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 10 of 2009 (DLG 20090104)
Heard:	Determined on the documents
Considered:	27 May 2010
Coram:	Mr B. Jolly (Presiding Member) Councillor C. Adams (Member) Mr J. Lyon (Member)

Complaint No. SP 10 of 2009
Complainant: (Cr) Frances Maureen GRIERSON
Council member complained about: Councillor Brett TREBY
Local Government: City of Wanneroo

Regulations alleged breached: Regulations 7(1)(b), 9(1) and 10(1)(a)

FINDINGS AND REASONS FOR FINDINGS

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 found:

(1) That Councillor Treby did not commit a breach of regulation 9(1) or regulation 10(1)(a) as alleged in the complaint.

(2) **That on 19 April 2009 Councillor Treby committed a breach of regulation 7(1)(b) by making improper use of his office as a Council member to cause detriment to Councillor Grierson by sending his email of that date to the City's Councillors.**

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 B2]* refers to the document that is Doc ID B2 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 B2]* refers to pages 3 - 4 of Doc ID B2.

FINDING/S AND REASONS FOR FINDING/S

Allegations of breaches made in the complaint

1. In the complaint *[Doc B]*, as supplemented by her 11-page undated letter (received on 12 June 2009) *[Doc D]* and its attachments *[Doc D1], [Doc D2]* and *[Doc D3]* (the supplementary material), Councillor Grierson makes 3 allegations of breach in addition to the 3 allegations of minor breach mentioned in paragraph 3 below – namely, that Councillor Treby's actions in this matter contravened:

(a) standing order 8.8(2) of the City's standing orders local law;

(b) section 14 of the *Age Discrimination Act 2004* (Cwlth);

(c) section 6 of the *Disability Discrimination Act 1992* (Cwlth); and

(d) regulation 3(1)(g).

2. In the Panel's view:

(1) The City's standing orders local law applies at Council and committee meetings only. Councillor Treby's actions in this matter do not appear to have occurred at any such meeting, and accordingly the City's standing orders local law is of no relevance in this matter.

(2) Broadly, the *Age Discrimination Act 2004* (Cwlth) makes it unlawful, in the particular circumstances set out in Divisions 2 and 3 of its Part 4, unless one of the statutory exemptions applies, to discriminate against someone (e.g. a Commonwealth Government employee or someone applying to become such) on the ground of age in respect of: employment and related matters; education; access to premises; provision of goods, services and facilities; provision of accommodation; disposal of land; administration of Commonwealth laws and programs; and requests for information on which age discrimination might be based. None of those circumstances is in point and accordingly the *Age Discrimination Act 2004* (Cwlth) is of no relevance in this matter.

(3) Broadly, section 6 of the *Disability Discrimination Act 1992* (Cwlth) makes it unlawful in the prescribed circumstances for a person to discriminate against another person on the ground of the other person's disability. However, that section is a "limited application provision" under section 12 of that Act, which, in subsections 12(3) to 12(14) (both inclusive), also sets out the circumstances in which that Act has application. None of those latter circumstances is in point and accordingly the *Disability Discrimination Act 1992* (Cwlth) is of no relevance in this matter.

(4) The general principles referred to in subregulation 3(1) are for guidance of council members but it is not *a rule of conduct* that the principles be observed [regulation 3(2)]. Also, regulation 3(1)(g), while important, is not a rule of conduct under section 5.104(1). Accordingly, an allegation of a breach of regulation 3(1)(g) is not an allegation that a minor breach has been committed.

Allegations of minor breach made in the complaint

3. In the complaint as supplemented by the supplementary material, Councillor Grierson makes 3 allegations of minor breach which can be expressed as follows:

(1) **That on 19 April 2009 Councillor Treby made improper use of his office as a Council member to cause detriment to Councillor Grierson by sending his 2-page email of 19 April 2009 *[Doc B4]* to all of the City's Councillors, in contravention of regulation 7(1)(b)** (allegation (1)).

(2) **That in the period prior to 22 April 2009 that related to the holding and organising of a Federal Cabinet Meeting at the City's Civic & Administration Centre, Councillor Treby undertook a task or tasks that contributed to the City's administration, without being authorised by the City's Council or by its CEO to undertake the task/s, in contravention of regulation 9(1)** (allegation (2)). It is not necessary to mention here the alleged task/s so undertaken.

(3) **That in the period prior to 22 April 2009 that related to the holding and organising of a Federal Cabinet Meeting at the City's Civic & Administration Centre, Councillor Treby directed or attempt to direct a person or persons who is/are a City employee to do or not to do anything in the person's capacity as a City employee, in contravention of regulation 10(1)(a)** (allegation (3). It is not necessary to mention here the alleged direction/s, the names of the City employees concerned, and the thing/s Councillor Treby is alleged to have so directed or attempted to direct.

Apparent facts

4. It is the Panel's view that the available information is sufficient evidence for it to conclude, on the balance of probabilities having regard to the Briginshaw principles, as the Panel hereby concludes, that the substance of the background and material facts in this matter is as follows:

(1) At all material times:

(a) Councillor Treby was a Council member, and the City's Deputy Mayor (the Deputy Mayor);

(b) Mayor Jon Kelly (the Mayor) was the City's Mayor, elected by the electors of the City's district; and

(c) Mr Daniel Simms (Mr Simms) was the City's Chief Executive Officer (the CEO).

(2) However, during the period from 9 April 2009 to 17 April 2009 Mr Simms was on leave *[p1Doc G1]* and Mr Dennis Blair (Mr Blair) was the City's Acting Chief Executive Officer (the A/CEO) *[Doc H]*.

(3) The Australian Government held a Community Cabinet meeting at Ballajura Community College on 22 April 2009, from 6.00pm to 8.15pm (the Community Cabinet meeting). The period from 6.00pm to 7.00pm was a public forum (being an address from the Prime Minister, followed by a question and answer session) *[Doc G1]*. In the period from 7.15pm to 8.15pm: Minister Kate Ellis had a meeting with the City's representatives - whom it appears consisted of Councillor Glynis Monks (Councillor Monks), Ms Fiona Bentley and one or more of the Mayor, the Deputy Mayor and the CEO; and Minister Anthony Albanese had a meeting with the City's representatives - whom it appears consisted of Councillor Laura Gray (Councillor Gray), Mr Blair and one or more of the Mayor, the Deputy Mayor and the CEO *[Doc G1]* and *[Doc G17]*

(4) Prior to the holding of the Community Cabinet meeting, the Mayor:

(a) decided which of the Councillors he wished to be included among the City's representatives at the 2 meetings mentioned in paragraph 4(3) above, and at 3 other like meetings with Ministers which did not eventuate *[Doc B6]* and *[p4Doc G]* – his selection consisting of himself, Councillor Treby, Councillor Gray, Councillor Tracey Roberts, Councillor Newton and Councillor Monks (the Mayor's selected Councillors) *[Doc G16]*; and

(b) decided which of those Councillors were in fact included among the City's representatives at the meetings mentioned in paragraph 4(3) above *[Doc B5]*.

(5) Council appears not to have made or authorised or played any role in making any of the decisions mentioned in paragraph 4(4) above.

(6) The Australian Government held a Cabinet meeting at the City's Council Chamber in the City's Civic Centre (the Civic Centre) on 22 April 2009 (the Cabinet meeting). This meeting required considerable planning in regard to the security and other arrangements required by the Department of the Prime Minister and Cabinet (DPMC). In order to facilitate those arrangements, the CEO:

(a) authorised the City's Director Governance and Strategy, to manage contact between the agencies – i.e. the City and the DPMC. This involved:

(i) the majority of the Elected Members' wing and associated meeting rooms (including the Council Chamber), and the Elected Members' area (including post box access etc), in the Civic Centre being closed and not accessible on Tuesday 21 and Wednesday 22 April 2009; and

(ii) the Basement car park in the Civic Centre to be closed for the 36 hour period from 6pm Tuesday 21 April 2009; and

(b) authorised the endeavours of any other City staff or any other person's endeavours to assist the City to achieve those arrangements.

(7) On 18 April 2009 Councillor Grierson sent an email *[Doc B3]* to the CEO, and the other Councillors. The text of the email reads:

"Hello Daniel,
I was most surprised to receive an email from Karen Capel telling us that the Council offices are not available to Councillors as we are hosting Dignitaries, may I ask was this decision made by Councillors at a properly conducted Council meeting and was it minuted, if mot why not, and then to add further insult an email was received from Amanda Bostock telling us only an anointed few would be attending as they had been chosen, can you please explain why there was no South Ward Councillors chosen to discuss the Girrawheen project of the Library and Community Centre, why are the Central Ward Councillors of Monks and Newton ,,,,, who do not represent this Ward, I know they would not like it if any South Ward Councillors came into their area , nut yet again they apparently are the anointed ones, and we are told that if we wish to attend we will have to ask and register with the public,
What is this costing the City as please remember the Ratepayers are the owners we are only the custodians, and in this economic climate why are we hosting anyone or are they classed as Royalty, I believe they are like us elected members and I think this is a slur on Councillors.
I would like answers to my questions/
Thank you"

(8) Councillor Gray responded to that email from Councillor Grierson *[Doc B3]* with her email of 18 April 2009 (sent at 8.13pm) *[Doc J10]* to the other Councillors and the City's Directors. The text of the email reads:

"Good evening

I am proud that the City of Wanneroo has a role in providing some facilities for the Prime Minister and Cabinet of our Nation. The City of Wanneroo as an entity should act with dignity and decorum and represent the passion and commitment that we all have for the City.

Executive Officers and the Mayor have every right to make the decisions regarding the Cabinet visit and as I see it the only inconvenience is to the Mayor. There is no Council meeting on Tuesday evening as most of us will be attending the Ag Society dinner. Yes I will be attending the Community Cabinet- as the only representative of the north ward, the growth corridor of the City, screaming for infrastructure, I am honoured to have that opportunity to represent you and the City and will do so with pride.

Please trust and support those to whom we have entrusted such decisions and move forward with a positive, unified and dignified representation of the City of Wanneroo as an outstanding local government within our Nation."

(9) Councillor Blencowe responded to that email from Councillor Gray *[Doc J10]* with his email of 19 April 2009 (sent at 11.49am) *[Doc J11]* to Councillor Gray, the other Councillors and the City's Directors. The text of the email reads, relevantly:

"That is not the issue Laura. Your pride in the City is in fact a red herring. I am ashamed at the way in which the law is being ignored in Wanneroo. What has stirred us up is the secrecy with which this was carried out and the legality of it. Obviously you are getting preferential treatment and we are asking who made these decisions and under what authority. Under the local Government Act, the Mayor is not entitled to replace the authority of Council. None of this has gone through official channels or been officially authorized. You are part of a decision which has been made without Council approval. Regardless of the benefits to Council, this lack of due process is not supported by the Local Government Act. This prompts me to ask who authorized it and what is their agenda that only selected Councillors were privy to it?

[Note: The remainder of the text was a reproduction of sections 2.7 and 2.8(1)]*"*

(10) Councillor Gray responded to that email from Councillor Blencowe *[Doc J11]* with her email of 19 April 2009 (sent at 1.26pm) *[Doc J12]* to Councillor Blencowe, the other Councillors and the City's Directors. The text of the email reads:

"Alan

I resent the implication that I am privy to any information or 'preferential' actions that other Councillors are not. I am a person of integrity and conduct myself as such.

The only information I have received is via emails that have been distributed to all Councillors.

I respect your interpretation of the Local Government Act, but request that you follow proper procedure and take up your issues with the CEO and or Mayor as appropriate, not broadcast your issues and potentially damage the reputation of the City of Wanneroo's - for those of us who value it."

(11) The second paragraph of that email from Councillor Gray *[Doc J12]* appears to be inaccurate in that at least one important email in this matter, *[Doc G16],* was sent on 9 April 2009 only to the Mayor's selected Councillors (which included Councillor Gray).

(12) On 19 April 2009 (at 6.53pm) Councillor Treby sent an email *[Doc B4]* to the other Councillors. This is the email referred to in allegation (1). The text of the email reads:

"Good evening Councillors,

Can I say that the tone and intent of the messages distributed from Cr's Grierson and Blencowe do a great disservice to both council specifically and the residents of Wanneroo generally. I am heartened to hear from many of you that have come to recognize this brand of nonsensical gibberish and clap trap and treat it with the contempt it richly deserves. Laura's email was concise and to the point, and can I say she has been personally attacked in a manner befitting of someone who simply who is neither in her class nor does he measure up to her high standards.

I am however deeply concerned those messages forwarded from both councillors are aimed at humiliating the Prime Minister of Australia and Federal parliamentarians - and in doing so bring great shame to the ratepayers of the City of Wanneroo.

Alan, notwithstanding some inaccuracies in the email distributed from Administration on Friday, in terms of the specifics of their emails concerning representation of the South Ward, the Mayor will in accord with his duties as set down in the Act attend as he deems fit. Where this is not possible, the Deputy Mayor will assist. Enough said!

That you again seem to have selectively missed council resolutions to the contrary should come as no surprise to your fellow council colleagues.

However – let's address some of the comments made.

The shameful manner with which hard working central ward councillors were signaled out in a disparaging manner as "anointed ones" ought not to go without response.

That Cr Grierson used the term "anointed one" is prophetic.

I can relay to all councillors that I was advised by a ratepayer that in a meeting he attended, the Federal Member for Cowan, Luke Simpkins was giving instructions to Cr Grierson on what needs to happen at the City of Wanneroo on a range of issues. This ratepayer expressed to me his concern that he believed this subservience was detrimental to the greater interests of the ratepayers of the City. At the time I commented that I did not agree with his comment that these actions were akin to that of a elderly lap dog, though upon review of recent dispatches I may need to reassess his comments. I believe the only thing that Cr Grierson has brought to council since October 2007 (and in her previous stint on Council for that matter) is an appetite.

It is now common knowledge that Cr Grierson handles Luke's dirty work on council. Maureen, you should state for the record that Luke is not using you to embarrass the Prime Minister of Australia and in doing so causing great harm to the City and its residents.

It should also be deeply concerning that Maureen, whilst currently on the second longest absence from Council duties (second only to Sam) expects that ratepayers - at great expense - pay for her to attend a private function on Tuesday evening.

This, when Cr Grierson cannot even be bothered even turning up to council meetings. She should do the honorable thing and let the CEO know that she has decided that in all good conscience to pay her own way.

Again councillors, the assertions made by both Maureen and Alan are without foundation and aimed solely at one thing - to bring dishonor and shame to both the City and its ratepayers."

Panel's dealing with the subject allegations of minor breach

5. The Panel deals with the subject allegations of minor breach by addressing them, in turn, in the following order: allegation (2) and allegation (3), and then allegation (1).

The complainant's contentions in relation to allegation (2) and allegation (3)

6. In the supplementary material Councillor Grierson contends, relevantly in relation to allegation (2) and allegation (3), that:

(1) [Prior to the 22nd April 2009 Councillor Treby] *"participate*[d] *in a decision with [the Mayor] and [Councillor Monks] to invite the Federal Government to utilize the facilities of the City of Wanneroo Chambers and Administration areas thereby misusing Council resources as well as contributing to the workload of the Administration and directing administration to undertake these relocation tasks and booking people into a federal community consultation without authority of the CEO nor Full Council. In addition, [Councillor] Treby participated in a decision with [the Mayor] and [Councillor Monks] to select themselves and three Senior Directors to attend the Federal Government Community Consultation Program held at Ballajura Community College on 22 April 2009 for their own purposes and without consent of the Full Council of the City of Wanneroo. This created the situation where they used their position as a council member to directly use the resources of a local government that was not authorized by the CEO nor permitted under the ACT. It is also contended that [the CEO] did not have the authority of the Full Council to make any decisions in relations to any of these matters." [p9Doc D]*

(2) "*The tasks that Councillor Treby together with Councillor Monks [and the Mayor] undertook were:*

1. *Participated in the decision to select themselves with CEO Daniel Sims, Director Fiona Bentley and Director John Paton to attend the Federal Governments Community Consultation Visit at Ballajura Community College on the 22 April 2009 with no approval by Full Council.*
2. *Participated in the decision to direct administration to relocate the Office of the Mayor and his staff to allow the Federal Government the use of the Council Building during their 2 days visit to Perth and Wanneroo with no approval of Full Council.*
3. *Participated in the decision to bar access to all councillors during this period of 36 hours with no approval of Full Council.*
4. *Participated in the decision to reschedule meetings with no approval of Full Council.*
5. *Carried out this process exclusively without the knowledge of and to the exclusion and detriment of other Councillors." [p9Doc D]*

(3) *"An email received from the CEO stated that the decisions had been made by the Mayor and I believe also that it was in conjunction with the Deputy Mayor as most of his decisions are carried out in this way as Mayor and Deputy Mayor work closely together and are of like minds." [p9Doc D]*

(4) *"In the instance of three selected members of council and 3 Senior Administration staff attending the Community Conference on the 22 April 2009; it was clear that a misuse of council resources occurred and was not approved by the CEO as I understand from the CEO's email that it was the Mayor and Deputy Mayor who made these decisions. The purpose of this meeting was political in that these members spoke with a federal member on issues of financial concern to them as Councillors and administration staff. The cost of*

three Senior Staff attending an out of hours meeting whether paid as overtime or time in lieu would have been approximately $1025 not including the Mayor, Deputy Mayor and Councillor Monks time. It was more appropriate that Councillors attended this meeting once it had been decided by a full council as to who should attend.

My complaint is regarding Councillor Treby's actions in all of this and I believe the response from Councillor Treby to all the Councillors I had "cc'd" in my email to the CEO, was to deflect the attention from the Mayor's decision to provide facilities for the Federal Cabinet and divert blame elsewhere however he was a party to the decisions about the Federal Cabinet and decisions made without the knowledge of Council in his role as Deputy Mayor.

My complaint in the matter of regulation 9(1) in this instance is not about the email Councillor Treby wrote but that he was a party to the decisions. His involvement in the deputation together with Councillor Monks and the Mayor Jon Kelly breached regulation 9(1) where they undertook a task that contributed to the administration of the local government and which task was not authorised by the council to be undertaken. It is a moot point that the CEO may approve a task because in this instance he stated by email that the Mayor Jon Kelly directed the task.

It is my assertion that Councillor Brett Treby and the Mayor Jon Kelly's involvement in the process of the deputation and exclusion of Councillors from chambers, relocating office administration staff and telephone lines was directing administration how to act." [p10Doc D]

Councillor Treby's responses in relation to allegation (2) and allegation (3)

7. For reasons apparent in paragraph 8 below, it is not necessary to reproduce or summarise any of Councillor Treby's responses in relation to allegation (2) or allegation (3).

Panel's views on allegation (2) and allegation (3)

8. Allegation (2) is as mentioned in paragraph 3(2) above. Allegation (3) is as mentioned in paragraph 3(3) above. The Panel's views in relation to these allegations follow:

(1) Regulation 9(1) and 10(1)(a) are each a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 9(1) or 10(1)(a) is a minor breach.

(2) Regulation 9(1) reads:

"A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task."

(3) Regulation 10(1)(a) reads:

"A person who is a council member must not —
(a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee"

(4) It is a function, power, duty, responsibility, authority and jurisdiction of a local government's Chief Executive Officer to manage the day to day operations of the local government [See section 5.41(d) of the Act, and the definition of the term 'function' under section 5 of the *Interpretation Act 1984*]. Accordingly, the supervision and control of the day to day operations of a local government's resources, including its landholdings, is clearly a function of its Chief Executive Officer.

(5) Thus, under the Act, it is the City's CEO who has supervision and control of the Council Chamber and the City's other landholdings. The City's policy on "*Use of Civic Centre – Function Rooms and Public Areas*" *[Doc G10]* in relation to the City's Civic Centre confirms that this is the case.

(6) The available information does not include an email from the CEO or the A/CEO in which it is stated that the Mayor directed the Administration to do any thing in relation to the Community Cabinet meeting or the Cabinet meeting.

(7) In any event, in the complaint and/or the supplementary material, while Councillor Grierson has indicated her speculations, suspicions and concerns about Councillor Treby's alleged actions, and her reasons for them, she has *not* provided any information to the Panel that indicates that Councillor Treby in fact:

(a) participated or took part in:

(i) any decision as to which Councillors and which staff would be or were in fact the City's attendees at the Community Cabinet meeting, or otherwise in regard to that meeting; or

(ii) any decision as to the security or other arrangements made in regard to the Cabinet meeting; or

(b) directed or attempted to direct the CEO, the A/CEO or any other City employee to do or not to do anything in relation to the Community Cabinet meeting or the Cabinet meeting.

Panel's findings on allegation (2) and allegation (3)

9. In view of the contents of paragraph 8 above, particularly paragraph 8(8) above:

(1) The Panel finds that Councillor Treby did not commit a breach of regulation 9(1) in the circumstances alleged in the complaint.

(2) The Panel finds that Councillor Treby did not commit a breach of regulation 10(1)(a) in the circumstances alleged in the complaint.

Allegation (1)

10. Turning to allegation (1), it is as mentioned in paragraph 3(1) above. Regulation 7(1) 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.

The complainant's contentions in relation to allegation (1)

11. In the supplementary material Councillor Grierson contends in relation to allegation (1), that:

> "1. The person complained about was a Council Member - Cr Brett Treby committed the detrimental conduct - *he sent the email* which was not only harassment but a bullying tactic which has adversely impacted on my reputation and character in an effort to keep me quiet during meetings so that he gets his way.
> 2. The member's conduct was a use of the member's office as a Deputy Mayor and council member - *he signed the email Deputy Mayor City of Wanneroo.*
> 3. The member's conduct constituted making improper use of the member's office as a council member in that he *attacked my character and integrity by email using at least seven derogatory statements* which has adversely affected my reputation, character and integrity." *[p2Doc D]*

12. The 7 statements made by Councillor Treby in his email of 19 April 2009, *[Doc B4]*, that Councillor Grierson specifically identifies and contends "adversely affected her character and integrity and caused detriment to her", are as follows (in each case the initial quotation is taken from the supplementary material):

(i) At *[p4Doc D]:* "*messages distributed from Cr's Grierson and Blencowe do a great disservice to both council specifically and the residents of Wanneroo generally."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

> At *[p1Doc B4]: "Can I say that the tone and intent of the messages distributed from Cr's Grierson and Blencowe do a great disservice to both council specifically and the residents of Wanneroo generally."*

(ii) At *[p4Doc D]: "many of you that have come to recognize this brand of nonsensical gibberish and clap trap and treat it with the contempt it richly deserves."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

> At *[p1Doc B4]: "I am heartened to hear from many of you that have come to recognize this brand of nonsensical gibberish and clap trap and treat it with the contempt it richly deserves."*

(iii) At *[p5Doc D]: "actions were akin to that of a elderly lap dog."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

At *[p1Doc B4]: "I can relay to all councillors that I was advised by a ratepayer that in a meeting he attended, the Federal Member for Cowan, Luke Simpkins was giving instructions to Cr Grierson on what needs to happen at the City of Wanneroo on a range of issues. This ratepayer expressed to me his concern that he believed this subservience was detrimental to the greater interests of the ratepayers of the City. At the time I commented that I did not agree with his comment that these actions were akin to that of a elderly lap dog, though upon review of recent dispatches I may need to reassess his comments."*

(iv) At *[p5Doc D]: "the only thing that Cr Grierson has brought to council is an appetite."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

At *[p1Doc B4]: "I believe the only thing that Cr Grierson has brought to council since October 2007 (and in her previous stint on Council for that matter) is an appetite."*

(v) At *[p6Doc D]: "It is common knowledge that Cr Grierson handles Luke Simpkins' dirty work on Council."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

At *[p1Doc B4]: "It is now common knowledge that Cr Grierson handles Luke's dirty work on council. Maureen, you should state for the record that Luke is not using you to embarrass the Prime Minister of Australia and in doing so causing great harm to the City and its residents."*

(vi) At *[p6Doc D]:* "*second longest absence from Council duties"* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

At *[pp1-2Doc B4]: "It should also be deeply concerning that Maureen, whilst currently on the second longest absence from Council duties (second only to Sam) expects that ratepayers - at great expense - pay for her to attend a private function on Tuesday evening."*

(vii) At *[p7Doc D]: "Cannot even be bothered to attend Council meetings."* – which in the Panel's view is a reference by Councillor Grierson to the following statements, comments, remarks or observations in the email complained about:

At *[p2Doc B4]: "This, when Cr Grierson cannot even be bothered even turning up to council meetings."*

13. In the supplementary material Councillor Grierson also contends in relation to allegation (1), that:

> At *[p3Doc D]:* "[Councillor Treby] *did breach this* [fiduciary] *relationship in that he sent the damaging email to me and a copy to all councillors on the 19 April 2009. This clearly shows that he acted on behalf of his own or another's interest that affected my interests directly.*
>
> *He breached this relationship by abusing his power as Deputy Mayor to abuse me via email rather than discuss any of his concerns with me privately and I now feel vulnerable to further abuse and harassment. He has also caused me detriment by adversely impacting on my character and my integrity through this email.*
>
> *He breached this relationship in that by adversely affecting my character to other Councillors would reduce any support I may receive from other Councillors for fear of retribution by the Deputy Mayor; as well as reducing my integrity with the Rate payers so that he will be reelected in October this year. He has breached the no-conflict duty as a result. By not being fair and impartial he is creating a conflict between his duty as a fiduciary and his own interest in diminishing my character and my hard work for my ratepayers in South Ward and his campaigning in South Ward for the October 2009 Elections.*
>
> *The fiduciary relationship has been brought to the Deputy Mayors attention in the past however he continually breaches this requirement. Having known of this relationship and the duty of care imposed as a result, Deputy Mayor Brett Treby should have taken special care not to adversely reflect upon my character and not caused distress, emotional harm and detriment to me."*

Councillor Treby's response to allegation (1) and the complainant's contentions in relation to it

14. Councillor Treby's response to allegation (1) and the complainant's contentions in relation to it can be summarised, relevantly, as follows

(1) He denies having committed a breach of regulation 7(1)(b) by sending the email complained about to the other City's Councillors on 19 April 2009 *[p4Doc J2.]*.

(2) He acknowledges that he sent the email complained about to the other City's Councillors on 19 April 2009. He claims that it was *"a **private email** conversation between "councillors only" and that he intentionally did not include senior staff or administration members, nor did he forward it to persons outside of the intended recipients"* (Bold emphasis supplied) *[para 5,p1Doc J2].*

(3) He says that the email complained about "*ought to be read in the context of where it sits (as the last of a raft of email correspondence)" [para7,p2Doc J2].*

(4) He says that his motivation for sending the email complained about to the other City's Councillors on 19 April 2009 was that:

(a) he was *"Feeling aggrieved and troubled for both the City's reputation at* [sic, and] *the reputations of those councillors and administrative personnel being targeted by both Councillor's Grierson and Blencowe" [para20,p3Doc J2];*

(b) he was *"consumed with protecting the reputation of both the City and valuable council colleagues"* and was *"also preoccupied with ensuring that the email exchange of those few days did not result in the humiliation of either the Prime Minister, or the Federal parliamentarians" [para21,p3Doc J2];*

(c) his *"overriding concern was to* [sic, the] *protection of the image, reputation and brand of the City"* and *"In addition to* [his] *commitment to protect the reputation of the City,* [he] *sought to protect the reputations of those councillors and administrative personnel who were not in a position to be able to protect themselves" [para22,p4Doc J2];*

(d) he was of the view that *"the email barrage emanating from [Councillor's Grierson and Blencowe] were aimed at causing embarrassment to the City of Wanneroo, and as a consequence, detriment to its ratepayers" [para23,p4Doc J2]*; and

(e) he was *"deeply troubled by the tenor of the emails forwarded from both Councillor's Grierson and Blencowe and [he] sought to assist in protecting the reputations and interests of councillors and administrative personnel that had been targeted by both Councillors" [p4Doc J2].*

(5) He says that the email complained about:

(a) "*was a measured response in context to those emails that preceding it aimed at protecting the image, reputation and brand of the City of Wanneroo" [p4Doc J2];* and

(b) *"**responded in kind** to unfounded allegations made by both Councillor Grierson and Councillor Blencowe"* (Bold emphasis supplied) *[p4Doc J2].*

(6) He "*strongly object[s] to the comment made by Councillor Grierson* [on page 3 of the complaint form itself] that "*this is not the first time Councillor [Treby] has spoken of other Councillors in public in a derogatory manner*". He states that "*this is simply an untrue statement aimed to portray [him] in a negative light to the Panel"* and he *"categorically den[ies] this assertion*". *[para2,p1Doc J2]*

Panel's general views on regulation 7(1)(b)

15. Regulation 7(1) and the Panel's general views on regulation 7(1)(b) for the purposes of the Panel's dealing with the complaint, are as set out or indicated in **Attachment B**.

Panel's views on allegation (1)

16. In relation to allegation (1) it is the Panel's view that the available information is sufficient evidence to conclude, on the balance of probabilities having regard to the Briginshaw principles, as the Panel hereby concludes, that:

(1) At all relevant times the Act (particularly section 2.8) and the common law did not provide any authority for the Mayor, and did not confer any function or power on him, to make any of his decisions mentioned in paragraph 4(4) above.

(2) At all relevant times the Act and the common law required that the subject matter of the decisions mentioned in paragraph 4(4) above was a matter to be considered and decided upon by Council.

(3) Viewed objectively, Councillor Grierson's email of 18 April 2009 to the CEO consisted, in essence, of her attempt to make enquiries about her concerns whether any relevant exercise of power, and any relevant use of public resources, in relation to the decisions mentioned in paragraph 4(4) above, was properly made or used.

(4) It was not an improper use of her office as a Council member for Councillor Grierson to make that attempt or those enquiries, particularly when she was not a party to any of those decisions.

(5) In the light of the Panel's general views set out or indicated in **Attachment B**, at 19 April 2009:

(a) the required standards of conduct of a Council member were in essence:

(i) the standards of conduct flowing from the fiduciary obligations owed by him to Council (or the City) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it) and the common law;

(ii) the standards of conduct for a Council member flowing from the City's "Council Members' Code of Conduct" *[Doc L1]* , being a relevant code of conduct;

(iii) to comply with his Council member obligations or duties under the City's policies; and

(iv) to observe Council's decisions;

(b) one of the fiduciary obligations owed by a Council member to Council (or the City) was the no profit rule – i.e. a Council member cannot obtain an advantage for himself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his position (the no profit rule).

(6) At 19 April 2009, the City's "Council Members' Code of Conduct" (the Code of Conduct) *[Doc L1]* included the following provisions in whole or relevant part:

"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."

[Note: Regulation 3(1) reads, relevantly:

"General principles to guide the behaviour of council members include that a person in his or her capacity as a council member should —
...
(g) treat others with respect and fairness;"]

"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;
…
(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) … avoid conduct which might suggest any departure from these standards;"

- *[Doc K]*, *[Doc L]* and *[pp4-5Doc L1]*

17. It is the Panel's view, in relation to Councillor Treby's motivation for his sending of the email complained about, as mentioned in paragraph 14(4) above, that:

(1) In the light of the material set out or indicated in **Attachment C**, the City does not have a general reputation (i.e. the esteem in which the City is held by others who are in a position to judge its worth) that the law recognises as deserving of protection. However, this is not to say that the City does not have a reputation that, in appropriate circumstances (including those in relation to the tort of injurious falsehood), may require Council to protect. In the event, in this matter, Councillor Grierson's sending of her email of 18 April 2009 [Doc B3] was irrelevant to protecting the City's reputation, as it was an internal email.

(2) The fiduciary and other duties of a councillor have precedence over any councillor's desire to protect any person's reputation from harm or to promote any person's well being.

(3) If any Councillor was of the view that Councillor Grierson's email of 18 April 2009 to the CEO was harmful to his/her reputation, it was for the Councillor concerned to decide what, if any, action (including any response) he/she might take on the matter.

18. On the available information it would appear that the only apparent circumstance in this matter that may have been, in Councillor Treby's words, *"humiliating to the Prime Minister of Australia and Federal parliamentarians - and in doing so bring great shame to the ratepayers of the City of Wanneroo"* was that the Act and the common law did not provide any authority for the Mayor, and did not confer any function or power on him, to make any of his decisions mentioned in paragraph 4(4) above.

19. In relation the matters raised by Councillor Treby and mentioned in paragraph 14(6) above the Panel notes that:

(1) Councillor Treby's response of 1 December 2009 ignores the facts that:

(a) on 17 December 2008, following a complaint of minor breach (Complaint SP 31 of 2008) by one of the Councillors in relation to whom Councillor Treby made remarks during the Special Council Meeting held on 25 July 2008, the Panel found that he had committed a minor breach under section 5.105(1)(b) by having contravened a standing order [that *"A member shall not reflect adversely upon the character or actions of another member ... nor impute any motive to a member"]* in his remarks made at the meeting;

(b) on 19 May 2009, the Panel decided, pursuant to section 5.110(6), that such minor breach (and another minor breach that the Panel found that he had committed at the meeting) be dealt with by ordering that Councillor Treby publicly apologise as specified in the Minute of Order attached to the Panel's Reasons for Decision; and

.

(c) on 9 November 2009 Senior Member Mr D R Parry delivered the Reasons for Decision of the State Administrative Tribunal (SAT) in SAT Case Nos: DR:238/2009 and DR:239/2009 (the SAT Reasons for Decision).

(2) The SAT Reasons for Decision have the citation *Treby and Local Government Standards Panel* [2009] WASAT 224 (the Treby Review), and a copy of them may usually be obtained through SAT's website at www.sat.justice.wa.gov.au.

(3) The matters raised by Councillor Treby and mentioned in paragraph 14(6) above are completely at odds with the Panel's findings that were the subject of the Treby Review, and are completely at odds with Councillor Treby's concessions mentioned, and the decision, in the SAT Reasons for Decision.

20. In relation to Councillor Treby's response, to allegation (1) and the complainant's contentions in relation to it, as mentioned in paragraph 14(5) above:

(1) The Panel does not agree with Councillor Treby's assertion that the email complained about "*was a measured response in context to those emails that preceding it*", because, in the Panel's view, the email complained about is properly categorised as a personal attack by Councillor Treby against Councillor Grierson and Councillor Blencowe.

(2) The Panel does not agree with Councillor Treby's assertion that the email complained about *"responded in kind to unfounded allegations made by both Councillor Grierson and Councillor Blencowe",* because, in the Panel's view:

(a) the email complained about is properly categorised as a personal attack by Councillor Treby against Councillor Grierson and Councillor Blencowe;

(b) the queries raised by Councillor Grierson in her email of 18 April 2009 to the CEO, and the issues raised by Councillor Blencowe in his email of 19 April 2009 (sent at 11.49am) *[Doc J11]* to Councillor Gray, were not unfounded for the reasons mentioned in paragraphs 16(1), 16(2), 16(3) and 16(4) above; and

(c) a councillor is able to meaningfully participate in the good government of the persons in the district and to duly, faithfully, honestly and with integrity fulfil the duties of the office for the people in the district according to his or her best judgment and ability, without making a personal attack on another member or an officer of the local government - indeed, good government requires courtesy amongst those elected to govern.

21. In relation to clause 2.1 of the Code of Conduct:

(1) A Council member has a duty, notwithstanding regulation 3(2), to abide by and comply with the general principles in regulation 3(1) and, by virtue of the fact of this clause, at 19 April 2009 a Council member had a duty, when making use of his/her office of Council member, to treat others with respect and fairness.

(2) The Panel's views on the terms 'respect for a person' and 'to treat a person with respect' are as set out or indicated in **Attachment D**.

22. In relation to clause 2.3(d) of the Code of Conduct, it is the Panel's view that:

(1) The term 'improper' in clause 2.3(d) of the Code of Conduct is to be given it's natural and ordinary meaning in its context, which is:

(a) according to the Macquarie Dictionary (5th ed), and relevantly:

"not in accordance with propriety of behaviour, manners, etc ... unsuitable or inappropriate, as for the purpose or occasion"

(b) according to the Shorter Oxford English Dictionary, and relevantly:

"unsuitable, inappropriate ... unbecoming, unseemly, indecorous"

(2) The term 'derogatory' in clause 2.3(d) of the Code of Conduct is to be given it's natural and ordinary meaning in its context, which is:

(a) according to the Macquarie Dictionary (5th ed):

"tending to derogate or detract, as from authority or estimation; disparaging; depreciatory"

(b) according to the Shorter Oxford English Dictionary (6th ed), and relevantly:

"lowering in honour or estimation; unsuited to one's dignity or position; depreciatory, disrespectful, disparaging"

(3) The term 'unwarranted' clause 2.3(d) of the Code of Conduct is to be given it's natural and ordinary meaning in its context, which is:

(a) according to the Macquarie Dictionary (5th ed):

"not justified, confirmed or supported ... not authorised, as actions"

(b) according to the Shorter Oxford English Dictionary (6th ed):

"not warranted; unauthorised; unjustified"

(4) The term 'in the public interest' in clause 2.3(d) of the Code of Conduct is a broad concept. It is used in other legislation and appears in numerous authorities - however, there does not seem to be any one firm definition of the term.

(5) The term 'public interest' is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1] where the Court said:

"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest".

(6) The concept of public interest involves matters that affect a considerable number of people. Where something might affect a single individual, it can be in the public interest if the effect involves some general principle that, in turn, has impact upon a wider population - such as conduct that gives rise to issues whether certain laws are adequate or require review.

(7) In the SAT Reasons for Decision in the Treby Review, Senior Member Parry said, at [20]:

"Section 3.1(1) of the LG Act refers to 'good government', not 'public interest', and certainly does not devolve to individual councillors the right to determine for themselves where the public interest lies. It is the Council, as a corporate body, that is to provide good government for the persons in the district."

[1] [1991] 1 VR 63, at p. 75

23. In relation to allegation (1), and in the light of the contents of paragraphs 15 to 22 above, it is the Panel's view that the available information is sufficient evidence to conclude, on the balance of probabilities having regard to the Briginshaw principles, as the Panel hereby concludes, that:

(1) On 19 April 2009 Councillor Treby sent the email complained about to the other Councillors in his capacity as a Council member.

(2) Councillor Treby made use of his office as a Council member in sending the email complained about to the other Councillors with his statements, comments, remarks or observations in it that are reproduced in paragraph 12 above.

(3) In making that use of his office, Councillor Treby committed:

(a) breaches of clause 2.1 of the Code of Conduct by failing to treat Councillor Grierson with respect, in that his statements, comments, remarks or observations reproduced in paragraph 12 above:

(i) show contempt (i.e. the feeling or attitude with which one regards another person or some thing as worthless) for Councillor Grierson and her queries in her email of 18 April 2009 to the CEO;

(ii) treat Councillor Grierson and her queries in her email of 18 April 2009 to the CEO with arrogance (by his offensive exhibition of assumed authority); and

(iii) defame Councillor Grierson, in the sense that his said statements, comments, remarks or observations have the tendency to lower Councillor Grierson in the estimation of right thinking members of society;

(b) a breach of clause 2.3(a) of the Code of Conduct, in that by the contents of the email complained about, and the other breaches identified in this paragraph 24, he did not act and could not be seen to have acted properly and in accordance with the requirements of the law and the terms of the Code of Conduct;

(c) breaches of clause 2.3(d) of the Code of Conduct, in that the allegations made by him about Councillor Grierson were:

(i) improper, in that they lacked propriety and were unbecoming and unseemly in the circumstances; and

(ii) derogatory, in that they had a tendency to belittle Councillor Grierson or to take away some part from her value or reputation; and

(iii) not in the public interest;

(d) breaches of clause 2.3(d) of the Code of Conduct, in that when he sent the email complained about to the other Councillors he committed conduct, purportedly by him in the performance of his role as a Council member, and that such conduct caused Councillor Grierson as a reasonable person gratuitous, uncalled-for and unprovoked offence or embarrassment;

(e) a breach of clause 2.4(a) of the Code of Conduct, in that when he sent the email complained about to the other Councillors he committed conduct which might suggest a departure from the standards in the Code of Conduct; and

(f) 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 (a) to (e) immediately above.

(4) As a consequence of the breaches identified in paragraph 23(3) above, Councillor Treby's sending of the email complained about to the other Councillors constituted making improper use of his office as a Council member.

(5) Viewed objectively, such sending was fully intended by Councillor Treby to cause detriment to Councillor Grierson – the detriment being for others to think less favourably of her.

(6) However, if such sending was not fully intended by Councillor Treby to cause detriment to Councillor Grierson:

(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 such detriment to Councillor Grierson 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.

Panel finding on allegation (1)

24. In view of the contents of paragraph 23 above the Panel finds that on 19 April 2009 Councillor Treby committed a breach of regulation 7(1)(b) by making improper use of his office as a Council member to cause detriment to Councillor Grierson by sending his email of that date to the City's Councillors.

…… ……..……

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 complaint in this matter was sent by the Complaints Officer (Complaints Officer) of the City of Wanneroo (City) to the Presiding Member, who in turn allocated it to the Panel. The complainant in this matter, Councillor Frances Maureen Grierson (Councillor Grierson) is an elected member of the City's Council (Council). Her complaint (the complaint) consists of a 4-page *Complaint of Minor Breach* dated 8 May 2009 *[Doc B]* and its attachments – *[Doc B1]*, *[Doc B2]*, *[Doc B3]*, *[Doc B4]*, *[Doc B5]* and *[Doc B6]*.

By a letter *[Doc C]* Councillor Grierson was requested to clarify her allegations and provide further information in this matter. Her response was her 11-page undated letter (received on 12 June 2009) *[Doc D1]* – the attachments to it being *[Doc D1], [Doc D2]* and *[Doc D3]*.

Preliminary matters

The complaint is in the form approved by the Minister for Local Government and was made within time. There is an allegation made in the complaint that Councillor Treby, a Council member at the time of each of the alleged incidents, has committed a minor breach as defined under section 5.105(1)(a).

Initial assistance sought from the Complaints Officer

A letter dated 31 July 2009 (*[Doc F]* was sent to the Complaints Officer requesting certain information in this matter. The City's CEO, Mr Daniel Simms (the CEO) responded with his 5-page letter of 20 August 2009 *[Doc G]* and its attachments – *[Doc G1]*, *[Doc G2]*, *[Doc G3]*, *[Doc G4]*, *[Doc G5], [Doc G6]*, *[Doc G7]*, *[Doc G8]*, *[Doc G9]*, *[Doc G10], [Doc G11]*, *[Doc G12]*, *[Doc G13]*, *[Doc G14]*, *[Doc G15], [Doc G16]*, *[Doc G17]*, *[Doc G18]*, *[Doc G19]*, *[Doc G20] [Doc G21]*, *[Doc G22]*, *[Doc G23]*, *[Doc G24]*, *[Doc G25]* and *[Doc G26]*. Mr Dennis Blair also sent his letter of 20 August 2009 *[Doc H]*.

Councillor Treby's response sought

By a *Notice of Complaint* dated 15 October 2009 *[Doc I]* Councillor Treby was notified of the subject allegations of minor breach and invited to respond to them. Councillor Treby responded with his 2-page letter of 1 December 2009 *[Doc J]* and its attachments *[Doc J1]*, *[Doc J2]*, *[Doc J3]*, *[Doc J4]*, *[Doc J5], [Doc J6]*, *[Doc J7]*, *[Doc J8]*, *[Doc J9]*, *[Doc J10], [Doc J11]*, *[Doc J12]*, *[Doc J13]*, *[Doc J14]*, *[Doc J15], [Doc J16]* and *[Doc J17]*.

Further assistance sought from the Complaints Officer

A letter dated 31 July 2009 (*[Doc K]* was sent to the Complaints Officer requesting certain information in this matter. Mr Shane Cable (the City's A/Director Corporate Strategy & Performance) responded with his letter of 2 February 2010 *[Doc l]* and the requested information, being *[Doc L1]*, *[Doc L2]* and *[Doc L3]*.

Another letter, dated 30 April 2010 *[Doc M]* was sent to the Complaints Officer requesting certain information in this matter. The Complaints Officer provided the information in his letter dated 4 May 2010 *[Doc N]*

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 Ms Karen Caple (Ms Caple) of the City of Wanneroo (City), dated 14 May 2009.
B	Copy of (4-page) complaint (**Complaint No. SP 10 of 2009, dated 8 May 2009**) – the attachments to it being *[Doc B1]* to *[Doc B6].*
B1	Copy of (1-page) printout of an email of 17 April 2009 (sent at 8.44am) from Ms Caple to "Councillors; Directors & CEO; Bonnink, Julie; Thomas, Tracy; Bonney, Kym" on the subject described as "City Hosting a Group of Dignitaries".
B2	Copy of (2-page) printout of an email of 17 April 2009 (sent at 1.05pm) from Ms Amanda Bostock to "Kelly, Jon; Councillors; Directors & CEO;" on the subject described as "Important: Advice from the Community Cabinet Secretariat".
B3	Copy of (1-page) printout of an email of 18 April 2009 (sent at 10.48am) from the complainant, Cr Grierson, to "Alan Blencowe; Bob Smithson; Brett Treby; Colin Hughes; Dot Newton; Glynis; Ian Goodenough; May Jon Kelly; Rudi Stevens; Roberts; Laura Gray" on the subject described as "Hosting Dignitaries".
B4	[**The alleged offending email**] Copy of (2-page) printout of an email of 19 April 2009 (or, in the USA nomenclature, 04/19/09)(sent at 18.53) from Cr Brett Treby to the other City Councillors on the subject described as "recent emails".
B5	Copy of (1-page) printout of an email of 20 April 2009 (sent at 5.23pm) from Mr Daniel Simms (the City's CEO) to the City's Councillors on the subject described as "Community Cabinet Meeting".
B6	Copy of (1-page) document headed 'Leave of Absence'.

C	**Copy of (2-page) letter to the complainant, Cr Grierson, dated 22 May 2009, requesting clarification of her allegations and more information.**
D	**Copy of (11-page) letter from the complainant, undated and received on 12 June 2009 – the attachments to it being *[Doc D1]* to *[Doc D3].***
D1	Copy of (2-page) letter from Cr Bob Smithson to the complainant, Cr Grierson, dated 9 June 2009
D2	Copy of (3-page) printout of an email of 6 October 2009 (sent at 21.15) from Cr Alan Blencowe to the complainant, Cr Grierson, with copies of other emails embedded in it.
D3	Copy of (2-page) printout of an email of 6 October 2009 (sent at 00.25) from Cr Alan Blencowe to the complainant, Cr Grierson, with a copy of the alleged offending email embedded in it.
F	Copy of (3-page) letter to Ms Caple, as the City's A/Complaints Officer, dated 31 July 2009
G	**Copy of (5-page) letter from Mr Daniel Simms (the City's CEO), dated 20 August 2009 – the attachments to it being *[Doc G1]* to *[Doc G26].***
G1	Copy of (2-page) Council Report dated 7 April 2009 re the appointment of Acting Chief Executive Officer for the period 9 April 2009 to 17 April 2009 inclusive.
G2	Copy of (2-page) letter dated 17 February 2009 from Mayor J Kelly to the Hon Kevin Rudd MP inviting the Prime Minister to hold a Community Cabinet Meeting at Wanneroo.
G3	Copy of (3-page) File Note dated 19 March 2009 by Fiona Bentley, Director Community Development, regarding inspection of the Civic and Administration Building by Community Cabinet Secretariat, to explore hosting a Community Cabinet Meeting.
G4	Copy of (1-page) response letter from the Prime Minister's office to Mayor Kelly dated 31 March 2009 re Community Cabinet Meeting.
G5	Copy of (1-page) email dated 1 April 2009, from A May (PA to CEO) on behalf of CEO to Directors, confirming Federal Cabinet Meeting to meet at Civic and Administration Centre on 22 April 2009, with Karen Caple and Martine Baker to manage coordination with authorities.
G6	Copy of (1-page) email dated 2 April 2009 relating to enquiry from Leeanne Tingey, Department of Prime Minister and Cabinet, to the CEO in regard to hosting the confidential Cabinet Meeting, and relayed to Karen Caple from A May (PA to CEO).
G7	Copy of (3-page) Mayor/CEO Briefing Minutes, dated 27 March 2009
G8	Copy of (3-page) Updates from Director Governance and Strategy provided at the Executive Team Meetings (EMT), in 3 excerpts of the Executive Management Team Minutes.
G9	Copy of (2-page) Memorandum dated 17 April 2009 from Director Governance and Strategy to CEO (#795872) — Logistics Delegation, Wednesday 22 April 2009.
G10	Copy of (3-page) City of Wanneroo Policy Manual "Use of Civic Centre - Function Rooms and Public Areas"
G11	Copy of (1-page) email to Darrell Forrest, DLGRD on 8 May 2009 by the CEO.
G12	Copy of (3-page) printout of: an email of 5 May 2009 from Daniel Simms, CEO to David Morris at Department of Local Government and Regional Development, with, relevantly, a copy of an email of 21 April 2009 (sent at 0.03) from Cr Blencowe to Daniel Simms embedded in it.

G13	Copy of (8 x A3-page) 2007 Register, (7 x A3-page) 2008 Register and (3 x A3-page) 2009 Register, noting periods of leave granted by Council to respective Councillors.
G14	Copy of (2-page) Director Governance and Strategy sent emails dated 16 & 17 April 2009, regarding special security arrangements in relation to a Federal Cabinet meeting.
G15	Copy of (1-page) email from CEO to Councillors, dated 20 April 2009.
G16	Copy of (1-page) email of 9 April 2009 from Tanya Kaptein to "Gray, Laura; Roberts, Tracey; Kelly, Jon; Newton, Dot; Monks, Glynis; Treby, Brett; Paton, John" (and copy sent to: "Dickson, Mark; Directors & CEO") on the subject described as "Community Cabinet Meeting @ Ballajura".
G17	Copy of (10-page) printouts of emails (from 7 to 21 April 2009) between the City and the Community Cabinet Secretariat, addressing the 2 Community Cabinet meetings and the City's amended list of attendees.
G18	Copy of (2-page) letter from Daniel Sims to Cr A Blencowe, dated 1 May 2009.
G19	Copies of (10-paged) the Council Clipboard dated 13 March, 9 and 17 April 2009, which make reference to the lobbying visit to Canberra and to the upcoming Community Cabinet Meeting and Federal Cabinet Meeting.
G20	Copy of (1-page), (p.176), the minutes of the City's Ordinary Council Meeting held on 29 July 2008, being a record of Council Resolution CEOO4-07/08, and a copy of the (4-page) "Report to Council Forum: dated 15 July 2008 *"WA State Election — Advocacy Plan"* referred to in that resolution.
G21	Copy of (2-page), pp.219-220, of the minutes of the City's Ordinary Council Meeting held on 23 September 2008, being a record of Council Resolution CEO3-09/08, and a copy of the (5-page) Report to Council: CEO3-09/08 dated 23 September 2008 in relation to that resolution.
G22	Copy of (1-page), (p.245), the minutes of the City's Ordinary Council Meeting held on 16 December 2008, being a record of Council Resolution CEO1-12/08, and copies of a (3-page) Report to Council: CEO1-12/08 dated 16 December 2008 with its (15-page) Attachment 1 "The City of Wanneroo AN OVERVIEW"
G23	Copy of (3-page), (pp9-11), of Chief Executive Officer's Bi-Monthly Report — April 2009 — Visit to Canberra
G24	Copy of (3-page) Report to Council: CS 15-06/09 dated 30 June 2009, "Recent Federal Funding Submissions"
G25	Copy of (1-page), (p.8), the minutes of the City's Ordinary Council Meeting held on 28 July 2009, being a record of CQOI-07/09 - Question from an Elected Member - Cr Grierson - *re Visit to the City by Prime Minister and Cabinet* - and Mayor Kelly's response.
G26	Copy of (1-page), (p.114), the minutes of the City's Ordinary Council Meeting held on 2 June 2009, being a record of Council Resolution CS09-06/09 — Donation Requests to be Considered by Council – Note: Points 3 and 6 of the resolution.
H	Copy of (1-page) letter from Mr Dennis Blair (the City's Director, Infrastructure), dated 20 August 2009
I	**Copy of (2-page) Notice of Complaint (and 1-page attachment) to Cr Treby, dated 15 October 2009**
J	**Copy of (2-page) letter from Cr Treby, dated 1 December 2009 – the attachments to it being *[Doc J1]* to *[Doc J17].***

J1	Copy of (1-page) List of Documents
J2	**Copy of (6-page) Cr Treby's Response to Allegations, dated 1 December 2009**
J3	[Attachment 1] Copy of (2-page) printout of an email of 17 April 2009 from Cr Dot Newton to "Caple, Karen; Councillors; Directors & CEO; Bonnink, Julie; Thomas, Tracy; Bonney, Kym", with an earlier email of that date from Karen Caple embedded in it.
J4	[Attachment 2] Copy of (1-page) printout of an email of 18 April 2009 from Cr Grierson to Daniel Simms
J5	[Attachment 3] Copy of (2-page) printout of an email of 18 April 2009 from Cr Dot Newman to the other Councillors, with an earlier email of that date from Cr Newman to Cr Grierson, and a copy of *[Doc J4]*, embedded in it.
J6	[Attachment 4] Copy of (1-page) printout of an email of 18 April 2009 (sent at 4.09pm) from Cr Blencowe to Daniel Simms and the other Councillors, with an earlier email of that date from Karen Caple embedded in it.
J7	[Attachment 5] Copy of (2-page) printout of an email of 18 April 2009 (sent at 4.18pm) from Cr Blencowe to the other Councillors and the City's Directors, with an email of 17 April 2009 from Cr Newton and an email of 17 April 2009 from Karen Caple embedded in it.
J8	[Attachment 6] Copy of (2-page) printout of an email of 18 April 2009 (sent at 4.31pm) from Cr Blencowe to the other Councillors and the City's Directors, with an email of 17 April 2009 from Alex Lang to "Kelly, Jon; Councillors; Directors & CEO" embedded in it.
J9	[Attachment 7] Copy of (2-page) printout of an email of 18 April 2009 (sent at 4.53pm) from Cr Blencowe to Cr Grierson and Daniel Simms, with an email of 18 April 2009 from Cr Grierson to Daniel Simms embedded in it.
J10	[Attachment 8] Copy of (1-page) printout of an email of 18 April 2009 from Cr Laura Gray to the other Councillors and the City's Directors
J11	[Attachment 9] Copy of (2-page) printout of an email of 18 April 2009 from Cr Blencowe to Cr Gray, the other Councillors and the City's Directors, with a copy of the email in *[Doc J11]* embedded in it.
J12	[Attachment 10] Copy of (1-page) printout of an email of 19 April 2009 from Cr Gray to Cr Blencowe, the other Councillors and the City's Directors
J13	[Attachment 11] Copy of (1-page) printout of an email of 20 April 2009 (sent at 5.23pm) from Mr Daniel Simms (the City's CEO) to the City's Councillors on the subject described as "Community Cabinet Meeting". i.e a further copy of *[Doc B5]*
J14	[Attachment 12] Copy of (2-page) article titled "PM at home in Wanneroo" by Jessica Willoughby, dated 20 April 2009
J15	[Attachment 13] Copy of (1-page) printout of an email of 25 November 2009 from the then City's Deputy Mayor, Cr Tracey Roberts, to Cr Treby
J16	[Addendum 1] Copy of a (2-page) Complaint of Minor Breach Form dated 1 December 2009, made and signed by Cr Treby, about alleged conduct of Cr Blencowe on 18 April 2009, followed by: (1-page) of the substance of the complaint, and a completed (1-page) Complainant Details Form.
J17	[Addendum 2] Copy of a (2-page) Complaint of Minor Breach Form dated 1 December 2009, made and signed by Cr Treby, about alleged conduct of Cr Blencowe on 19 April 2009, followed by: (1-page) of the substance of the complaint, and a completed (1-page) Complainant Details Form.
K	Copy of (1-page) letter to Mr John Paton, the City's Complaints Officer, dated 28 January 2010

L	Copy of (1-page) letter from Mr Shane Cable (the City's A/Director Corporate Strategy & Performance, dated 2 February 2010 – the attachments to it being *[Doc L1]* to *[Doc L3].*
L1	**Copy of (8-page) City of Wanneroo "Council Members' Code of Conduct", current at 19 April 2009**
L2	**Copy of (6-page) City of Wanneroo policy on "Elected Member Allowances and Expenses", current at 19 April 2009**
L3	**Copy of (3-page) City of Wanneroo policy on "Communications", current at 19 April 2009**
M	Copy of (1-page) letter to Mr John Paton, the City's Complaints Officer, dated 30 April 2010
N	**Copy of (1-page) letter from from Mr John Paton, the City's Complaints Officer, dated 4 May 2010**

Panel's role; duty to make finding; required standard of proof; Briginshaw principles

The Panel notes that:

(1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.

(2) Under the Act and the common law the Panel:

(a) has no power or duty to carry out any investigation in relation to any complaint before it;

(b) has no power to compel any information to be provided to it; and

(c) has no power, on the application of a party or on its own initiative, to make an order that a complaint or an allegation be dismissed or struck out if the Panel forms the view that the complaint or the allegation concerned:

(i) is frivolous, vexatious, misconceived or lacking in substance; or

(ii) is being used for an improper purpose; or

(iii) is otherwise an abuse of process.

(3) Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia.

(4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)(a)]. In order for it to make any finding that any minor breach has been committed by a council member, the finding is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur [section 5.106].

(5) This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).

(6) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.

(7) The approach to a court's findings described in the High Court of Australia case of *Briginshaw v Briginshaw* [2] (*Briginshaw*) is based on the principle that a court in a civil action should not lightly find that a party has engaged in criminal conduct. As accusations of wrongdoing usually involve serious consequences for the defendant, justice demands that the accuser, whether in civil or criminal matters, carries the burden of proof to the requisite standard.

(8) *Briginshaw* is the leading authority, frequently applied, that where the allegation in a civil proceeding is a serious one:

(a) the importance and gravity of the allegation makes it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the evidence survives a careful scrutiny; and

(b) circumstantial evidence cannot satisfy a sound judgment of a state of facts if that evidence is susceptible of some other not improbable explanation; and

(c) if the evidence adduced, when subjected to these tests, satisfies the tribunal of fact that the conduct alleged was committed, it should so find.

(9) The contents of paragraphs (8)(a) and (8)(b) immediately above, taken together, are referred to in these *Reasons* as the Briginshaw principles.

(10) Her Honour Branson J, in her separate reasons for judgment in the Full Federal Court case of *Qantas Airways Limited v Gama* [3] (*Gama*), has considered and expressed her views on the *Briginshaw* approach - which views were generally agreed with by French J, as he then was, and Jacobson J in their joint reasons for judgment in *Gama* [4].

(11) In the Panel's view, the Briginshaw principles and Branson J's said views have relevance when the Panel is dealing with a minor breach complaint.

[2] [1938] HCA 34; (1938) 60 CLR 336
[3] [2008] FCAFC 69
[4] Supra, at [110]

Attachment B

THE PANEL'S GENERAL VIEWS IN RELATION TO REGULATION 7(1)(b)

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 states what constitutes the offence of and penalty for improper use of (confidential) information. *The Criminal Code* section 83 states what constitutes the crime of and penalty for corruption.

Elements of regulation 7(1)(b)

In the Panel's view, the essential elements or the core ingredients of a breach of regulation 7(1)(b) are that:

- a council member committed the alleged conduct
- that conduct was a use of the member's office as a council member
- viewed objectively, that 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, that conduct was committed by the member for the sole or dominant purpose (motive or intent) of causing detriment to the local government or any other person.

Panel general views

In the Panel's view:

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 a council member are in essence:
   (a) the standards of conduct flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it) and the common law;
   (b) the standards of conduct for a council member flowing from a relevant code of conduct;

(c) to comply with council member obligations or duties under his or her local government's policies; and
(d) to observe his or her council's decisions.

3. 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.

4. In considering the meaning of the term "detriment" in regulation 7(1)(b), the Macquarie Dictionary 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".

5. The term "detriment" in regulation 7(1)(b) 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, such "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.

6. 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.

7. 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.

8. A council member's right of freedom of expression is a factor in considering what constitutes improper conduct by him or her.

9. 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 section 2.7, which reads:

"(1) The council -

(a) governs 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 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 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.

(8) The essential features of the fiduciary relationship, and the fiduciary duties, owed by a council member to his or her council as the governing body of the local government may be summarised as:
   (a) a duty to act in good faith – i.e. the council member must in his dealings act bona fide in what he 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";
   (c) the no conflict rule – i.e. a council member cannot have a personal interest (i.e. a pecuniary interest) or an inconsistent engagement with a third party where there is a real and sensible possibility of conflict; and
   (d) the no profit rule – i.e. a council member cannot obtain an advantage for himself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his position.

(9) Those fiduciary duties are the paramount duties of a councillor by virtue of the fact that councillors are representatives of their community and elected by and from that community, and take precedence notwithstanding that:
   (a) a councillor, when acting in his capacity as a private citizen, has a conditional right of free expression – i.e. that right is subject only to any lawful restrictions on the right of free speech;
   (b) it may be expected that councillors will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community;
   (c) councillors may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as councillors by reference to those views;
   (d) councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council;
   (e) a councillor's expression of such views is part of the electoral process;
   (f) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, councillors can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions; and
   (g) it is expected councillors will have views about the matters before council and express those views in a way which in a tribunal or court context could or would be considered biased, as this reflects the nature of the decision-making process undertaken by councils.

Attachment C

MATERIAL IN RELATION TO THE "REPUTATION" OF A LOCAL GOVERNMENT

The Panel notes in relation to the "reputation" of a local government that:

(1) There is a recognised distinction between "reputation", which at law is generally considered as general reputation, and the view which a particular individual may take of a person. In the Judgment of the Court of the New South Wales Supreme Court in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 (24 December 2002) Beazley JA, Giles JA and Santow JA said, at [1370] – [1371] (omitting authorities):

> *"In fulfilling the purpose of reparation for harm done to, and vindication of, reputation, it is necessary to know the reputation said to have been injured. In principle, a plaintiff with a bad reputation will be entitled to lower damages than a plaintiff with a high reputation, because the injury to the reputation will be less if the reputation is already diminished.*
>
> *A person's reputation is the character which he bears in public estimation, that is, what other people think of the person. Evidence may be called to prove good reputation, but must be evidence of general reputation, "*the esteem in which he is held by others who know him and are in a position to judge his worth*", not evidence of specific events going to make up the general reputation. As a qualification to this, evidence of specific events of sufficient notoriety that they contribute to the general reputation may be admissible. Reputation can be contrasted with character, that is, what a person is as distinct from what other people think of the person, although "character" has been and can properly be used in the same sense as "reputation". If it is sought to prove bad reputation, again the evidence must be of general reputation and not of particular instances of bad conduct. In each case, however, in cross-examination the witness may be asked the grounds for the good or bad reputation and on what it is based, and so particular facts or instances may come up."*

(2) In the House of Lords case of *Derbyshire County Council v Times Newspapers* (1993) AC 534 (*Derbyshire*) the action was commenced by a local authority and one of its members in respect to newspaper articles questioning the propriety of certain investments made by the council. Lord Keith, in *Derbyshire* at 547, referred to the features which distinguish a local authority from other types of corporation. He observed:

> *"The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be opened to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."*

In *Derbyshire* at 549, Lord Keith refers to the case of *Die Spoorbond v South African Railways* 1946 AD 999, a South African decision relating to government departments. He quotes Schreiner JA as observing, inter alia:

> *"Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would I think be unfortunate if that practice were altered."*

Lord Keith then proceeded to state that such "observations may properly be regarded as no less applicable to a local authority ... ". He concluded that at common law a local authority does not have the right to maintain an action for defamation.

(3) This decision of the House of Lords was followed in New South Wales by the New South Wales Court of Appeal in the action of *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (*Ballina*) and in the case of *NSW Aboriginal Land Council v Jones* (1998) 43 NSWLR 300. In *Ballina* Gleeson CJ stated (at 691):

> *"To treat governmental institutions as having a "governing reputation" which the common law will protect against criticism on the part of citizens is, to my mind, incongruous. I regard the matter as turning upon the concept of reputation, and the nature of the reputation which the law of defamation sets out to protect. I understand that concept in its application to individuals (including individual politicians), trading corporations and other bodies but I have the greatest difficulty with the concept in its application to the government reputation of an elected governmental institution. The right of an individual, even one in public life, to his or her personal reputation is one thing. Such a right can be recognised and protected by the law without undue interference with the right of free speech."*

(4) The common law position, that local governments themselves have no right to take action in defamation, is now recognised and confirmed in statutory law (see section 9 of the *Defamation Act 2005* (W.A.)). However, the Courts, in formulating the common law, have not decided that taking an action for defamation would be beyond the power or outside the functions of a local authority. What the Courts have decided is that local governments should not be afforded the right to take an action for defamation because as a matter of public policy, criticism of elected governments should be unfettered.

Attachment D

THE PANEL'S VIEWS ON THE TERMS 'RESPECT FOR A PERSON' AND 'TO TREAT A PERSON WITH RESPECT'

The Panel notes that in considering the meaning of the terms 'respect for a person' and 'to treat a person with respect':

(1) The Macquarie Dictionary (5th ed) defines 'respect', relevantly, as 'to show esteem, regard, or consideration for' and 'to treat with consideration; refrain from interfering with'.

(2) The central tenet of Immanuel Kant [5] on respect for persons is relevant. The tenet is: "*Act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a means but always at the same time as an end.*" [6]

(3) In Kant's view, the respect we owe others is "*to be understood as the maxim of limiting our self-esteem by the dignity of humanity in another person, and so as respect in the practical sense.*" [7]

In the Panel's view:

(1) A council member of a local government will:

(a) fail to be respectful of a person; and

(b) fail to have respect for a person; and

(c) fail to treat a person with respect,

if the member fails to keep his or her sense of own self esteem (or, ego) in check so as to give proper recognition of the dignity of humanity in the person.

(2) For all practical intents and purposes, the behaviour or conduct of a council member will demonstrate such failures, if the member:

(a) treats the person merely as a means to something (because to do so values the person as less than an end in himself or herself); or

(b) shows contempt for the person (because to do so denies that the person has any worth) – noting that the term 'contempt' in this context refers to the feeling or attitude with which one regards another person as worthless; or

[5] 1724 – 1804

[6] Kant, I., 1785 (1964) 4:429, *Grundlegung zur Metaphysik der Sitten,* translated as *Groundwork of the Metaphysic of Morals* by H.J. Paton, New York: Harper and Row

[7] Kant, I., 1797 (1991) 6:449, *Die Metaphysik der Sitten,* translated as *The Metaphysics of Morals* by M. Gregor, Cambridge: Cambridge University Press

(c) treats the person with arrogance (because to do so is a demand that the person value the member more highly than the person values himself or herself) – noting that the term 'arrogance' in this context refers to an offensive exhibition of assumed or real authority; or

(d) defames the person by publicly exposing his or her faults; or

(e) ridicules or mocks the person – noting that:

(i) the term 'ridicule' in this context refers to two cases – namely:

(A) when a third person is or third persons are present or in the vicinity, or is/are the recipient/s of any publication or communication, the saying or communication of words or the display of any action or gesture for the purpose (motive or intent) of causing contemptuous laughter at the person; and

(B) otherwise, to deride or make fun of the person; and

(ii) the term 'mock' in this context refers to two cases – namely:

(A) ridiculing the person by mimicry of action or speech; or

(B) scoffing or jeering at the person's action or speech.

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 10 of 2009 (DLGRD 20090104)
Heard:	Determined on the documents
Considered:	27 May 2010 & 4 August 2010
Coram:	Mr B. Jolly (Presiding Member) Councillor C. Adams (Member) Mr J. Lyon (Member)

SP 10 of 2009
Complainant: (Cr) Frances Maureen GRIERSON
Council member complained about: Councillor Brett TREBY
Local Government: City of Wanneroo

Regulations alleged breached: Regulations 7(1)(b), 9(1) and 10(1)(a)

DECISION & REASONS FOR DECISION

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 OF MINOR BREACHES

The Panel has made findings (the findings) in relation to Complaint No. SP 10 of 2009 that include one finding of minor breach – namely, that on 19 April 2009 Councillor Treby committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by making improper use of his office as a Council member to cause detriment to Councillor Grierson by sending his email of that date to the City's Councillors – such detriment being for others to think less favourably of Councillor Grierson (the present breach) .

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 subsection (c) of that section, it ordered two of the sanctions described in subsection (b) of that section – namely that Councillor Treby be publicly censured and that he apologise publicly to Councillor Grierson, as specified in the attached Minute of Order.

DECISION & 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 Panel notes that through its Presiding Member it has given to Councillor Treby:

(a) notice of the findings (the notice of the findings);

(b) a copy of the Panel's Reasons for Findings in this matter (the 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 Treby's response and submissions

3. By his letter of 10 July 2010 Councillor Treby has responded to the notice of findings and the Reasons for Findings, and has made such submissions. The relevant part of his letter that consists of his submissions about how the present breach should be dealt with under section 5.110(6) is reproduced as follows.

> "9. In terms of the findings and orders made, I accept that the Panel has formed a view and has invited a submission.
>
> 10. In response to the options provided, I wish to draw to the Panels attention to the judicial concept of **proportionality**.
>
> 11. **Proportionality**: *The doctrine that legislation or administrative action should not excessively or unjustifiably impinge upon the constitutionally guaranteed rights. Cuncliffe v Commonwealth (1994).*
>
> 12. In this matter**, it is relevant** that the email was sent only to elected members within a constrained environment and not distributed to a person or persons outside of that constrained environment. For the Panel to then apportion a requirement for a public apology where the email was not made public disproportionately imparts a penalty inconsistent with the alleged offence.
>
> 13. Indeed Cr Grierson in her original complaint paid a higher level of attention to proportionality than the Panel, and requested an apology to the Wanneroo councillors *(only)* who were included in the email. In view of the Panel's findings, I accept that this would be more balanced and proportionate response in terms of how the minor breach might be addressed.

14. Conversely, and importantly, it appears that the legislation may be prescriptive in terms of the penalty with respect to the only remedy available for a minor breach being that offered by the Panel, that of a public apology, and potentially a requirement for training. Were this to be the case, the prescribed penalty would breach the concept of **proportionality**.

I would therefore suggest that the Panel consider the following;

1. In respect to the matter identified in 11, if the only course of action available to the Panel, ***as an operational consequence the legislation****,* was a finding of minor breach and therefore a penalty of a public apology and training, the concept of proportionality *(penalty balanced against breach would be weighted heavily and injudiciously against* me) would be breached and therefore be completely unreasonable.

2. If available to the Panel, and were the Panel to *(reasonably and in an informed manner)* take into consideration the concept of proportionality, a private apology to Councilor Grierson might be acceptable.

3. Notwithstanding the passage of time and the fact that I have independently ameliorated my response and dealings with several councillors in keeping with the *Government (Rules of Conduct) Regulations 2009,* the public apology (2 *July 2010)* and as a consequence of the findings of Members Parry and Pritchard and the general principals of propriety, respect and honesty when dealing with councillors, additional training may be directed by the Panel and accepted by me."

(Councillor Treby's submissions)

Panel's views on Councillor Treby's submissions

4. In the Panel's view:

(1) In Australian criminal law a basic principle of sentencing is that the sentence imposed by the court should never exceed that which is appropriate or proportionate to the gravity of the crime. This notion is referred to as "proportionality".

(2) When the Panel deals with a minor breach pursuant to section 5.110(6) it is appropriate that the Panel's decision be such that it is appropriate or proportionate to the gravity of the breach.

(3) Councillor Treby's reference to *Cuncliffe v Commonwealth (1994)* is a reference to the decision in *Cunliffe v Commonwealth* [8] (*Cunliffe*). In relation to Councillor Treby's proposition – *the doctrine* [of proportionality is] *that legislation or administrative action should not excessively or unjustifiably impinge upon the constitutionally guaranteed rights:*

[8] [1994] HCA 44.

(a) it is noteworthy that in *John Kizon v Michael John Palmer* [9] it was said by Lindgren J (whose Reasons were agreed with by Jenkinson and Kiefel JJ) that:

> *"In Cunliffe, it is made clear that a proportionality test becomes relevant only where it is sought to support the validity of the law by reference to the end or object of a head of power."*

(b) while Councillor Treby does not give any detail as to which alleged constitutionally guaranteed right or rights he is referring to, such 'right' would appear to be the immunity commonly referred to as the implied freedom of political communication under the Australian Constitution.

(4) In Councillor Treby's submissions it appears that he is attempting to raise jurisdictional issues - namely:

(a) whether regulation 7(1)(b) should be read down, having regard to the said implied freedom of political communication; and

(b) whether section 5.110(6)(c) is constitutionally invalid, having regard to the said implied freedom of political communication.

(5) The current state of the common law is such that it appears inconclusive whether or not the Panel has power to determine collateral matters such as the jurisdictional issues mentioned in paragraph 4(4) above.

(6) However, in *Treby and Local Government Standards Panel* [10] (the SAT Review) Judge J Pritchard (as she then was) in her Reasons for Decision, at [43] – [59], dealt with and gave extensive reasons on an unsuccessful submission made by Councillor Treby that regulation 7(1)(b) should be read down having regard to the implied freedom of political communication under the *Constitution*. [See paragraph 5 below for further comment in relation to the SAT Review.]

(7) In the event, Councillor Treby's submissions are that the present breach should be dealt with under section 5.110(6) by way of:

(a) a 'private' apology to Councillor Grierson in front of or circulated between the other City Councillors who received the offending email from Councillor Treby; or

(b) if the legislation does not allow a private apology, a public apology to Councillor Grierson and training for Councillor Treby.

Panel's views how the present breach should be dealt with under section 5.110(6)

Relevant antecedent/s

[9] [1997] FCA 21 (31 January 1997)
[10] [2010] WASAT 81.

5. In considering an appropriate sanction or sanctions for the present breach the Panel notes that in relation to another complaint (No. SP 31 of 2008):

(1) The Panel found that Councillor Treby had committed two minor breaches (the first found breaches) – namely:

(a) that at the City of Wanneroo's Council's Special Meeting on 25 July 2008 (the Special Meeting) he committed a breach of standing order 11.9 of the *City of Wanneroo Standing Orders Local Law 2000* (the standing order breach) by making adverse reflections upon the character or actions of Councillor Alan Blencowe, former Councillor Paul Miles and Councillor Grierson and by imputing a motive or motives to them, and thus committed a minor breach by virtue of the fact of regulation 4(2); and

(b) that at the Special Meeting Councillor Treby also committed breaches of the City's Code of Conduct applicable at the time and a breach of regulation 7(1)(b) (the regulation 7 breach) by making improper use of his office as a Council member to cause detriment to the reputations of Councillors Blencowe and Grierson and former Councillor Miles.

(2) The Panel dealt with the first found breaches pursuant to paragraph (b)(ii) of section 5.110(6) by ordering Councillor Treby to apologise publicly to Councillors Blencowe and Grierson and former Councillor Miles, on terms specified by the Panel.

(3) Paragraph 11(4) and paragraph 12 of the Panel's Reasons for Decision read:

"[11]
(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.

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."

(4) Councillor Treby made application to the State Administrative Tribunal (SAT) for the SAT Review (being a SAT review of the Panel's two findings of minor breach mentioned in paragraph 5(1) above and its decision mentioned in paragraph 5(2) above).

(5) The SAT Review was heard and dealt with in two parts – see *Treby and Local Government Standards Panel [2009] WASAT 224* and *Treby and Local Government Standards Panel* [2010] WASAT 81.

(6) The SAT Review resulted in SAT orders to the effect that in relation to Councillor Treby: the Panel's two findings of minor breach mentioned in paragraph 5(1) above were affirmed; the Panel's decision mentioned in paragraph 5(2) above was affirmed; and Councillor Treby's application for review was dismissed.

(7) Councillor Treby has made the required Panel-ordered apology at a Council meeting, in the terms specified by the Panel.

Other factors

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

(1) In Councillor Treby's submissions:

(a) he does not dispute any of the findings, reasons or contents in the Reasons for Findings; and

(b) he does not advise that he has made an apology, private or public, in this matter to Councillor Grierson since he sent the offending email - in particular, since he has received a copy of the Reasons for Findings in this matter.

(2) Councillor Treby has not demonstrated or shown any remorse or contrition to the Panel for his offending conduct in this matter.

(3) The possible sanctions, that section 5.110(6) provides for the Panel to deal with the present breach by, are:

(a) an order that the person against whom the complaint was made be publicly censured as specified in the order; or

(b) an order that the person against whom the complaint was made apologise publicly as specified in the order; or

(c) an order that the person against whom the complaint was made undertake training as specified in the order; or

(d) an order that the person against whom the complaint was made be publicly censured, and apologise publicly, as specified in the order; or
(e) an order that the person against whom the complaint was made be publicly censured, and undertake training, as specified in the order; or
(f) an order that the person against whom the complaint was made apologise publicly, and undertake training as specified in the order; or
(g) an order that the person against whom the complaint was made be publicly censured, and apologise publicly, and undertake training, as specified in the order.

(4) Accordingly, the Panel does not have power to order that the person against whom the complaint was made apologise 'privately'.

(5) A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.[11] While a public censure has that character or effect it is aimed at reformation of the offending council member and prevention of further offending acts.

(6) A breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure – not only as a reprimand aimed at reformation of the offending council member and prevention of further offending acts, but also as a measure in support of the institution of local government and those council members who properly observe the standards of conduct expected of them.

(7) A breach of regulation 7(1) to cause detriment to another person – whether or not the other person is a council member – is a very serious matter and will in almost all occasions deserve the sanction of a public apology to the other person/member, in addition to a public censure.

Appropriate sanction/s for the present breach

7. It is the Panel's view that:

(1) The present breach is the second time that the Panel has found that Councillor Treby made improper use of his office of Council member to cause detriment to Councillor Grierson (either alone or together with others).

(2) Taking into account the reasoning and matters mentioned in paragraphs 5 and 6 above, it is appropriate and proportionate to the gravity of the present breach that Councillor Treby should be publicly censured and that he apologise publicly

[11] *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

to Councillor Grierson, in the terms specified in the attached Minute of Order, as those sanctions:

(a) are an appropriate reflection of the seriousness of the present breach; and

(b) are an appropriate reflection of the fact that Councillor Grierson was the subject of the improper conduct in which Councillor Treby engaged.

(3) What is required of Councillor Treby in this instance 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 the Reasons for Findings;
(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;

and thus the Panel does not consider that an order for Councillor Treby to undertake training is an appropriate sanction or part of the appropriate sanctions in this matter.

Form of the public apology

8. The Panel notes that:

(1) To date, when it has dealt with a minor breach by ordering that a council member publicly apologise, the form of the apology specified by the Panel has been a concise description of the found minor breach/es and a statement by the council member that he or she apologises to the person/s concerned for the offending conduct and for any embarrassment or distress that such conduct caused to such person/s.

(2) However, the case law set out in **Attachment A** appears to be of some relevance, by analogy, when considering the form of an apology ordered by the Panel.

(3) The components of a full apology (or, a good apology) appear to consist of an acknowledgment of the offending conduct, acceptance of responsibility, expression of remorse or regret, and a promise not to repeat the offending conduct.

(4) Accordingly, if the Panel were to order Councillor Treby to publish a full apology in this matter to Councillor Grierson in a newspaper or newspapers, the appropriate form of the apology might read, for example:

"NOTICE OF PUBLIC APOLOGY

I, **BRETT TREBY**, am a member of the Council of the City of Wanneroo. The Local Government Standards Panel has made a finding that on 19

April 2009 I committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 by making improper use of my office as a Council member to cause detriment to **Councillor Maureen Grierson** by sending to the other City Councillors a copy of an email of that date from me to Councillor Grierson containing improper and derogatory remarks about her.

Councillor Grierson, please accept my apologies for my conduct. There is no excuse for my behaviour.

The purpose of this apology is to convey my regret to you for any hurt, inconvenience or unpleasantness I have caused to you by my conduct.

I realise I was wrong to have sent you an email containing improper and derogatory remarks about you, and that making improper use of my office of Council member to cause detriment to you (or anyone else) is a serious matter.

I will endeavour not to make improper use of my office of Council member again.

BRETT TREBY"

(5) However, a forced public apology in the form described in paragraph 8(1) above will often be sufficient to publicise the relevant council member's conduct in such a way that his/her unacceptable conduct is identified to the public and he/she is effectively sanctioned.

(6) Notwithstanding the contents of paragraph 8(5) above, the Panel foreshadows that in other matters in the future it may be appropriate for the Panel to order that the person against whom the complaint was made make a full public apology in terms that consist of all of the components mentioned in paragraph 8(3) above.

Panel decision

9. Having regard to the Reasons for Findings, the matters mentioned in paragraphs 4 to 8 above (both inclusive), and the general interests of local government in Western Australia, the Panel's decision on how the present breach is dealt with under section 5.110(6) is that, pursuant to subsection (c) of that section, it orders two of the sanctions described in subsection (b) of that section – namely that Councillor Treby be publicly censured and that he apologise publicly to Councillor Grierson – as specified in the attached Minute of Order (being Attachment B).

…….. ……

Brad Jolly (Presiding Member) 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).**

Attachment A

Case law on a compelled or forced apology and its form

1. *Falun Dafa Association of Victoria Inc. v Melbourne City Council* [2004] VCAT 625 (7 April 2004)

This matter concerned the refusal by the respondent (the MCC) to permit the applicant (Falun Dafa) to participate in the 2003 Melbourne Moomba Waterfest Parade (the Parade), which refusal was found to have breached the provisions of the Equal Opportunity Act 1995 (the Act) by excluding Falun Dafa from the Parade and thereby unlawfully discriminating against it. Two issues were specifically reserved for further argument. One was the relief which would be afforded to Falun Dafa in light of the second finding. Falun Dafa was specifically seeking an apology from the MCC. Questions of whether the Tribunal had the power to order an apology, whether it was appropriate for it so to do in the present case, and, if so, what form such apology should take, were reserved.

In his Reasons for Decision in this Victorian Civil and Administrative Tribunal matter Judge Bowman, Vice President, said at [10] – [43]:

"Having dealt with the preliminary points concerning the apology, I turn now to the substantive issues.

(a) The Case for Falun Dafa

The case for Falun Dafa could be summarised as follows. The Tribunal has the power to order an apology pursuant to s.136(a)(iii) of the Act. The existence of such a power was clearly recognised by the Supreme Court of Victoria in De Simone v Bevacqua (1994) 7 VAR 246. In that case, McDonald J, dealing with an almost identical provision contained in the Equal Opportunity Act 1984, not only recognised the power of the Tribunal to order an apology but found that it was open, on the particular facts, to make such an order, and indeed amended the wording of the apology so ordered. Thus, there should be no doubt but that the Tribunal has the power to order an apology. It also has the power to order that such apology be published, for example, in a newspaper - see White v Gollan (1990) EOC 92 -303.

The next question is whether it is then appropriate in the present case to order an apology. It is so appropriate. The rights protected by the Act are important rights. The objects of the Act are set out clearly in s.3. The Tribunal has previously determined that the MCC breached the provisions of the Act and made remarks to the effect that the MCC treated Falun Dafa harshly, handled the situation poorly, and caused Falun Dafa considerable inconvenience. Discriminatory behaviour such as this is even worse when it is so done by an arm of Government. Its conduct was such as to cause Falun Dafa public humiliation, loss of repute and the like. It is the very sort of case where an apology is appropriate, and such apology should come from the councillors, as they constitute the MCC.
The fact that Falun Dafa is an incorporated association does not deprive it of the right to an apology. Firstly, it is constituted by its members. They are members as opposed to shareholders. Secondly, the Act applies to bodies corporate. The Act prohibits discrimination against persons. The definition of a "person" contained in s.4 is clearly of sufficient breadth to include corporations. Furthermore, that a body

corporate can be the subject of discrimination and have rights pursuant to legislation such as this was so determined by the High Court of Australia in Koowarta v Bjelke-Petersen 39 ALR 417. It has never previously been suggested during the conduct of this case that Falun Dafa could not be discriminated against because it is a body corporate. If it has rights pursuant to the Act, and can be discriminated against, it is only logical that it also has open to it the relief available in s.136, and all aspects of that relief.

In relation to arguments that s.136(a)(iii) requires the existence of "loss, damage or injury suffered", the victim of the discrimination does not need to have received loss, damage or injury capable of being compensated for by the payment of damages or money. Section 136 contemplates different relief in different circumstances. Section 136(a)(ii) contemplates a situation where monetary compensation can be paid. Section 136(1a)(iii) speaks of relief of a different kind for situations where monetary compensation might not be appropriate. An apology is relief of that kind. The existence of loss, damage or injury of the kind that would attract general or special damages is not a prerequisite. Even if Falun Dafa has abandoned any claim for monetary compensation, it has nevertheless suffered loss, damage and injury in the form of humiliation, loss of repute, inconvenience, time and energy expended in preparing for the Parade, and the like.

Accordingly, a public apology can and should be ordered. The MCC, on behalf of the councillors who constitute it, should publish such apology.

(b) The Case for the MCC

The case for the MCC could be summarised as follows.

An apology is an expression of sympathy or regret in relation to an incident directed to alleviating the injury, loss or damage to reputation or feelings, or hurt. Such matters are damages in the nature of general damages.

Section 136(a)(iii) permits the making of an order "with a view to redressing any loss, damage or injury suffered by the complainant as the result of the contravention". Thus, what is to be redressed by such an order is such loss, damage or injury. This presupposes the existence of loss, damage or injury.

The damages under s.136 are compensatory in nature and not punitive - see Spencer v Dowling (1997) 2 VR 127 at 144. In the present case, Falun Dafa has specifically abandoned claims for orders compensating it for expenses and for humiliation, and has abandoned any claim for aggravated damages or interest Damages in the nature of general damages have not been shown to arise from the contravention. Falun Dafa has not demonstrated injury, loss or damage to reputation, or to feelings, or hurt.

Mere hurt or inconvenience is not sufficient to demonstrate loss, damage or injury. The normal standard is a high degree of robustness in reaction to the vicissitudes of life, and this is particularly so in a political context and where the complainant is a corporation.

There has been no loss, damage or injury of the requisite kind as a result of the contravention, and accordingly it is not possible for the Tribunal to make an order

pursuant to s.136(a)(iii) for an apology. The required loss, injury or damage of the required kind has not been demonstrated by the evidence to exist.

Furthermore, to order an apology where no relevant injury, loss or damage has been sustained would be an order in the nature of punitive damages, an order not open to the Tribunal. Falun Dafa has already been vindicated by the previous declaration as to discrimination. This received considerable publicity. An order requiring an apology would be punitive.

Furthermore, the loss, injury or damage must be suffered by the complainant. In the present case the complainant is a body corporate. It cannot have feelings. It cannot receive damages in respect of hurt to its feelings or its reputation as such. The action is in the name of Falun Dafa. Its members have not joined in the action. It cannot now be asserted that the members suffered some loss, damage or injury sufficient to satisfy the requirements of s.136(a)(iii).

Furthermore, courts have been loathe to order the making of apologies. Apologies made compulsorily may lack genuine contrition or regret. In the present case, it would be a matter of a corporation apologising to another corporation, which makes such an apology even more hollow.

Further, the crafting of the appropriate orders would present practical difficulties, and ultimately such orders are unenforceable and should not be made.

(c) Ruling

Firstly, I am of the opinion that pursuant to s.136(a)(iii) this Tribunal does have the power to order a person who has contravened the provisions of the Act to make an apology. Apart from the fact that the power to make such an order seems to me to be consonant with both the objectives of the Act and the wording of the section, the decision in De Simone seems to me to establish such a proposition. I indicated during the conduct of argument that the existence of such a power seemed to me to be comparatively clear. There was not a great deal of argument to the contrary. Accordingly, I find that the Tribunal does possess the power to order an apology in an appropriate case.

Given that the Tribunal possesses such a power, the next question to be determined is whether it is appropriate that it should be exercised in the circumstances of the present case. Basically, I accept the submissions made by Mr Borenstein. I have arrived at this conclusion for the following reasons.

Firstly, it seems to me to be correct that there will be situations where the ordering of monetary compensation is not appropriate. As I have found, the legislation permits the ordering of non-compensatory relief, such as an apology. The confining of the phrase "loss, damage or injury" to what is envisaged by the concept of general damages seems to me to be incorrect. Section 136(a)(ii) seems to me to envisage the payment of monetary sums. Section 136(a)(iii) contemplates an alternative or additional remedy. Whilst any order made pursuant to it is made "with a view to redressing any loss, damage or injury", it does not seem to me logical that any such order must be made so as to reduce, replace or supplement monetary relief. The relief afforded by s.136(a)(iii) seems to me to be a "stand alone" option. It presupposes the existence of "loss, damage or injury" but does not specify that these

must be in the nature of matters which would attract general damages. Put simply, if a complainant has suffered loss, injury or damage, two options are available. One is for the making of orders that do not involve the payment of money. To me, it is reading too much into the wording to say that there must first exist loss, damage or injury which would attract the payment of money.

Furthermore, I am not convinced that the argument advanced by Ms O'Brien based upon resemblances to general and punitive damages is correct. I have already dealt with this in part in the preceding paragraph, and I am fortified in this view by the words of Winneke P in Spencer v Dowling at p. 144. His Honour there says:

> *Thus, an analogy between the measure of an award of damages in tort and an award of compensation under the Equal Opportunity Act must be an imperfect one. An award of damages under the latter Act is a creature of statute. The measure of damage for tortious conduct has been carefully crafted by the common law for over a century and has been confined by principles which, so far as I can see, would have no place in a law which seeks to eliminate discrimination in defined relationships.*

His Honour went on to discuss rules relating to damages in defamation, negligence and other torts, before stating as follows:

> *These and other principles would seem to me to have little scope for operation in the context of an award of damages under the equal opportunity legislation which, when all is said and done, is sui generis. Although I do not doubt that the Act allows compensation for injured feelings, hurt and humiliation caused by the conduct of a respondent, care needs to be taken, in my view, not to assimilate too closely the methods of assessment with those adopted in defamation, trespass, negligence or malicious prosecution.*

Accordingly, it seems to me that there is a very real limit upon the extent to which, when considering relief pursuant to s.136 of the Act, helpful comparisons can be made with general, special or punitive damages available in other areas of the law. As stated above, the section seems to me to mean what it says, and to offer alternative forms of relief. In any event, I do not accept the argument that the ordering of an apology is punitive in nature. It may be that some circumstances might exist where the ordering of an apology would result in such embarrassment and humiliation that it might not be appropriate to make such an order. I would still not accept that this is necessarily in the nature of punitive damages. Whether or not that be correct, such circumstances do not exist in the present case. I do not accept that the ordering of an apology, or the publication of same, is in the nature of punitive damages or is punitive in the general sense of the word.

I might say that this approach, and the ordering of an apology generally, seem to me to fit within the objectives of the Act as set out in s.3. In particular, such an order seems to me to be consistent with s.3(a) and (d). Indeed, redress in such a form could be said to be closer to the spirit and objects of the legislation than awards of monetary compensation, although, of course, the latter is also made available.

I am also satisfied that a corporation can be a complainant pursuant to the provisions of the Act. I accept Mr Borenstein's argument in this regard. I note the findings of the

High Court of Australia in Koowarta, and for example, the observations of Mason J at p.468 of that decision where he said:

> *It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, `person' should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s.12 being to prohibit acts involving racial discrimination, there is a strong reason for given the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour or national or ethnic origin of any associate of that corporation.*

If a corporation can be a complainant pursuant to the Act, and it proves its case, why should it not have open to it all aspects of the relief set out in s.136? It seems to me only logical that it should. Thus, I am of the opinion that a body corporate may obtain from the Tribunal an order that an apology be made and/or published. I might add that I reject the submission that its position is in some way weakened if the entity from which it is seeking an apology is also a body corporate.

In the present case, I am of the view that Falun Dafa has suffered loss, injury or damage within the meaning of the section. I have previously received and accepted evidence that it went to very considerable trouble in preparing for the Parade prior to its being excluded by reason of the discriminatory act perpetrated by the MCC. I refer to paragraph 5 of my judgment of 7 March 2003 and paragraph 58 of my judgment of 23 December 2003. I fail to see why inconvenience, and considerable inconvenience at that, should not fall within the words "loss, injury or damage". Without adopting too technical an approach to what are broad words in an act designed to achieve social justice, Falun Dafa has suffered a loss or detriment. Through its members, it has expended considerable time and energy, and thus suffered considerable inconvenience, preparing for and pursuing an enterprise from which it was wrongfully excluded. Without anything further, that seems to me to constitute loss, damage or injury.

I also accept that a body corporate, whilst it may not have, as Ms O'Brien put it "a soul", can sustain damage to its reputation. The rejection of Falun Dafa, after it had been accepted for the Parade, and given that public rehearsals and the like were staged, could duly be seen as having an adverse effect on its reputation. It seems to me that, particularly in this Tribunal, specific evidence as to damaged reputation in such circumstances is scarcely needed. The rejection of Falun Dafa from the Parade by the Council of what is arguably the most prominent municipality in the State of Victoria from participating in one of its most prominent events could scarcely be regarded as a private matter. In my opinion, I am entitled to draw the conclusion that some damage to Falun Dafa's reputation thereby ensued.

In addition, a loss or detriment of another kind was suffered by Falun Dafa. I have previously found, on the evidence, that its failure to be able to spread its message concerning its culture and beliefs by reason of its wrongful exclusion from the Parade was a detriment suffered by Falun Dafa - see paragraph 44 of the judgment of 23 December 2003. A loss is a detriment - see the definition of "loss" contained in Butterworth's Concise Australian Legal Dictionary, 2nd Edition. Viewed another way, it has suffered a loss of opportunity.

In my opinion, Falun Dafa has sustained injury, loss or damage within the meaning of s.136(a)(iii). It is entitled to an order made with a view to redressing any such damage, loss or injury. There is a power to make an order for an apology. In my opinion, it is appropriate that such an order be made.

I should add that I reject the MCC's further submissions that an order to make an apology is something which courts have been loathe to make and therefore should not be made. The decision in De Simone indicates that a court will certainly make such an order if it feels that it is appropriate. I do not agree that the crafting of such an order presents practical difficulties. It did not do so in De Simone. It does not do so here. I am confident that an appropriate apology can be drafted.

Similarly, I do not agree with the submission that such an order would be unenforceable. The Victorian Civil and Administrative Tribunal Act 1998 ("the VCAT Act") contains within it specific provisions in relation to non-compliance with orders (see s.133). If necessary, contempt proceedings can be brought (see s.137). I fail to see any merit in this submission.

Accordingly I am of the view that it is appropriate that an apology be ordered pursuant to s.136(a)(iii). I prefer and accept the submissions of Mr Borenstein in this regard.

I am also of the view that the apology should be published by the MCC. Falun Dafa has succeeded in establishing contravention of the Act, in establishing that the Tribunal has power to order an apology, and in establishing that it is appropriate that such an apology be ordered. As discussed in paragraph 11 of this judgment, and with reference to De Simone and White v Golan, the Tribunal also has the power to make an order in relation to the fashion in which publication is performed. It seems to me to be reasonable and appropriate that, Falun Dafa having succeeded in the way which I have described, publication should be performed by the MCC. It also seems to me that the method of publication requested by Falun Dafa - namely, in three specified Chinese language newspapers and in the form and location specified, all of which is for a sum which I was assured is moderate (which was not contested) - is reasonable. Thus, I am satisfied that the order which I make should include reference to the fact that the MCC shall publish the apology. The specifics of such publication will be set out in the orders herein, but will be in accordance with the request of Falun Dafa.

2. FORM OF THE APOLOGY

There was some discussion concerning the form of the apology, assuming that I ordered same. Some "concessions" in relation to the draft apology were made by Mr Borenstein, if I can conclude that statements such as "I would not die in a ditch over that word" are concessions.

Whilst I appreciate that Falun Dafa is made up of its membership, who would have doubtless reacted in different ways to these occurrences, and that the MCC is constituted by its councillors, various of whom may have voted for or against the resolution precluding Falun Dafa from participating in the Parade, it seems to me that, when it comes to the wording of the apology, the fairest, and the simplest, wording is that which names the parties actually in dispute. I am against Mr Borenstein in this regard. Bearing this in mind, and bearing in mind the arguments for

and against various individual wordings, I find that the apology should read as follows:

Apology

The Melbourne City Council makes the following statement of apology.

In February 2003 the Council excluded the Falun Dafa Association of Victoria from participating in the 2003 Moomba Parade on the basis of its political associations.

The Council now acknowledges that the exclusion was in contravention of the Equal Opportunity Act 1995 and it apologises for this to the Falun Dafa Association.

The Council also expresses its regret as to any trouble, inconvenience and damage to reputation that was caused to the Association as a result of the exclusion and looks forward to a more positive relationship with the Association in the future."

.....

***2. Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (EOD)* [2007] NSWADTAP 19 (16 April 2007)**

In this case the Administrative Decisions Tribunal Appeal Panel of New South Wales said, at [76] – [79]:

"Courts have questioned the efficacy of ordering apologies and retractions in anti-discrimination proceedings, including those involving vilification. For example, in Jones v Scully [2002] FCA 1080; (2002) 120 FCR 243 at [245], a case in which the respondent was found to have contravened Part IIA of the Racial Discrimination Act 1975 (Cth) by distributing anti-Semitic leaflets, Hely J stated:

> *During the course of submissions I suggested to the applicant's counsel that, prima facie, the idea of ordering someone to make an apology is a contradiction in terms. Mr Rothman accepted this. Although an apology has been ordered in proceedings of this type in the past (see, for example, Oberoi v HREOC [2001] FMCA 34), I do not think that an order that the respondent publish an apology is appropriate in these proceedings.*

However, it is clear that an apology may be ordered to fulfil a legal requirement rather than as a statement of genuinely held feelings. In Burns v Radio 2UE Sydney Pty Ltd & Ors (No2) [2005] NSWADT 24 at [29] and [30] the Tribunal discussed this issue in the context of the former equivalent provision in the AD Act in relation to vilification complaints:

We agree that if an apology is understood, as it is commonly understood, to be a statement that reflects a person's own feeling of regret for conduct that has caused offence or harm, then of its nature it cannot be ordered to be made, unless the feeling is in fact held and it is only its expression that is ordered. In submissions the applicant, however, says that an apology for purposes of s113(1)(b)(iiia) should be understood as being associated with a legal requirement, rather than "genuine and voluntary". The Anti-Discrimination Act 1977 makes clear that there is power to order an apology in respect of a vilification complaint. The apology is acknowledgement of

the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct.

We agree, therefore, with the respondents' argument that to compel the publication of an apology is misguided, only to the extent that the argument refers to what we will call a personal apology, rather than an apology that is one made for the purposes of the Anti-Discrimination Act 1977. An apology of the type that meets the purposes of the Anti-Discrimination Act 1977 can, and in this case will be, compelled by order.

In this case the Tribunal said that "an apology that takes the form of an expression of regretful acknowledgement of fault or remorse for the unlawful conduct would not serve any purpose ... " While that may be so, the Tribunal failed to appreciate that an apology within the meaning of that term in s 108(2)(d), could also take the form of an acknowledgement of wrong doing whether genuinely held or not. It follows that the Tribunal erred by failing to appreciate the extent of its power to order an apology.

Again, it makes sense for the Appeal Panel to extend the appeal to the merits of the Tribunal's decision on this point and to invite submissions from the parties as to whether an apology should be ordered and, if so, what form it should take. Mr Sutherland should make any such submissions within 14 days of receiving these reasons and the Association should reply within a further 14 days. We will then determine the issue "on the papers" pursuant to s 76 of the ADT Act. "

.....

3. *Independent Education Union of Western Australia, Union of Employees v Corpus Christi College* [2007] WAIRComm 89 (12 February 2007)

In this dispute, Commissioner J L Harrison said, relevantly at [128]:

"I propose to make the following orders:

...

2. That the respondent apologise in writing to the applicant and its delegates for Mr Harvie's unwarranted actions towards the applicant's delegates in the following form:

"On 2 September 2004 the then Acting Principal Mr Barry Harvie published as an attachment to an email to teaching and non-teaching staff of Corpus Christi College, a copy of a letter he had sent to the Secretary of the ISSOA, now the Independent Education Union of Western Australia, Union of Employees ("the IEUWA"), on 31 August 2004. The letter expressed his concerns about the activities of the ISSOA and its delegates at the College

The letter suggested that delegates of the ISSOA at the College had bullied and harassed some staff at the College. The letter also stated that a staff member had left the employ of the College giving as one of her reasons for leaving "bullying" she experienced from other staff. The imputation arising from that statement was that delegates of the ISSOA had bullied her and were a factor in her leaving.

College staff were well aware that Philip Petale, Kerry Kowald, Ann Nisbet and Russell Scanlon were delegates of the ISSOA at the time along with three other delegates.

The publication of the letter caused distress to the delegates and damaged the reputations of the delegates and the ISSOA in that it implied that the delegates in their role as delegates of the ISSOA had bullied and harassed other staff at the College. This imputation damaged the delegates' relationships with other college staff and the reputation of the ISSOA.

The College regrets that the publication of the letter has caused distress to the delegates and damaged the reputation of the delegates and the ISSOA.

The College unreservedly retracts the allegation that the delegates bullied and harassed other staff at the College and apologises for the hurt and damage the publication of the letter has caused.""

Attachment B

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 10 of 2009 (DLGRD 20090104)
Heard:	Determined on the documents
Considered:	27 May 2010 & 4 August 2010
Coram:	Mr B. Jolly (Presiding Member) Councillor C. Adams (Member) Mr J. Lyon (Member)

SP 10 of 2009
Complainant: (Cr) Frances Maureen GRIERSON
Council member complained about: Councillor Brett TREBY
Local Government: City of Wanneroo

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Brett Treby, a member of the Council of the City of Wanneroo, be publicly censured as specified in paragraph 2 below.

2. Within the period of 29 days to 43 days from the day following the date of service of this Order on him, the Chief Executive Officer of the City of Wanneroo arrange the following Notice of Public Censure to be published, in no less than 10 point print:

   (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and

   (b) as a one-column or a two-column display advertisement in the first 10 pages of the "Joondalup-Wanneroo Times" newspaper.

NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel (the Panel) has made a finding that on 19 April 2009 **BRETT TREBY**, a member of the Council of the City of Wanneroo, committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that he made improper use of his office as a Council member to cause detriment to Councillor Frances Maureen Grierson by sending to the other City Councillors a copy of an email of that date from him to Councillor Grierson containing improper and derogatory remarks about her.

The Panel censures Councillor Treby for this breach of regulation 7(1)(b).

LOCAL GOVERNMENT STANDARDS PANEL

3. The said Brett Treby apologise publicly to Councillor Frances Maureen Grierson, also a member of the Council of the City of Wanneroo, as specified in paragraph 4 or paragraph 5 below, as the case requires.

4. At the next City of Wanneroo Ordinary Council Meeting immediately following the date of service of this Order on the said Brett Treby:

   (a) the said Brett Treby shall request the presiding person for his/her permission to address the meeting immediately following Public Question Time or during the Announcements part of the meeting or at such time during the meeting when it is open to the public as the presiding member thinks fit, for the purpose of the said Brett Treby making a public apology to the said Councillor Frances Maureen Grierson; and

   (b) subject to the said presiding person giving such permission, at the time permitted by the said presiding person the said Brett Treby shall verbally address the City's Council as follows, without him making any introductory words prior to his address, and without him making any comment or statement after his address:

"I advise this meeting that:

(1) A complaint has been made by Councillor Maureen Grierson to the Local Government Standards Panel about certain conduct by me as a member of this Council.

(2) The Local Government Standards Panel has considered Councillor Grierson's complaint, and has made a finding that on 19 April 2009 I committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that I made improper use of my office as a Council member to cause detriment to Councillor Grierson by sending to the other City Councillors a copy of an email of that date from me to Councillor Grierson containing improper and derogatory remarks about her.

(3) I apologise to Councillor Grierson for my said conduct, and regret any hurt, inconvenience or unpleasantness I have caused to her."

5. If the said Brett Treby:
   (a) fails to comply with the requirements of paragraph 4 above; or
   (b) is not able to so comply due only to the presiding person refusing to giving him the permission described in paragraph 4 above,

within 14 days after the next City of Wanneroo Ordinary Council Meeting immediately following the date of service of this Order on him, the said Brett Treby shall cause the following Notice of Public Apology to be published, in no less than 10 point print, as a one-column or a two-column display advertisement in the first 10 pages of the "Joondalup-Wanneroo Times" newspaper:

PUBLIC APOLOGY

The Local Government Standards Panel (the Panel) has made a finding that on 19 April 2009 I, **BRETT TREBY**, a member of the Council of the City of Wanneroo, committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that I made improper use of my office as a Council member to cause detriment to Councillor Frances Maureen Grierson by sending to the other City Councillors a copy of an email of that date from me to Councillor Grierson containing improper and derogatory remarks about her.

I apologise to Councillor Grierson for my said conduct, and regret any hurt, inconvenience or unpleasantness I have caused to her.

BRETT TREBY