

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 31 of 2008
Heard: Determined on the documents
Considered: 1 December 2008 and 17 December 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 31 of 2008

Complainant: (Cr) Alan Edwin BLENCOWE

Council member complained about: Councillor Brett TREBY

Local government concerned: City of Wanneroo

Regulations alleged breached: 4(2) and 7(1)

Findings:

The Panel finds that Councillor Treby committed a breach of the City of Wanneroo's standing order 11.9, and thus committed a minor breach by virtue of regulation 4(2).

The Panel also finds that Councillor Treby committed a breach of regulation 7(1)(b).

REASONS FOR FINDING

1. In these Reasons, unless otherwise indicated, a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* ("the Act"), and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").
2. Mr John Love, at the time the acting complaints officer of the City of Wanneroo ("City"), has sent to the Local Government Standards Panel ("the Panel") a complaint dated 4 August 2008 ("the complaint") made by Councillor Blencowe about Councillor Treby's conduct during the debate ("the debate") on the motion relating to Item SCS02-07/08 (in regard to the City's 2008/2009 annual budget) ("the motion") at the City's Council's Special Meeting on 25 July 2008 ("the Special Meeting").
3. The complaint consists of a 2-page Complaint of Minor Breach Form and a 1-page Complainant Details Form that has marked on it "Refer to tape of meeting". Mr Love also sent to the Panel a copy of the minutes of the Special Meeting and a CD recording of the proceedings at the Special Meeting. Subsequently, Ms Karen Caple, the City's complaints officer, sent to the Panel a typed transcript of that recording ("the transcript").

4. The Panel's Administration, on its own initiative, corresponded with Councillor Blencowe for clarification of his allegations and further information in this matter. Councillor Blencowe's response ("the complaint supplementary material") consisted of, relevantly, a 3-page unsigned letter dated 11 September 2008 and copies of pages 5, 6 and 11 of the 5th August 2008 edition of the "Sun City News" newspaper.

5. Two allegations of minor breach are made by Councillor Blencowe in the complaint ("the two allegations"). They are:

- (1) That Councillor Treby's conduct contravened standing order 11.9 ("standing order 11.9") of the *City of Wanneroo Standing Orders Local Law 2000* ("the City's standing orders") by making adverse reflections upon the character or actions of Councillor Blencowe, Councillor Miles and Councillor Grierson or by imputing a motive or motives to any one or more of such other members.
- (2) That by the conduct complained about in relation to allegation (1) Councillor Treby committed a breach of regulation 7(1) by making improper use of his office as a Council member both, or alternately, to gain a moral advantage for himself and/or to cause detriment to the reputations of Councillors Blencowe, Miles and Grierson.

6. The Panel notes that Councillor Blencowe has also complained that Councillor Treby's conduct during the debate was a breach of section 23 of "the Anti-Discrimination Act". Considering this claim, it may be noted that Western Australia does not have an Act by that name – however, it appears that his reference to "the Anti-Discrimination Act" is a reference to the Northern Territory's *Anti-Discrimination Act*, which is clearly not relevant in this matter.

7. On 25 September 2008 the Panel Administration, on its own initiative, sent Councillor Treby a Panel *Notice of Complaint* together with copies of: the complaint; the transcript; the Panel Administration's file copy letter of 3 September 2008 to Councillor Blencowe; and the complaint supplementary material. By the Panel *Notice of Complaint* the Panel Administration, inter alia, notified Councillor Treby of the two allegations and:

- (a) advised him the adverse reflections or imputing of motives by him consisted of statements or comments (as detailed in and expanded by the complaint and the complaint supplementary material) with the following substance, effect or implication:
 - (i) Councillors Blencowe, Miles and Grierson had no right to oppose the motion because they did not mention, during the prior budget process, the matters they were then raising; and
 - (ii) Councillors Blencowe, Miles and Grierson had been derelict in their Council duties; and
- (b) invited his response to the two allegations.

8. Councillor Treby's response to the two allegations, relevantly, is his 2-page letter of 5 November 2008. In his response, Councillor Treby says, relevantly:

"I will only respond to the nature of the allegations made by Cr Blencowe, as outlined in your letter of 25 September 2008.

It is not my intention in this response to provide commentary on the transcript of the meeting, nor the generalisations, inferences, suppositions or conjectures made by Cr Blencowe.

Notwithstanding, several items of debate introduced at the Special Budget meeting of 25 July 2008 had not been previously raised, and these formed the basis of comments made by several councillors on the evening. With certainty, comments made by Councillors Smithson, Monks, Roberts, Newton and Goodenough bear out the differences in recollection to those of Cr Blencowe.

Significantly, the issues raised, particularly by Cr Blencowe were contrary to the advice of the professional officers and could in all likelihood impact adversely on the positive reputation of the City and the capacity of Council to provide good governance. It was therefore necessary to rebut these items in debate in pursuit of the public interest.

That no allegation is made against other councillors, with the exception of the Mayor and myself, raises questions of vexatious or oppressive behaviour, on the part of Cr Blencowe, particularly with the introduction of unsubstantiated and inflammatory comments such as "victimisation" or "bullying" behaviour. It is however not my intention at this stage to take these matters further.

In terms of responding to the councillor's claim of a breached of the City of Wanneroo Standing Orders Clause 11.9 {complaint form 4 August 2008}, I offer the following comment.

It was entirely available to the councillor, at that time, to raise a point of order in the normal course of business and bring this alleged breach to the attention of the Chairman. That Cr Blencowe chose not to address the issue within the normal convention of meeting procedure brings into question the validity of the allegations and importantly the observance of the orderly conduct and good governance of Council

In regard to the allegations as formalised in Complaint No 3 of 2008, I formally respond as follows.

*In terms of **Allegation 1 part (a)** I completely refute the claims that I adversely reflected on the character of Cr Blencowe. In regard to **Allegation 1 part (b) sub point (i)**, I deny totally the allegation that I claimed in debate that the councillor had no right to oppose the motion. With respect to **Allegation 1 part (b) sub point (ii)** I categorically deny the assertion made in the allegation that I stated the councillor was derelict in his duties.*

*In regard to **Allegation 2**, it is not accepted that the comments raised on the evening were anything other than reasoned debate for purposes of rebuttal, and in support of the recommendation and advice of the professional officers of the City. As a consequence I do not accept any of the assertions made regarding misuse of office."*

9. The Panel is satisfied that: the complaint; the confirmed minutes of the Special Meeting and the other written material referred to above; and page 151 of WALGA's WA Local Government Directory 2008, are evidence from which it may be concluded, and which the Panel so concludes, that it is more likely than not that:

- (a) at all material times Cr Treby was the City's deputy mayor and a member of the City's council ("Council");
- (b) during the period from February to July 2008 there were briefing meetings between the Council members and City officers in connection with the preparation of the City's proposed 2008/2009 budget ("the proposed budget");
- (c) at some of those briefing meetings Councillor Blencowe, Councillor Miles and Councillor Grierson raised objections in regard to items in or not in the proposed budget;
- (d) the debate took place when the meeting was open to members of the public;
- (e) the Council members who spoke against the motion were Councillor Blencowe, Councillor Miles and Councillor Grierson;
- (f) clause 10 of the motion was: "That Council by an absolute majority endorses the withdrawal of the Mobile Library service and the revised format of the Podiatry Service";
- (g) at the end of his speech against the motion, Councillor Blencowe moved that the motion be amended by deleting clause 10 - however, his motion lapsed for want of a seconder;
- (h) the motion was carried 13/2, with the councillors voting against it being Councillor Blencowe and Councillor Miles;
- (i) the copy of the transcript provided by the City's complaints officer to the Panel is a true record of what was said at the Special Meeting at all material times; and
- (j) at the time of the debate:
 - (i) the City's local law relating to conduct of people at council or committee meetings was the City's standing orders; and
 - (ii) the City's code of conduct for council members was the *City of Wanneroo Code of Conduct for Council Members 2008* ("the Code of Conduct").

10. The Panel now considers each of the two allegations referred to in paragraph 5 above in turn. In relation to allegation (1) it is noted that by section 5.105(1)(b) a council member commits a minor breach if he or she contravenes a local law under the Act, contravention of which the regulations specify to be a minor breach.

Regulation 4 reads:

- (1) *In this regulation —*
“local law as to conduct” means a local law relating to conduct of people at council or committee meetings.
- (2) *The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.”*

The City’s standing orders are a local law as to conduct. Standing order 11.9 reads:

“A member shall not reflect adversely upon the character or actions of another member or an officer of the City nor impute any motive to a member or an officer unless the Council resolves, without debate, that the motion then before the Council cannot otherwise be adequately considered.”

11. In the Panel’s view the intent and purposes of standing order 11.9 include:

- (a) the prohibition of adverse reflections by council members about the City’s officers, except in appropriate circumstances;
- (b) except in rare situations, the prohibition of the use by a council member of any argument that consists of a personal attack by the council member directed against any speaker or other council member in a council debate – the term “personal attack” including replying to an argument or factual claim of another council member by attacking or appealing to a characteristic or belief of that other council member, rather than by addressing the substance of the argument or producing evidence against the claim; and
- (c) assisting the presiding person to keep of order at a meeting.

12. In the Panel’s view, an adverse reflection is a remark or observation that would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her - the phrase “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.

13. In the Panel’s view:

- (1) A council member will *reflect adversely upon the character of another member* if the council member makes a remark or observation that relates to the other member’s moral or mental characteristics, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.
- (2) A council member will *reflect adversely upon the actions of another member* if the council member makes a remark or observation that relates to any thing done by the other member, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.

- (3) A council member will *impute a motive* to another member if the council member attributes something to the other member as the other member's goal or object for acting or not acting in the manner that the other member acted or did not act.

14. In the present case, it would appear from the complaint supplementary material, particularly Councillor Blencowes' 3-page undated letter, that the alleged adverse reflections and the wrongful imputations of motive in relation to allegation (1), that Councillor Blencowe states or refers to in the complaint supplementary material, are as follows (in each case the initial quotation is taken from item 3 of the 3-page undated letter):

- (i) "Page 11 of the transcript where Cr Treby stated *"it was the equivalent of the three monkeys, crossing eyes, ear and mouth – heard nothing, saw nothings and tonight is the time that everyone decides to rewrite history"* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Cr Treby on pages 11 and 11-12 of the transcript:

[on p. 11] *"Now with the exception of potentially three or four other Councillors and those who asked relevant, reasonable questions, it was the equivalent of the monkey, or the three monkeys, crossing eyes, ears and mouth – heard nothing, saw nothing and tonight is the time that everyone decides to rewrite history."*

[on p. 11-12] *"... it is nothing short of offensive."*

- (ii) "... on page 12 end of first paragraph *"I'll say for the sake of nothing other than grandstanding and "I don't like it"*" – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Cr Treby on page 12 of the transcript:

"To, to suggest that we operate in a vacuum and for the, for the sake and I'll say for the sake of nothing other than grandstanding and 'I don't like it' to go through this entire process."

- (iii) "Further in his statement, he states *"to say nothing, to not raise the issues before now ... does a disservice to every other Councillor that put in the hard work ..."* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Cr Treby on page 12 of the transcript:

"To go through this process and to then suggest to be at the meetings, to sit down, to say nothing, to not raise the issues before now and then say that I don't like the outcome does a great disservice to every other Councillor that put in the hard work, it does a great disservice to the Administration who tried incredibly hard to make sure that they cut their positions and cut their cloth."

- (iv) "... further in last few lines of his second paragraph he states ... *"those councilors who sat back, who did not say anything, who did not raise it before this evening, to then raise it for nothing other than grandstanding is I'd have to say Mr Mayor offensive ..."* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Cr Treby on page 12 of the transcript:

“This is a Council that does not exist in a vacuum. The Council isn’t immune to fuel, fuel charges. The Council isn’t immune to the economy that we’ve got. This isn’t some utopia where we simply say from on high ‘this is what we’re going to charge and we really don’t care’. To suggest otherwise is incredibly misleading and it is, it is indeed offensive to the good Councillors and staff that put in the time, the effort, opened their mouths and debated hardily in the forums that we were at and really made their points known. Those Councillors who didn’t, who sat back, who did not say anything, who did not raise it before this evening, to then raise it for nothing other than grandstanding is I’d have to say Mr Mayor from my perspective, offensive.”

15. The Panel notes that the Macquarie Dictionary (2nd ed) defines:

- (a) the verb intransitive “grandstand” as “to behave ostentatiously in order to impress or win approval”;
- (b) the noun “ostentation” as “pretentious show; display intended to impress others”;
- (c) the adjective “ostentatious” as “characterised by or given to ostentation or pretentious show” and “(of actions, manner, qualities exhibited, etc.) intended to attract notice”; and
- (d) the adjective “pretentious” relevantly as “making an exaggerated outward show”.

16. In the Panel’s view:

- (1) The transcript indicates that none of Councillors Blencowe, Miles and Grierson made any statement or suggestion that the City “operates in a vacuum”.
- (2) In the light of the Panel’s views in paragraph 13 above, the remarks or observations repeated in paragraphs 14(i) and (iii) above:
 - (a) were made by Cr Treby with reference to Councillors Blencowe, Miles and Grierson as the Councillors who spoke against the motion; and
 - (b) were adverse reflections by Cr Treby upon the respective character and actions of Councillors Blencowe, Miles and Grierson;

and accordingly were breaches by Cr Treby of standing order 11.9.

- (3) In the light of the Panel’s views in paragraph 13 above, the remarks or observations repeated in paragraphs 14(ii) and (iv) above:
 - (a) were made by Cr Treby with reference to Councillors Blencowe and Miles; and
 - (b) were the imputing of a motive by Cr Treby to each of Councillor Blencowe and Councillor Miles in making their earlier remarks or observations during the debate,

and accordingly were breaches by Cr Treby of standing order 11.9.

Accordingly, the Panel finds that at the Special Meeting Mayor Kelly contravened standing order 11.9, and thus committed a minor breach due to regulation 4(2).

17. Turning to allegation (2) referred to in paragraph 5 above, it is noted that regulation 7 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 7(1)(b) is a minor breach.

Regulation 7(1)(b) reads:

“A person who is a council member must not make improper use of the person’s office as a council member: ...

(b) to cause detriment to the local government or any other person.”

18. In the Panel’s view a breach of regulation 7(1)(b) will occur if:

- (a) at the relevant time the person complained about was a council member, and committed the alleged conduct; and
- (b) the member’s conduct was a use of the member’s office as a council member; and
- (c) the member’s conduct constituted making improper use of the member’s office as a council member; and
- (d) the relevant conduct was accompanied by the member’s intention to cause detriment to the local government or any other person.

19. 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].

20. In the Panel’s view 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, the common law where the Act is silent, and any relevant code of conduct.

21. The fiduciary obligations owed by a council member to his or her council (or local government) include 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) and an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred (i.e. for “proper purposes”).

22. The Code of Conduct includes the following clauses:

“2.1 General principles

It is a requirement of this Code that members observe the general principles referred to in Regulation 3(1) of the Rules of Conduct Regulations.

2.3 Personal behaviour

A member must:

- (a) *act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;*
- (b) *perform his or her duties impartially and in the best interests of the City;*
- (c) *act in good faith and fidelity in the interests of the City and the community; and*
- (d) *make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of the member's role, which may cause any reasonable person unwarranted offence or embarrassment.*

2.4 Honesty and integrity

A member must:

- (a) *observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from these standards;”*

23. For regulation 7(1)(b) to be breached, it is not necessary that a detriment has been actually suffered, as it is sufficient that the council member had the intention of causing a detriment (*Chew v R* (1992) 173 CLR 626). 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).

24. The Panel notes that, 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”.

25. In the Panel’s view, 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.

26. The Panel considers that for the purposes of regulation 7(1)(b) it 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.

27. In the present case, it is the Panel's view that the information in the written material mentioned above is sufficient evidence from which it may be concluded, and it so concludes, that it is more likely than not that:

- (a) Councillor Treby made use of his office as a Council member to make the remarks and observations quoted in paragraph 14 above, when the meeting was not closed to members of the public;
- (b) in making that use of his office, Councillor Treby committed:
 - (i) breaches of the City's standing order 11.9;
 - (ii) breaches of clause 2.1 of the Code of Conduct by failing to treat Councillors Blencowe, Miles and Grierson with respect and fairness;
 - (iii) a breach of clause 2.3(b) of the Code of Conduct by failing to perform his duties impartially and in the best interests of the City;
 - (iv) a breach of clause 2.3(c) of the Code of Conduct by failing to act in good faith and fidelity in the interests of the City and the community;
 - (v) a breach of clause 2.3(d) of the Code of Conduct by failing to refrain from any form of conduct, in the performance of the member's role, which may cause any reasonable person unwarranted offence or embarrassment;
 - (vi) a breach of clause 2.4(a) of the Code of Conduct by failing to observe the highest standards of integrity;
 - (vii) a breach of clause 2.4(a) of the Code of Conduct by failing to avoid conduct which might suggest any departure from the standards in the Code of Conduct;
 - (viii) breaches of his duty to act in good faith and his obligation to exercise powers conferred on him as a Council member only for the purposes for which they were conferred, by the breaches referred to in (i) to (vii);
- (c) Councillor Treby's conduct constituted making improper use of the member's office as a council member;

- (d) Councillor Treby intended by his conduct to cause detriment primarily to Councillors Blencowe and Miles, and to a lesser extent to Councillor Grierson, such detriment being a diminishing of their respective reputations and/or a tendency for others to think less favourably of each of them, as there is a rational inference arising from the circumstantial evidence that he intended to cause the detriment, 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; and
- (e) Councillor Treby committed a breach of regulation 7(1)(b).

Accordingly, the Panel finds that Councillor Treby committed a breach of regulation 7(1)(b).

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Quentin Harrington (Presiding Member)

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Clive Robartson (Member)

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John Lyon (Member)

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File Nos: SP 31 of 2008 (DLGRD 20080262)
Heard: Determined on the documents
Considered: 1 December 2008, 17 December 2008 and 4 May 2009
Corams: *4 May 2009:*
Mr Q. Harrington (Presiding Member)
Councillor Carol Adams (Member)
Mr J. Lyon (Member)
1 December 2008 and 17 December 2008:
Mr Q. Harrington (Presiding Member)
Councillor Clive Robartson (Member)
Mr J. Lyon (Member)

Complaint No.: SP 31 of 2008
Complainant: (Cr) Alan Edwin BLENCOWE
Council member complained about: Councillor Brett TREBY
Local government concerned: City of Wanneroo

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.

SUMMARY OF FINDINGS

The Panel has made a finding ("the first finding") that Councillor Treby committed a breach ("the standing order breach") of standing order 11.9 of the *City of Wanneroo Standing Orders Local Law 2000*, and thus committed a minor breach by virtue of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").

The Panel has also made a finding ("the second finding") that Councillor Treby committed a breach of regulation 7(1) of the Regulations ("the regulation 7(1) breach").

CHANGE IN COMPOSITION OF PANEL SINCE FINDINGS

After the Panel made the first finding and the second finding (together, "the first and second Findings") and gave Councillor Treby notice of them and a copy of the Panel's *Reasons for Finding* in this matter ("the Reasons for Finding"), the terms of the appointments of the then members of the Panel expired on 31 December 2008. That Panel as so composed is referred to below as "the previous Panel". The current composition of the Panel, being the present Coram ("the Panel"), includes two members of the previous Panel.

Councillor Adams has confirmed that, prior to considering the Panel's decision in this matter under section 5.110(6) of the *Local Government Act 1995* ("the Act"), she was provided with and she has considered all information provided to the previous Panel when it made the first and second Findings.

SUMMARY OF DECISION

The Panel's decision on how the standing order breach and the regulation 7(1) breach are dealt with under section 5.110(6) of the Act was that, for the following reasons, pursuant to paragraph (b)(ii) of section 5.110(6) it ordered Councillor Treby to apologise publicly as specified in the attached Minute of Order.

REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the Regulations.

Procedural fairness matters

2. The previous Panel gave to Councillor Treby:

- (a) notice of the first and second Findings;
- (b) a copy of the Reasons for Finding; and
- (c) a reasonable opportunity for him to make submissions about how the Breaches should be dealt with under section 5.110(6).

3. Councillor Treby responded to the previous Panel's notice of the first and second Findings, with a 17-page response dated 29 January 2009 ("Councillor Treby's submissions") which consists of: a 8-page letter; and 9 pages of a document headed "2008/09 Budget Discussion Outcomes" with its contents relating to the Elected Member Workshops of the City of Wanneroo ("City") on 22 April 2008, 13 May 2008, 10 June 2008 and 8 July 2008.

4. Before turning to Councillor Treby's submissions, the Panel notes that in the Panel Notice of Complaint sent to Councillor Treby on 25 September 2008 he was advised, relevantly, that:

"It would assist the Panel in considering the allegations if you were to provide your response and any information that you consider to be relevant to them.

...

All responses and information that you wish to provide to the Panel should be in writing, ... and should be made within 21 days

Once the 21-day period has expired the Panel may proceed to make its findings in this matter on the documents then before it."

Councillor Treby's submissions

5. Turning to Councillor Treby's submissions, the Panel notes that:

(1) In essence the majority of Councillor Treby's submissions consist of:

- (a) what he alleges to be relevant information, and his arguments, on the allegations of minor breach made in this matter – arguments that he did not make and information that he did not provide at the time when he exercised his opportunity to respond to the allegations in his response of 5 November 2008;
- (b) what he contends to be “a number of significant and compounding errors” of the Panel's factual conclusions in “paragraphs 11(c), (h), (k) and (m)” of the Reasons for Finding (although the passages he refers to that are in the Reasons for Finding are in paragraphs 9(c), (g) and (i) of the Reasons for Finding); and
- (c) his explanation for making his various remarks and observations that are repeated in paragraph 14 of the Reasons for Finding.

(2) In his correspondence and submissions in this matter to the Panel, Councillor Treby:

- (a) has not denied having made the various remarks and observations attributed to him in the transcript provided to the Panel (“the transcript”); and
- (b) has not made any submission of substance in relation to any of the breaches of the *City of Wanneroo Code of Conduct for Council Members 2008* (“the Code of Conduct”) and his fiduciary duties set out in paragraph 27(b) of the Reasons for Finding.

6. Councillor Treby, in his submission, challenges the Panel's findings the subject of paragraph 9(c), (g) and (i) of the Reasons for Finding. In relation to 9(c) the Panel notes the contents of the record headed “2008/09 Budget Discussion Outcome”. It is clearly only a summary concerned with the outcomes. In any event, for the purposes of this complaint the Panel revokes its finding the subject of paragraph 9(c) of the Reasons for Finding, and makes no finding on the issue of whether or not the Councillors raised objections at the briefing meetings. The Panel does not view this aspect as crucial to its decision. Insofar as 9(g) is concerned the Panel concedes that it was wrong but again the point about when the motion was moved is not of great relevance. In relation to 9(i) the Panel accepts that the transcript may not incorporate all interjections.

Affirmation of previous Panel's findings

7. After reconsidering all information provided to the previous Panel when it made the first and second Findings, and after carefully considering Councillor Treby's submissions, it is the Panel's view that:

- (1) Although there were a number of remarks or observations that the previous Panel found under paragraph 16 of the Reasons for Finding to have been made by Councillor Treby in breach of standing order 11.9, it was appropriate for the previous Panel to have made only one finding of minor breach in relation to those breaches – because the breaches occurred in a relatively short period in relation to the same matter before Council.
- (2) It was also appropriate for the previous Panel to conclude in this matter that there is sufficient evidence from which it may be concluded, and from which it so concluded, that it is more likely than not that those breaches, and Councillor Treby's breaches of the Code of Conduct and his fiduciary duties set out in paragraph 27(b) of the Reasons for Finding, occurred.
- (3) At the time of signing these *Reasons for Decision* there is no information before the Panel that suggests any miscarriage in this matter or provides any valid reason, on the balance of probabilities, to doubt the correctness of the first and second Findings.

Accordingly, the Panel affirms the first and second Findings.

Councillor Treby's submissions re section 5.110(6)

8. The Panel notes that:

- (1) Subject to (3), in relation to the standing orders breach and specifically how that breach should be dealt with under section 5.110(6), in Councillor Treby's submissions he says:

"I seek that the Panel note that it considers that I have contravened standing order 11.9 of the City's Standing Order, but takes no further action on the basis:

- a. *In the context of the debate the comments were relatively minor; and*
- b. *That my comments were true and correct; and*
- c. *That my comments were intended to protect the City's reputation; and*
- d. *That my comments were intended to protect the City from unnecessary financial loss (\$10000 a day)*
- e. *The claims made by Councillor Miles, Councillor Blencowe and Councillor Crierson that they had raised their concerns in the Budget Briefing meetings as they claimed were false and misleading; and*
- f. *They would have reasonably known at the time of providing the information to the Panel that their comments to have been false and misleading."*

- (2) Subject to (3), in relation to the regulation 7(1) breach and specifically how that breach should be dealt with under section 5.110(6), in Councillor Treby's submissions he says:

"I seek a finding that I did not breach regulation 7(1) of the Regulations on the basis that:

1. *The Panel has made a number of significant and compounding errors which have resulted in it arriving at conclusions that would not been open to it had it not erred; and*

2. *Had the Panel properly weighted the independent evidence available to it and/or taken the reasonable steps to verify the events of the budget briefing meeting a reasonable person would not be able to draw the same conclusions as the Panel; and*
3. *Based on the existing weight of evidence it is open for a reasonable person to conclude that I was seeking to protect the City's reputation and financial position by supporting the professional officers recommendation and seeking to support the passage of budget; and*
4. *Consequently, it is more likely than not that the inference drawn by the Panel is not the only inference that a reasonable person may draw and therefore no breach of regulation 7 (1) of the regulations has occurred."*

(3) As set out in paragraph 6 above, the Panel revokes its finding that at the briefing meeting the Councillors concerned raised objections in regard to items in or not in the proposed budget. However, the Panel observes that even if Councillor Treby's comments were true and correct and intended to protect the City's reputation and financial position, they nonetheless were made in breach of standing order 11.9 and regulation 7(1).

9. The Panel repeats paragraph 11 of the Reasons for Finding, in that in the Panel's view the intent and purposes of standing order 11.9 include:

- (a) the prohibition of adverse reflections by council members about the City's officers, except in appropriate circumstances;
- (b) except in rare situations, the prohibition of the use by a council member of any argument that consists of a personal attack by the council member directed against any speaker or other council member in a council debate – the term "personal attack" including replying to an argument or factual claim of another council member by attacking or appealing to a characteristic or belief of that other council member, rather than by addressing the substance of the argument or producing evidence against the claim; and
- (c) assisting the presiding person to keep order at a meeting.

10. In the Panel's view, Councillor Treby's submissions indicate that his views on this matter can be reduced in effect to him:

- (a) not regarding this matter as one of considerable seriousness;
- (b) denying virtually any (if not all) wrongdoing in this matter; and
- (c) being justified in his actions.

11. In determining an appropriate sanction or sanctions in this matter:

- (1) The Panel's views are that:
 - (a) the actions of a council member, at a council meeting when members of the public are present, in reflecting adversely upon the character and actions of other council members, and in imputing motives to other council members, is inappropriate conduct and usually deserving of public censure; and

- (b) any improper use by a council member of his/her office of council member for the purpose of causing a detriment to another member is a very serious matter and usually deserving of public censure.
- (2) The Panel notes that:
- (a) Councillor Treby has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach; and
 - (b) on the basis of Councillor Treby's submissions, he has failed to appreciate that his targeted comments relating to Councillors Blencowe, Miles and Grierson during the debate were and are unacceptable, and thus the Panel must embrace the possibility that the breaches should be dealt with by the Panel by making an order that includes Councillor Treby undertaking training in his debating skills.
- (3) The Panel has not made an order that includes such training, in the hope that Councillor Treby digests these Reasons, and that after he duly reflects upon the Reasons for Finding and these Reasons, he will ensure his conduct accords with the relevant standards.
- (4) The Panel also notes that:
- (a) it has now dealt with a separate Complaint of Minor Breach made by Councillor Blencowe about the conduct of Mayor Jon Kelly, the City's Mayor, as the Presiding Person of the Special Meeting during the debate concerned in this matter;
 - (b) Councillor Treby's conduct in this matter was allowed, and later followed in like tenor during the debate, by Mayor Kelly as the Presiding Person; and
 - (c) no Councillor present during the debate called a point of order at any time while Councillor Treby was conducting himself as complained about in this matter.

Panel decision

12. Having regard to the Reasons for Finding, the matters mentioned in paragraph 11 above, and the general interests of local government in Western Australia, the Panel's decision in this matter is that pursuant to paragraph (b)(ii) of section 5.110(6) it orders Councillor Treby to apologise publicly as specified in the attached Minute of Order.

Councillor Treby ought to be ordered to apologise publicly to Councillors Blencowe, Miles and Grierson for his conduct during the debate when he improperly used his office as a Council member to cause detriment to them by, among other things, reflecting adversely upon their characters or actions and by imputing motives to them.

Although Councillor Treby's breaches are of concern to the Panel, by virtue of the matters mentioned in paragraph 11(4) above the Panel did not consider it appropriate for it to order a public censure in relation to the breaches.

Panel's concluding observations

13. The Panel concludes its dealing with Complaint SP31 of 2008 by making the following observations:

- (1) An effective Council governance system demonstrates accountability by means that include ensuring Council and staff act ethically and lawfully. In the case of City Councillors, this includes observing the provisions of the City's standing orders when at a Council meeting.
- (2) The standards of conduct which a member of the City's Council present at a Council meeting (or at a relevant committee's meeting) is to comply with consists of the standards that flow from the fiduciary obligations owed by the member to Council (or the City) as complemented by the Act, the Regulations, the common law where the Act is silent, and (at the time of the Special Meeting) the *City of Wanneroo Standing Orders Local Law 2000* and the *City of Wanneroo Code of Conduct for Council Members 2008* ("the Code of Conduct").
- (3) Those standards do not prevent a City Councillor from engaging in debate that is robust, strong, vigorous or impassioned, without contravening standing order 11.9.

.....
Quentin Harrington

.....
Carol Adams

.....
John Lyon

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).**