

6. In relation to allegation (2), in the light of the available information and the Panel's views and the material in Attachment B, it is the Panel's view that:

- (1) On or about 21 September 2008 Councillor Hargreaves sent copies of the email to some unnamed persons of his local community who he believed had voted for him in his election as a Council member.
- (2) Such sending:
 - (a) was a use of Councillor Hargreaves' office as a Council member, as the email was signed "Tim Hargreaves Councillor – Shark Bay"; and

- (b) viewed objectively, was an improper use of Councillor Hargreaves' office as a Council member, on the grounds that:
 - (i) such sending was to make inappropriate public criticism of Mr Matthews;
 - (ii) he failed to follow the appropriate manner of expressing his concerns about Mr Matthews' alleged past – such manner being to raise them with his fellow Councillors at a Council meeting when it was closed to members of the public; and
 - (iii) such sending had the potential for the contents to be given greater weight by virtue of the fact that an elected Councillor had made them.
- (3) Viewed objectively, such sending was fully intended by Councillor Hargreaves to cause detriment to Mr Matthews – the detriment being for others to think less favourably of Mr Matthews.
- (4) However, if such sending was not fully intended by Councillor Hargreaves to cause detriment to Mr Matthews:
 - (a) there is in any event a rational inference arising from the circumstantial evidence that it is more likely than not that such sending was done with reckless indifference that detriment to Mr Matthews was a probable or likely consequence of such sending; and
 - (b) it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.
- (5) Viewed objectively, such sending was not intended by Councillor Hargreaves to cause detriment to the Shire. If Councillor Hargreaves's conduct in this matter caused any detriment to the Shire then the detriment was collateral damage.

Panel finding on allegation (2)

7. In the light of the contents of paragraph 6 above the Panel finds that Councillor Hargreaves committed a breach of regulation 7(1)(b) on or about 21 September 2008 by sending copies of the email to some unnamed persons of his local community who he believed had voted for him in his election as a Council member.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

References to sections and regulations, and the term “viewed objectively”

In these Reasons, unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”), a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (“the Act”).
- (2) The term “viewed objectively” means “as viewed by a reasonable person” (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

Details of the complaint

The complainant in this matter, Mr Matthews, is the complaints officer (“complaints officer”) and the Chief Executive Officer (“CEO”) of the Shire of Shark Bay (“Shire”). His complaint (“the complaint” or “Complaint SP37”) consists of a 4-page *Complaint of Minor Breach* dated 14 October 2008 [Doc B] and the attachment to it. The attachment is a copy of a 4-page email of 21 September 2008 [Doc B1] from Councillor Hargreaves to two named officers of the then Department of Local Government and Regional Development.

On 5 occasions Mr Matthews has been requested in writing ([Doc C], [Doc C1], [Doc C3], [Doc C4] and [Doc C6]) to clarify his allegations and provide further information in this matter. He responded by his letters of 10 March 2009 [Doc C2] and 5 May 2009 [Doc C5].

Preliminary matters

The complaint is in the form approved by the Minister for Local Government and was made within time. There are allegations made in the complaint that Councillor Hargreaves, a Council member at the relevant time, has committed a minor breach as defined under section 5.105(1)(a).

Councillor Hargreaves’ response sought

Councillor Hargreaves was sent a Notice of Complaint [Doc D], and he responded [Doc D].

Available information

The information before the Panel in relation to this matter (“the available information”) is described in the following table:

Doc ID	Description
A	Copy of 1-page letter from Mr Matthews, dated 14 October 2008
B	Copy of the complaint (4-page Complaint No. SP 37 of 2008, dated 14 October 2008) – the attachment to it being <i>[Doc B1]</i>
B1	Copy of 4-page email of 21 September 2008
C	Copy of 3-page letter to Mr Matthews, dated 7 November 2008
C1	Copy of 2-page letter to Mr Matthews, dated 11 February 2009
C2	Copy of 1-page letter from Mr Matthews, dated 10 March 2009
C3	Copy of 2-page letter to Mr Matthews, dated 24 March 2009
C4	Copy of 1-page letter to Mr Matthews, dated 23 April 2009
C5	Copy of 1-page letter from Mr Matthews, dated 5 May 2009
C6	Copy of 2-page letter to Mr Matthews, dated 22 May 2009
D	Copy of 2-page <i>Notice of Complaint</i> to Cr Hargreaves, dated 19 October 2009
E	Copy of 2-page email response of 25 October 2009 from Cr Hargreaves

Attachment B

VIEWS AND MATERIAL IN RELATION TO REGULATION 7(1)

Relevant legislation

Regulation 7 reads:

- “(1) A person who is a council member must not make improper use of the person’s office as a council member:*
- (a) to gain directly or indirectly an advantage for the person or any other person; or*
 - (b) to cause detriment to the local government or any other person.*
- (2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

Section 5.93, headed ‘Improper use of information’, reads:

“A person who is a council member, a committee member or an employee must not make improper use of any information acquired in the performance by the person of any of his or her functions under this Act or any other written law:

- (a) to gain directly or indirectly an advantage for the person or any other person; or*
- (b) to cause detriment to the local government or any other person.*

Penalty: \$10 000 or imprisonment for 2 years.”

[Note: In section 5.93, the term ‘information’ refers to confidential information.]

By virtue of the definition of “public officer” in *The Criminal Code* section 1, a council member is a public officer.

The Criminal Code section 83, headed ‘Corruption’, reads:

“Any public officer who, without lawful authority or a reasonable excuse:

- (a) acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (c) acts corruptly in the performance or discharge of the functions of his office or employment,*

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.”

Elements of regulation 7(1)

In the Panel's view, the elements of a breach of regulation 7(1) are that:

- a council member
- committed the alleged conduct
- the member's conduct was a use of the member's office as a council member
- viewed objectively, the member's conduct constituted making improper use of the member's office as a council member (where the term "viewed objectively" means as viewed by a reasonable person – i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts)
- viewed objectively, the member's conduct was committed by the member for the sole or dominant purpose (motive or intent) of:
 - gaining directly or indirectly an advantage for the member or any other person; and / or
 - causing detriment to the local government or any other person.

Views

The Panel's views in relation to regulation 7(1) are that:

1. Conduct has been held to be "improper" where it involves "a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case.": *R v Byrnes: Re Hopgood* (1995) 183 CLR 501 at 514 – 5.
2. The required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, any relevant code of conduct, and his or her council's decisions and policies.
3. The fiduciary obligations owed by a council member to his or her council (or local government) include:
 - (a) a duty to act in good faith (i.e. the council member must in his/her dealings act bona fide in what he/she considers to be the best interests of the council);
 - (b) an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred (i.e. for "proper purposes"); and
 - (c) the "no profit" rule – i.e. a council member cannot obtain an advantage for the member or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his or her position.

4. For regulation 7(1) to be breached, it is not necessary that an advantage has actually been directly or indirectly gained or that a detriment has been actually suffered, as it is sufficient that the council member had the intention of directly or indirectly gaining an advantage or of causing a detriment: *Chew v R* (1992) 173 CLR 626.
 5. Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing: *Chew*, at 647; *R v Byrnes* at 514 – 5.
 6. In considering the meaning of the term “detriment” in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:
 - (a) the noun “detriment” as “loss, damage, or injury” and “a cause of loss or damage”;
 - (b) the noun “loss”, relevantly, as “detriment or disadvantage from failure to keep, have or get”;
 - (c) the noun “damage” as “injury or harm that impairs value or usefulness”;
 - (d) the noun “harm” as “injury; damage; hurt” and “moral injury; evil; wrong”;
 - and
 - (e) the noun “disadvantage”, relevantly, as “any unfavourable circumstance or condition” and “injury to interest, reputation, credit, profit, etc”.
 7. The term “detriment” is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, or any state, circumstance, opportunity or means specially unfavourable. Accordingly, “detriment” may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment.
 8. The Panel may find that a council member intended by his/her conduct to cause a detriment to a person if:
 - (a) the member’s admission/s is/are to that effect; or
 - (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member’s conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.
- [Note: In *Ryan and Local Government Standards Panel* [2009] WASAT 154 Mr Justice J A Chaney (President), at [32], agreed with the observations set out in 4, 5, 6 and 7 above.]
9. In considering the meaning of the term ‘advantage’ in regulation 7(1)(a), the definitions of the noun ‘advantage’ in the Shorter Oxford English Dictionary (6th ed) include: “a favouring circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ...”.
 10. The term ‘advantage’ in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.

11. Section 83 of the *Criminal Code* [see regulation 7(2)] makes reference to a public officer who “acts in the performance or discharge of the functions of his office”, whereas regulation 7(1) refers only to “use of the person’s office”. Accordingly, improper conduct falling short of being in the performance or discharge of a council member’s office is caught by regulation 7 so long as it involves the use of office.
12. A council member’s right of freedom of expression is a factor in considering what constitutes improper conduct by him or her.
13. The role, responsibilities, empowerment and limitations of a council member include the following:
 - (1) The role of the council of a local government is set out by former section 2.7, which read at the relevant time:

“(1) The council -
(a) directs and controls the local government's affairs; and
(b) is responsible for the performance of the local government's functions.

(2) Without limiting subsection (1), the council is to -
(a) oversee the allocation of the local government's finances and resources; and
(b) determine the local government's policies.”
 - (2) Thus, by virtue of former section 2.7 and the definition of the term ‘function’ in section 5 of the *Interpretation Act 1984*, it is the role of the council to direct and control (now, under the current section 2.7, ‘to govern’) the local government’s affairs and to be responsible for the performance of the local government’s functions, powers, duties, responsibilities, authorities and jurisdictions.
 - (3) Section 2.10 defines the role of a councillor:

“A councillor -
(a) represents the interests of electors, ratepayers and residents of the district;
(b) provides leadership and guidance to the community in the district;
(c) facilitates communication between the community and the council;
(d) participates in the local government's decision-making processes at council and committee meetings; and
(e) performs such other functions as are given to a councillor by this Act or any other written law.”
 - (4) Elected members constitute a local government’s council. They are responsible for observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.

- (5) While a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government.
- (6) The Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that position; or the council's responsibility for the performance of the local government's functions.
- (7) A councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.

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Complaint SP 37 of 2008

Complainant: (Mr) Kelvin John MATTHEWS

Council member complained about: (Cr) Timothy Wynn HARGREAVES

Local Government: Shire of Shark Bay

Regulation alleged breached: 2 x regulation 7(1)(b)

DECISION & REASONS FOR DECISION

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SUMMARY OF FINDING OF MINOR BREACH

The Panel has made a finding (the finding) to the effect that on or about 21 September 2008 Councillor Hargreaves made improper use of his office of Council member for the purpose of causing detriment to Mr Matthews, and thus committed a breach of regulation 7(1)(b) (the present breach), by sending to some unnamed persons of his local community copies of his email of 21 September 2008 that he had sent to two named Officers of the [then] Department of Local Government and Regional Development.

SUMMARY OF DECISION

The Panel's decision on how the present breach is dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, pursuant to paragraph (c) of that section it ordered 2 or more of the sanctions described in paragraph (b) of that section, as specified in the Minute of Order attached to these Reasons. Summarised, these sanctions are: that Councillor Hargreaves be publicly censured; and that he apologise publicly to Mr Matthews.

DECISION & REASONS FOR DECISION

References to sections, regulations and the offending conduct

1. In these Reasons, unless otherwise indicated:

- (a) a reference to a section is a reference to the corresponding section in the Act;
- (b) a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations); and
- (c) a reference to the term 'the offending conduct' is a reference to the physical conduct that, in the Panel's view, resulted in the present breach having occurred – namely, that on or about 21 September 2008 Councillor Hargreaves sent, to unnamed persons of his local community, copies of his 21 September 2008 email to two named Officers of the department of the Public Service (the Department) then assisting the Minister for Local Government (the Minister) to administer the Act.

Procedural fairness matters

2. The Panel gave to Councillor Hargreaves:

- (a) notice of the finding (the Notice of Finding);
- (b) a copy of the Panel's Reasons for Findings (the present Reasons for Findings); and
- (c) a reasonable opportunity for him to make submissions about how the present breach should be dealt with under section 5.110(6).

Councillor Hargreaves' response and submissions

3. Councillor Hargreaves' initial response to the Notice of Finding consists of his emails of 10 and 11 February 2010 (noting that the texts of those emails are identical), the attachment to his email of 11 February 2010, his fax of 12 February 2010 (being a one-page cover message followed by 10-pages of copies of media items that appear to mention the complainant Mr Matthews (Mr Matthews)), and his email of 1 March 2010.

4. In his emails of 10 and 11 February 2010 Councillor Hargreaves

- (a) made incorrect reference to “page 7 of *your* [Mr Jolly’s or the Panel’s] submission”, as his reference appears to be a reference to page 7 of the present Reasons for Findings; and
- (b) made the comment that he does not know the contents of, and his belief that it is only fair he be given the opportunity of seeing the letters to and from Mr Matthews – which, in the Panel’s view, was and is a reference to the letters identified by the Doc ID notations C, C1, C2, C3, C4, C5 and C6 in the table of available information on page 7 of the present Reasons for Findings.

5. Copies of the letters mentioned in paragraph 4(b) above were sent to Councillor Hargreaves for his comments, which he provided in his email of 19 March 2010.

6. In the Panel’s view, Councillor Hargreaves’ response to the Notice of Finding (Councillor Hargreaves’ response) may be summarised, relevantly, as consisting of:

- (a) his submissions about how the breach should be dealt with under section 5.110(6), as follows:

“(a) dismissal of the complaint, and failing that (b) undertake training (Local Gov’t Legal course preferably) or as specified. (This being on the understanding I have not been found guilty.)”;

- (b) his foreshadowing of his intention to make application to the State Administrative Tribunal (SAT) pursuant to section 5.125(1) for a review of the Panel’s decision in this matter if the Panel, in his words, “*is not prepared to accept either option*”;
- (c) his queries and comments about the complaint being made about his conduct in this matter, when that conduct has already been the subject of a previous complaint made by Mr Matthews which was dealt with by the Panel some time ago;
- (d) various examples of his view of the alleged truth of his statements about the alleged history of Mr Matthews’ personal and professional misconduct or illegal activities before January 2006 and since then while employed as the Shire’s CEO;
- (e) copies of media material which Councillor Hargreaves claims supports those statements; and
- (f) his explanation of why he committed the offending conduct.

7. In the Panel’s view, Councillor Hargreaves’ explanation of why he committed the offending conduct, as it appears in his responses of 10 and 11 February 2010, is sufficiently summarised as follows:

- (1) He alleges that many of the adverse factual comments about Mr Matthews’ past that he has made – some of which are complained about in the complaint – have been public knowledge in his local community from about January 2007.

- (2) He claims that when he stood for office of Council member [at the 20 October 2007 Shire elections] it was public knowledge in his local community that the then incumbent Shire President was the subject of investigations by the Department.
- (3) When he stood for and was elected to his office of Council member [on 20 October 2007] it was on “an unambiguous anti-corruption ticket” that he had a responsibility to try to “clear up” what he alleges and describes as “two corruption issues”:
 - (a) an improperly functioning Council – as instanced particularly in relation to the process by which a person of Mr Matthews’s alleged background came to be the Shire’s CEO; and
 - (b) “an already corrupt [Shire] Administration which in essence boiled down to the CEO Mr Matthews”.
- (4) He believes that part of his role as a Council member - particularly his duty to represent the interests of the electors in the Shire’s district - is to clear up those ‘corruption issues’ and the other issues relating to Mr Matthews’ vocational and personal activities.
- (5) The offending conduct was in conformity with his formal declaration, as required by section 2.29, that he made after he was elected as a councillor and before he acted in that office – namely, he formally declared that he took the office on himself and would duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the Shire district according to the best of his judgment and ability, and that he would observe the Regulations.
- (6) The offending conduct was committed by him in the pursuit of his electoral promises.
- (7) The offending conduct may have been appropriate conduct by an elected member of the Shire’s Council because, in the view of an unidentified person that was expressed to Councillor Hargreaves on 9 February 2010 (i.e. two days before he made his response), the offending conduct occurred as the result of:
 - (a) Councillor Hargreaves’ pursuit of his legal responsibilities as a Shire Councillor, in that he had made reports to, and asked for the assistance of, the ‘recommended and customary’ agencies (including the Department of Local Government, the Corruption and Crime Commission, the Police Service, the Ombudsman, the ‘Public Sector Panel’ and Members of Parliament including the Minister) in relation to his views that:
 - (i) it was inappropriate for the complainant to continue to be the Shire’s CEO because of his alleged history of personal and professional misconduct or illegal activities before and since he was employed as the Shire’s CEO; and
 - (ii) accordingly, the complainant should cease to be employed by the Shire as its CEO; and

- (b) as that assistance had not been forthcoming, he was left with no other option but recourse to 'alternative persons or Agencies'.

Panel view on procedural fairness accorded to Councillor Hargreaves in the light of his responses

8. In relation to Councillor Hargreaves comment and belief mentioned in paragraph 4(b) above, and his queries and comments mentioned in paragraph 6(c) above, the Panel observes that:

- (1) In Councillor Hargreaves' response he does not deny having committed the offending conduct.
- (2) On page 6 of the present Reasons for Findings, the Panel said: "On 5 occasions Mr Matthews has been requested in writing ([Doc C], [Doc C1], [Doc C3], [Doc C4] and [Doc C6] to clarify his allegations and provide further information in this matter. He responded by his letters of 10 March 2009 [Doc C2] and 5 May 2009 [Doc C5]."
- (3) In the context of the Panel's role, the principles of procedural fairness or due process require that:
 - (a) the council member complained about in a complaint should have matters adverse to him/her put to the member for comment or evidence before the Panel makes a finding that a minor breach has occurred¹; and
 - (b) the Panel should not make a minor breach finding having had regard to undisclosed material being adverse information that was credible, relevant and significant to the finding to be made without first putting that material to the council member complained about².
- (4) The information and material that the Panel took into account in making the finding of minor breach in this matter was the information in the documents identified by the Doc ID notations A, B, B1, C2, D and E in the table of available information on page 7 of the present Reasons for Findings.
- (5) The relevant information, in the document so identified by the Doc ID notation C2 and so taken into account by the Panel, was that Mr Matthews confirmed that his allegations were as indicated in the complaint.
- (6) None of the letters to and from the complainant Mr Matthews (being the letters identified by the Doc ID notations C, C1, C2, C3, C4, C5 and C6 in the table of

¹ *Kioa v West* (1985) 159 CLR 550

² (*Kioa, ibid*, at 629.3 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; and *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966)

available information on page 7 of the present Reasons for Findings) contained any information:

- (a) that was adverse to Councillor Hargreaves, and that was not already in the complaint or the email complained about in it; and
 - (b) that was credible, relevant and significant to the Panel when it made its finding of the present breach; and
 - (c) that was not disclosed to Councillor Hargreaves before the Panel made its finding of the present breach.
- (7) Mr Matthews' previous complaint referred to in paragraph 6(c) above was allocated the Panel's notation SP 43 of 2008. The conduct complained about in that complaint was that on 16 October 2008 Councillor Hargreaves sent an email to: the Panel; two officers of the Department; and the Minister. Thus the conduct complained about in that complaint was after and differs from the conduct complained about in the present complaint SP 37 of 2008 which in the Panel's view resulted in the present breach.
- (8) It is the Panel's view that:
- (a) it accorded Councillor Hargreaves procedural fairness (or, 'due process') before it made its finding of the present breach; and
 - (b) Councillor Hargreaves' response does not provide any reason to cause the Panel to doubt or rescind its finding of the present breach.

Panel view on aspects of Councillor Hargreaves' response

9. In relation to those parts of Councillor Hargreaves response referred to in paragraphs 6(d) and 6(e) above, the Panel generally observes that:

- (1) Conduct may be improper notwithstanding:
- (a) the motives which lie behind the conduct; or
 - (b) how beneficial the conduct may otherwise be.³
- (2) In paragraph 6(2)(b) of the present Reasons for Finding, the Panel expressed part of its views in this matter in relation to the offending conduct – namely, that
- “viewed objectively, [the offending conduct] was an improper use of Councillor Hargreaves' office as a Council member, on the grounds that:
- (i) such sending [i.e. the sending of his relevant email to members of his local community] was to make inappropriate public criticism of Mr Matthews;
 - (ii) he failed to follow the appropriate manner of expressing his concerns about Mr Matthews' alleged past – such manner being to raise them with

³ *Woollahra Municipal Council v Minister for the Environment and Or* (1991) 23 NSWLR 710 at 716 and 717 per Gleeson CJ; at 727 and 730 per Kirby J.

his fellow Councillors at a Council meeting when it was closed to members of the public; and

(iii) such sending had the potential for the contents to be given greater weight by virtue of the fact that an elected Councillor had made them.”

- (3) Thus, it is apparent from a plain reading of the present Reasons for Finding that the relevant legal issues in this matter did not and do not concern the truth or falsity of Councillor Hargreaves’ statements and imputations, in the relevant email, concerning alleged conduct by Mr Matthews; but rather that they include the *propriety* of to whom did he make those statements and imputations.
- (4) Councillor Hargreaves’ claims of the truth of those statements and imputations are submissions that may be appropriate as a defence if Mr Matthews had brought civil proceedings for defamation against Councillor Hargreaves for publishing them. However, those claims are of little (if any) relevance to the fair and objective disposition of the allegations made in the complaint or to how the Panel deals with the present breach pursuant to section 5.110(6).

10. In relation to those parts of Councillor Hargreaves response referred to in paragraph 6(f) above and summarised in paragraph 7 above, the Panel observes that:

- (1) When an individual becomes a member of a council of a local government, he or she undertakes high public duties. Those duties are inseparable from the position: the individual cannot retain the honour and divest him/her of the duties.⁴
- (2) Councillor Hargreaves fails to accept that he has committed any wrongdoing in his conduct that, in the Panel’s view, resulted in the present breach.
- (3) It is noteworthy that Councillor Hargreaves’ response pays scant attention to but does not disagree with the Panel’s general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure B to the present Reasons for Finding, which include the following:
 - (a) while a council member has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the council member’s duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government; and
 - (b) the Act does not impose upon a council member any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that

⁴ By analogy from *Horne v Barber* ([1920] HCA 33; (1920) 27 CLR 494) per Isaacs J.

position; or the council's responsibility for the performance of the local government's functions.

- (4) The principles that apply to a local government in respect of its employees are set out in section 5.40. They include the principles that employees are to be treated fairly and consistently, and are to be provided with safe and healthy working conditions in accordance with the *Occupational Safety and Health Act 1984*. Accordingly, council members need to be mindful of these and other workplace obligations under the law, and to ensure that they do not subject a council employee to any conduct (including making any unsubstantiated or defamatory attack on the employee) that could open their local government, or themselves as individuals, to a breach of the employee's contract of employment or to a workers compensation claim.
- (5) In the present matter:
 - (a) before Councillor Hargreaves was an elected Council member, and since then, he has had concerns about Mr Matthews being the Shire's CEO because of his alleged history of personal and professional misconduct or illegal activities before and since he was employed as the Shire's CEO;
 - (b) once elected as a Council member, Councillor Hargreaves tried without success to convince a majority of the Council members that those concerns had merit;
 - (c) Councillor Hargreaves then implemented his two-pronged campaign to have Mr Matthews cease being the Shire's CEO by:
 - (i) making his reports to many State agencies (including the appropriate regulatory agencies that have the necessary powers, statutory role and functions to carry out any investigation) in which he expressed similar or related concerns about Mr Matthews's alleged conduct and insisted that his concerns had merit and that they required urgent action that was or included Mr Matthews cease being the Shire's CEO; and
 - (ii) as the present breach now indicates in the light of Councillor Hargreaves' response, misusing his title and position of Councillor to publicly circulate those concerns in his local community in an attempt to further garner public support for his campaign and to encourage persons from within his local community to apply pressure on Council and the appropriate regulatory agencies for the purpose of having Mr Matthews cease being the Shire's CEO.
- (6) In Councillor Hargreaves' response he says, in effect, that because the appropriate regulatory agencies did not "provide assistance to him" he was "left with no other option" but to act as described in paragraph 10(5)(c)(ii) above.

Panel views on appropriate sanction/s for the present breach

11. In considering an appropriate sanction or sanctions for the present breach the Panel notes that:

(1) [*Relevant antecedent of Councillor Hargreaves*] In relation to the allegation of minor breach made in Complaint No. SP 5 of 2008 (and which was also one of the allegations made in Complaint Nos. SP 8, 9, 11, 12 and 13 of 2008 respectively):

(a) Councillor Hargreaves has previously been found by the Panel, under Part 5 Division 9 of the Act, to have committed a minor breach (the first found breach) – namely, that at the Shire’s Council Ordinary Meeting on 19 December 2007 he committed a breach of regulation 10(3)(b) by using an offensive or objectionable expression in reference to a Shire employee; and

(b) the Panel’s decision was that it dealt with the first found breach pursuant to paragraph (b)(ii) of section 5.110(6) by ordering that Councillor Hargreaves publicly apologise to the Shire employee concerned.

(2) Councillor Hargreaves applied to SAT for a review of the Panel decision mentioned in paragraph 11(1)(b) above. The review was SAT case no. DR:296/2008, and was conducted by the then Deputy President of SAT, Judge J Chaney (as he then was). The Reasons for Decision of the Tribunal, delivered on 17 December 2008, bear the citation *Hargreaves and Local Government Standards Panel [2008] WASAT 300 (Hargreaves)*.

(3) In *Hargreaves Chaney J*:

(a) concluded that Councillor Hargreaves committed a breach of regulation 10(3)(b) by using an offensive or objectionable expression in reference to the Shire employee;

(b) said that, in his view, the Panel was correct in imposing the requirement which it did [that Councillor Hargreaves publicly apologise to the Shire employee concerned, as specified in its order];

(c) said, at [24]:

“Materials provided to the Tribunal, both through the Standards Panel, and from Cr Hargreaves, demonstrate that there is an unfortunate division within the Council of the Shire. The five complainant councillors appear to be on one side of that divide, and Cr Hargreaves and Cr Cowell appear to be on the other side. I was informed that there have been a large number of complaints emanating from this Shire to the Standards Panel since the new provisions dealing with breaches of conduct rules by councillors were introduced into the LG Act in November 2007. There is obviously a complete lack of effective communication between Cr Hargreaves and the Chief Executive Officer and the President of the Shire, and certain other councillors. The Tribunal is not in a position to assess the reasons for that breakdown of communication or where the fault for it lies.”

(d) said, at [25]:

“... That Cr Hargreaves chose to use an offensive expression in relation to the health inspector in the context of raising the concerns is probably attributable to his relative inexperience as a councillor as at December 2007. ...”; and

(e) said, at [26] – [28]:

“... The obvious adversarial approach taken in relation to this issue is unfortunate. The fact of a division between councillors does not, however, justify a breach of the Rules of Conduct in relation to an employee of the local government. Even if a criticism of a local government employee were to have some justification, the purpose of the rules is to ensure that that criticism is not dealt with by publicly denigrating the employee. Where that occurs, it is appropriate that the breach be remedied by a public apology.

Cr Hargreaves opposed the requirement for a public apology on the basis that he was simply endeavouring to provide proper representation of his constituents and to address criticisms which he has of the operations of the Shire over a period of years. He considers the requirement that he apologise will merely serve to deepen the divide in the community, and on the Council, which is detrimental to the good government of the Shire.

In my view, an apology is appropriate. If, as Cr Hargreaves contends, he did not intend to be offensive to the health inspector, then an apology for any offence unintentionally caused is a very reasonable step to take. An apology should serve to put the matter behind all concerned, so that they can focus on the constructive and proper government of the Shire. ...”

- (4) *[Is a public censure appropriate in this matter?]* A breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure. The Panel does not see any reason in this matter as to why this position should differ when considering the present breach.
- (5) *[Is a public apology appropriate in this matter?]* Where a councillor is found by the Panel to have breached regulation 7(1)(b) by committing an act deliberately done to bring about a result which can be characterised as a detriment to a named or identifiable person, the breach will in almost all occasions deserve the sanction of a public apology to that person. The Panel does not see any reason in principle why this position should differ when considering the present breach.
- (6) *[Is training appropriate in this matter?]* Part of Councillor Hargreaves’ submissions mentioned in paragraph 6(a) above, about how the breach should be dealt with under section 5.110(6), indicates some preparedness on his behalf to undertake training. He refers to training in a “Local Gov’t Legal course preferably”.
- (7) However, it is the Panel’s view that what is required of Councillor Hargreaves is not formal training – rather it is for him:

- (a) to take on board the Panel's general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure B to the present Reasons for Finding;
- (b) to accept that whenever he is acting in his capacity as a Council member he is required to steadfastly adhere to and actively observe and carry out all of the legal duties and ethical duties that he has as a Council member; and
- (c) to act accordingly.

Panel decision

12. Having regard to the present Reasons for Findings, these Reasons for Decision above, and the general interests of local government in Western Australia, the Panel's decision in this matter is that the present breach is dealt with pursuant to paragraph (c) of section 5.110(6) by ordering 2 or more of the sanctions described in paragraph (b) of that section, as specified in the Minute of Order attached to these Reasons – namely that Councillor Hargreaves:

- (a) be publicly censured, as specified in that Minute of Order; and
- (b) apologise publicly to Mr Matthews, as specified in that Minute of Order.

.....
Brad Jolly (Presiding Member)

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Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (“the Panel”) hereby gives notice that:

- (1) Under section 5.125 of the *Local Government Act 1995* **the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (“SAT”) for a review of the Panel’s decision in this matter. In this context “decision” means a decision to dismiss the complaint or to make an order.**
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules **an application to SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice under the *State Administrative Tribunal Act 2004* (“SAT Act”) section 20(1).**
- (3) **The Panel’s *Reasons for Finding* and these *Reasons for Decision* constitute the Panel’s notice (i.e. the decision-maker’s notice) given under the SAT Act section 20(1).**