



WESTERN AUSTRALIA

INQUIRY UNDER DIVISION 2 PART 8 LOCAL  
GOVERNMENT ACT 1995

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INQUIRY INTO THE CITY  
OF JOONDALUP

27 September 2005



# Executive Summary

*The Joondalup Inquiry*

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“The notion of “public service” is indisputably value laden, just as the vocation of politics is an ethical enterprise. Much of the work of public officials – elected or appointed – involves “choices amongst values”, indeed it is this characteristic of their role in a liberal democracy that often makes their decisions contestable, debatable and requiring public justification. Therefore, nothing is more dangerous to the wellbeing of the body politic than a public official who is technically competent or strategically astute but ethically illiterate or unfit.”

*Preston, N (ed) Ethics for the Public Sector: Education and Training, Federation Press, 1994.*

1. The Council of the City of Joondalup was suspended by the Minister for Local Government and Regional Development on 5 December 2003. Pursuant to Section 8.16 of the *Local Government Act 1995* this Inquiry Panel was appointed on 26 May 2004 on 27 September 2004. Public hearings commenced on 27 September 2004 and concluded on 22 June 2005. The following findings are reached in the Report.
2. The Council unreasonably failed to offer a renewal of contract to its inaugural CEO Mr Lindsay Delahaunty whose contract expired in September 2001.
3. The Council subsequently engaged in a poor decision-making process in engaging a recruitment consultant. The recruitment consultant had no local government experience. It undertook an executive search process and relied on, among other things, a curriculum vitae provided by Mr Denis Smith (then the General Manager of Warringah Council) which represented that he had certain educational qualifications.

4. The recruitment consultant relied on the qualifications represented by Mr Smith in recommending him for a short list of candidates. Mr Smith misrepresented his educational qualifications.
5. Mr Smith was not the most highly rated candidate of the councillors involved in the selection process and was not, objectively, the best candidate but was recommended as the preferred candidate by the recruitment consultant ostensibly because he was the most enthusiastic and on the basis of the recruitment consultant's belief that Mr Smith was preferred by the then Mayor Mr John Bombak. Mr Smith was thus appointed in preference to a candidate of greater merit.
6. In *The West Australian* of 20 November 2002 and *The Sunday Times* of 15 December 2002 it was reported that Mr Smith was found to have lied to the District Court of New South Wales in Sydney in the defamation case of *Jones v Sutton* concerning of his qualifications (and to have given unsatisfactory evidence in other respects in that case).
7. The Council paid insufficient regard to the significance of these reports and did not adequately inform itself of the issue which they raised about Mr Smith's probity.
8. The Council relied on a memorandum from Mr Smith which detailed various so-called qualifications of which certificates had been shown to the Mayor and the Human Resources Manager. The Council failed to investigate those matters, but, instead, the Council meeting of 17 December 2002 passed a motion of confidence in the CEO. Cr Don Carlos, the only dissenter, argued strongly in debate at that they should not do so before investigating the veracity of Mr Smith's qualifications.
9. That decision was an error which set in train a course of conduct in which a majority of the Council made a series of decisions supporting the CEO, Mr Smith.
10. Cr Carlos moved in February 2003 to have Mr Smith suspended and his qualifications and aspects of his conduct at Warringah investigated. The majority opposed that position and censured Cr Carlos, reaffirmed their confidence in Mr Smith and authorised Mr Smith to seek legal advice in relation to the allegations made by Cr Carlos.
11. In May 2003 Mr Carlos was elected as Mayor and sought to view Mr Smith's qualifications. The Mayor's position was the subject of state-wide media attention. Mr Smith obtained legal advice that he was not obliged to comply with the Mayor's request.
12. The Council appointed Freehills Solicitors to provide advice in relation to the CEO's obligations and the liability of the City if it purported to terminate the CEO's contract. Freehills outlined a process of inquiry, which included an investigation of Mr Smith's qualifications. Mr Smith asserted that Freehills had a conflict of interest, having represented Ruth Sutton in the proceedings of *Jones v Sutton*. The Council decided that it was expeditious (without reaching a view as to any conflict of interest) to appoint Minter Ellison to replace Freehills.

13. Minter Ellison gave advice on 17 and 24 June 2003 that the Council, in the light of its previous decisions supporting Mr Smith, should not question Mr Smith's qualifications any further, and should reiterate their support of Mr Smith and make not public statements on the matter. The Council accepted that advice.
14. In July 2003 an investigation by the Major Fraud Squad concluded that Mr Smith had no case to answer in respect of a complaint of fraud.
15. Following that decision, media interest in the issue intensified. Two Councillors made public statements about the matter and Mayor Carlos then made further public statements concerning the Smith issue.
16. In the same month the Legislative Council Standing Committee on Public Administration and Finance, at the request of the Minister, commenced a limited inquiry into the matter.
17. The City agreed to a Governance Review in August 2003 led by an officer of the Department of Local Government and Regional Development and in November set up a Working Group to negotiate the terms of a termination of Mr Smith's employment
18. Meetings of the Council were attended by significant numbers of members of the public raising questions about the CEO's qualifications commencing in late November 2003. On 1 December a meeting became rowdy, causing councillors to adjourn the meeting due to the refusal of members of the public to leave the Council Chamber and allow the Council to resume meeting behind closed doors.
19. On 2 December the Council resolved by a majority to seek its own suspension and the Minister suspended the Council on 5 December 2003.
20. The majority of councillors failed to pay due regard to the interest of the City of Joondalup in preserving public confidence in the honesty and integrity of its CEO.
21. A number of councillors contributed to the failure to provide good government by engaging in conduct, which has been specifically identified in Chapter 3, which was not ethical because it did not comply with the Code of Conduct. Such conduct contributed to poor relationships between councillors and in turn caused a breakdown of the level of co-operation between councillors, which is necessary for a Council to perform its function of providing good government.
22. Where the Council of the City of Joondalup, as a group, failed to provide good government was in failing, in various instances identified in Chapter 3, to make ethically sound decisions. In those instances the decisions of the Council were not rational, or not adequately informed and otherwise not in the interests of the City.

23. Mr Carlos, both as a councillor and as Mayor, adopted a principled position in relation to the investigation of the probity of Mr Smith, but alienated other councillors by the occasionally unsatisfactory manner in which he pursued the matter, such as—

- his use of the public media to comment adversely on other councillors;
- his carelessness with the truth in relation to certain matters of fact of significance to other councillors; and
- his failure to take appropriate steps to reveal to other councillors information upon which he based his views,

all of which contributed to a loss of confidence in him by a number of councillors.

24. He was, therefore ultimately unsuccessful as a leader of the Council and ought to have resigned when that position became irreversible.

25. The misrepresentations in the CVs Mr Smith provided to the recruitment consultants to the Coff's Harbour City Council, the Warringah Council and the City of Joondalup and his untruthful evidence before Judge Gibson in the District Court of New South Wales, were deserving of investigation. Once ascertained they irreparably damaged his reputation for honesty and integrity to a point where no public sector employer, such as the City of Joondalup, could continue to employ him, because of the impact on its own reputation; regardless of his capabilities as an administrator.

26. The tortuous process which commenced with the decision in March 2001 not to renew the position of Mr Delahaunty as CEO and ended with the suspension of the Council on 5 December 2003, was one in which elected members strayed many times from the path of rational and otherwise ethical behaviour, both in the way in which they behaved individually towards one another and in the way they behaved as a group, by reason of their decisions, towards the electors whom they were representing. They significantly failed in that regard to provide good government to the City of Joondalup.

**Recommendation 1:** It is recommended that the Council be dismissed

**Recommendation 2:** An assessment is made of the arguments for and against the continuation of elected councils as opposed to appointed boards of commissioners for local government.

**Recommendation 3:** The role of Councils should be to set policy and as a watchdog against unresponsiveness, incompetence and corruption and away from the administration of service provision.

**Recommendation 4:** If recommendation 3 is not followed, then Councils should be fashioned and procedures adopted more akin to those of a cabinet style of government, including principles of cabinet secrecy and solidarity.

**Recommendation 5:** If neither of recommendations 3 or 4 is regarded as desirable, then serious consideration should be given to the appropriate role, responsibilities and procedures of elected Councils.

**Recommendation 6:** Consideration should be given to whether it remains appropriate for the local government Council and electors of a local district to decide that a Mayor is to be elected by the electors of a district. The recommendation of this Inquiry is that the Mayor should continue to be popularly elected by the electors of the district.

**Recommendation 7:** A CEO of a local government performs statutory functions under the LGA and so, like other public sector CEO should be appointed by the Governor, or the Local Government Commission proposed by this report, to perform those functions and the LGA should be amended to so provide.

**Recommendation 8:** A statutory body, such as the Local Government Commission proposed by this Report, should be responsible for the appointment and supervision of all CEOs for all local authorities within the State. Such a statutory body would be obliged to consult with the elected Council of each local government as to the specific requirements of the district. The statutory body should be accorded powers similar to those given to the Public Sector Standards

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Commissioner under the *Public Sector Management Act 1994* and should have power to set salaries and allowances similar to the powers set out under the *Salaries and Allowances Act 1975*.

**Recommendation 9:** A Local Government Commission should be established to appoint and supervise CEO's and assume the functions of the Minister and Executive Director under Part 8 of the *Local Government Act 1995* with power to perform the functions of a Commissioner under Part 2, Division 7 of the LGA and the functions of the Advisory Board under Part 2, Division 8 of the LGA.

**Recommendation 10:** There should be established a Local Government Assistance Authority to perform the present role of the Capacity Building Division of the DLGRD and co-operatively manage or assist in providing the educational and assistance roles being provided by voluntary local government industry associations to local governments.

**Recommendation 11:** The proposed Local Government Commission and Local Government Assistance Authority be funded from a combination of State and Commonwealth local government funding.

**Recommendation 12:** Local authorities should ensure that they obtain media advice and the assistance of media research when the public media is reporting on matters relevant to the local authority, to assist them in identifying publicly reported problems related to a local authority and responding appropriately.

**Recommendation 13:** A committee of the Council of the City of Joondalup should be established to supervise the answering of public questions and report on and recommend action relating to the answers to questions to the Council.

**Recommendation 14:** A local government, when recruiting a CEO should verify the professional and academic qualifications of candidates for appointment.

**Recommendation 15:** Local governments should engage a media research officer or consultant to identify information concerning the public reputation of any candidate for the position of CEO.

**Recommendation 16:** Local governments should require authorities from candidates for the position of CEO to obtain information from police and other regulatory authorities as to any record of convictions or investigations and conclusions of regulatory authorities relevant to the candidate.

**Recommendation 17:** Local governments should not hesitate to obtain alternative legal advice or a second opinion, where elected members are divided or hesitant about any advice given.

**Recommendation 18:** When elected members are considering advice from legal practitioners they should be careful to follow legal advice, so as to ensure that they are not otherwise acting improperly, but Councillors, employees and legal advisers should be careful also to ensure that a distinction is drawn between advice which is legal advice and advice which is strategic advice,

and be aware of the discretion which remains in elected members to make decisions inconsistent with strategic advice.

**Recommendation 19:** The meeting procedures for local authorities should preclude the provision of written legal advice without adequate time to read and understand it before it is acted upon.

**Recommendation 20:** Contracts of employment of senior employees of a local authority are generally legal documents of a degree of complexity which should preclude their execution without legal advice as to the content of the contract and the process leading to execution

**Recommendation 21:** Local authorities and the DLGRD should co-operate to keep a central register of legal advices which may be of general assistance to local governments, in so far as that may occur without impacting on the need to preserve legal professional privilege.

**Recommendation 22:** A policy should be established by the Council of the City of Joondalup which facilitates full access to legal advice by elected members.

**Recommendation 23:** The City of Joondalup should consider establishing Council Committees to conduct some aspects of the business of the Council, as a means of establishing co-operative working relationships between elected members.

**Recommendation 24:** The Code of Conduct of the City of Joondalup should be reviewed and a process of adjudication of alleged breaches by an independent referee added, and elected members should be trained in its content.

**Recommendation 25:** Section 8.2(1) of the LGA should be amended to permit the Executive Director to require any person in a local government to provide any relevant information in that person's possession.



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## Introduction

### Appointment

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1. By a Notice of Appointment under the hand of the Minister for Local Government and Regional Development, the Hon. Tom Stephens MLC, dated the 26th of May 2004 I was appointed as an Inquiry Panel pursuant to Section 8.16 of the Local Government Act 1995 (“the LGA”) to conduct an inquiry into aspects of the City of Joondalup and its operations and affairs set out in the instrument as follows:

#### **The Nature and Functions of the Inquiry**

##### **(a) Nature of the Inquiry**

The Inquiry Panel is to - Inquire into all matters considered relevant to the activities of the Council and its Chief Executive Officer (CEO) during the period 13 March 2001 to 4 December 2003, including events predating this period that are relevant, to determine whether there has been a failure to provide good government at the City of Joondalup.

(i) Without limiting the generality of the inquiry, inquire into-

- a) the processes associated with the selection and appointment of Mr Denis Smith as CEO;
- b) decisions made by the Council, or purported to have been made by the Council, in relation to the selection, employment and retention of Mr Denis Smith as CEO;
- c) advice provided by any parties in relation to the selection, appointment and retention of Mr Denis Smith as CEO;
- d) the terms of the contract of the CEO and in particular the performance assessment provisions and their application;
- e) adherence to the provisions of the contract of employment by the CEO and the Council; and
- f) the provision, cost and use of legal advice associated with all aspects of the appointment and on-going employment of the CEO;

and

- (ii) with specific reference to the period 5 May 2003 to 4 December 2003, address the effect on the government provided by the Council of the conduct of Mr Denis Smith, the Mayor and Councillors, and the operations of the Council; and
- (iii) inquire into any other matters coming to the Panel’s attention during the course of the inquiry but only to the extent to which the Panel regards it necessary for the purpose of reporting on whether there has been failure to provide good government in the City of Joondalup.

### **(b) Functions of the Inquiry Panel**

Pursuant to section 8.22(1) and (2) of the Local Government Act 1995, the Inquiry Panel is to inquire, report and make any recommendations that it considers appropriate, including, without limiting its discretion:

- (i) that the Council be dismissed; or
- (ii) that the Council be reinstated.

2. The initial instrument of appointment did not set out any limit to the duration of the inquiry. Section 8.17(c) suggests that any limit imposed on the duration of an inquiry be set out in the notice of appointment. On the 25th day of February 2005 the then Minister, the Hon. Ljiljianna Ravlich MLC, gave notice of an amendment to the notice of appointment to add the following:

### **(c) Duration of the inquiry**

The Inquiry Panel is to make a final report no later than 29 July 2005.

3. It became apparent during the course of the hearing that the task of completing the report could not be completed by that date and, upon application being made to the Minister the date for reporting was amended to 27 September 2005.
4. Under Section 8.20 the Inquiry Panel has the powers of a Royal Commission. Where, as in this case, the Inquiry Panel consists of one person, that person has the powers of the chairman of a Royal Commission and the provisions of the Royal Commissions Act 1968 apply to this Inquiry with such modifications as are required.
5. The scope of this Inquiry is very broad. It has turned out to be the largest inquiry conducted so far in this State under the LGA.

## **Processes of the Inquiry**

6. In the preliminary investigation, which preceded the public hearings of the Inquiry, a huge quantity of documentary material was amassed through the issue and return of summonses to produce documents. In order to give shape and direction to the Inquiry, a number of factual issues were identified. These were outlined in the opening address of Counsel Assisting. These issues enabled the preparation of a core set of evidential documents, which was presented during that opening address. An initial list of witnesses to be called was also presented. In the course of the public hearings that followed the volume of oral and documentary evidence expanded, reflecting the dynamic nature of the inquiry process.

7. A public inquiry respecting as it must the rights of witnesses to natural justice, to some extent has a life of its own, in that it must constantly adapt to the course of the evidence and the issues which emerge from it.
8. At all times, and to the end, the focus has been on the central and ultimate question: did the Council fail to provide good government to the City of Joondalup? At one level, this question can be answered simply by reference to the decision of Council on 2 December 2003 to request the Minister to suspend it. Such an admission of incapacity to continue to govern the City might be viewed as conclusive. Yet the process of inquiry prescribed by the LGA and the terms of reference require, in the public interest, a closer examination and analysis of the events leading to why it was that a majority of the Council believed that they were unable to govern at that time.
9. The process, therefore, creates a tension between the simple and essential task of determining whether there has been a failure to provide good government, which may be viewed as largely self-evident, and an exhaustive “post-mortem” examination. This tension reflects competing public interests. It is desirable on the one hand that a democratically elected Council be restored to the City without undue delay and that the statutory inquiry process be conducted with speed and economy, and on the other, that the Inquiry be conducted in a thorough and fair manner and that its findings serve to assist, not only the electors, ratepayers and residents of the City of Joondalup, but the administration of local government generally, by identifying the contributing factors to the Council’s dysfunction and the ways and means by which similar and other difficulties can be avoided in future.
10. Consequently, and mindful of these competing considerations, the Inquiry must, whilst taking account of the totality of the evidence, necessarily arrive at factual conclusions and recommendations which reflect a refinement and reduction of the issues canvassed in the course of evidence. It is not the function of the Inquiry to address all issues to the satisfaction of witnesses or other interested persons, but to deal with such matters as are necessary in order to discharge its statutory function. The evidence taken by the Inquiry is publicly available and speaks for itself on many matters that may not be the subject of specific comments or findings in this Report.
11. Inevitably there are findings made which are critical of the acts and omissions of various persons and organisations. Like the legal advice given to Council on 24 June 2003, such findings may not be “welcomed” or “palatable”. Adverse findings do not necessarily denote

bad faith or an absence of good intention. As Sir George Jessel wrote, “*Mistakes are the inevitable lot of mankind*”: **Tomlin v. Underlay** (1882) LR 22. This Inquiry has uncovered all manner of errors from deliberate wrongdoing to breach of duty, bad judgment, negligence and minor oversight. From these there is much to be learned.

## The Procedures of the Inquiry

12. This is an administrative inquiry to which the rules of natural justice or procedural fairness apply. In general terms, procedural fairness requires that the Inquiry be free of bias or pre-judgment and that those against whom there might be adverse findings or comments have an opportunity to be heard in relation to such findings or comments and to know what is being taken into account in arriving at any such conclusion.
13. During the course of the Inquiry various applications were made that I disqualify myself from further conducting the Inquiry on the basis that there was a reasonable apprehension that I may be biased against certain parties, either because of a particular association or because of the manner in which I was conducting the Inquiry. I received evidence and heard detailed submissions in relation to each of those applications and on each occasion declined to recuse myself. Detailed reasons for my decisions in that regard are set out at Appendix 1 and in the passages of transcript that are referred to therein.
14. I have been guided in the conduct of this Inquiry by the words of Brennan J in **Annetts v McCann** (1990) 170 CLR 596 at 608 when he said –

*“Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected had had a full and fair opportunity to show why the finding should not be made.”*

15. The Inquiry proceeded on the basis which is common to administrative inquiries of this kind, (see, for example, the Douglas Report into the City of Cockburn, 2000) that the standard of proof which should be applied is proof on the balance of probabilities, and that the strength of the evidence necessary to establish a fact on the balance of probabilities may vary according to the nature of what is to be proved: see **Neat Holding Pty Ltd v Karajan Holdings Pty Ltd** (1992) 110 ALR 449 at 450. The Inquiry took into account the following statement of Dixon J in **Briginshaw v Briginshaw** (1938) 60 CLR 366 at 362:

*“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular*

*finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences."*

16. Another dictum which provides some guidance as to the application of the appropriate standard of proof is that of Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 257 at 266:

*"Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."*

17. This Inquiry was not established for the particular purpose of identifying criminal conduct or unprofessional conduct. To the extent that any evidence has emerged which is suggestive of criminal or unprofessional conduct, Section 8.12 of the LGA gives power to refer any matter arising out of an inquiry to an authority that has power to investigate or take action in relation to that matter. That section is suggestive of how any such evidence should be dealt with.

## Public Inquiry

18. This Inquiry has been conducted as a public inquiry. Evidence was heard in public between 27 September 2004 and 22 June 2005 and the proceedings have been published on a website established by the Inquiry. Any findings made in this Inquiry have been made solely on evidence which was publicly presented to this Inquiry or has been the subject of publication by the Inquiry on the website and to interested parties.
19. It is generally desirable that as part of the administration of justice an inquiry of this kind be open: see *The King v Sussex Justices ex parte McCarthy* (1924) 1 KB 256 at 259 and Gleeson CJ in *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 at 28-29.
20. The only exception to that general statement has been where it was demonstrated that there were circumstances which, in the public interest and the interests of justice, required the suppression of publication of particular evidence: see *Re Bromfield; Ex parte WA Newspapers Ltd* (1991) 6 WAR 155.
21. Suppression orders were carefully constructed from time to time to balance the particular public interests in question, recognising that there is a public interest in this Inquiry being

conducted publicly. Where an allegation or statement was made concerning an individual, which might be considered defamatory of that individual, then a suppression order was made suppressing the statement, the identity of the individual or both until there had been an opportunity for that person to respond to the defamatory imputation. Those suppression orders were stated to be interim orders, but, as it turns out, there has been no sufficient public interest in such matters to return to them and lift any of the suppression orders made.

22. The evidence is before the Inquiry and, where relevant, will be referred to in this report. The names of candidates who applied for the position as CEO of the City, but did not give evidence before this Inquiry, were referred to by a letter of the alphabet, because it was not relevant to this Inquiry for the identities to be made public. One witness sought the suppression of her name from publication because of a perceived fear of adverse repercussions in her employment if her identity was revealed. There was no public interest reason related to the Inquiry for not granting that application.

## Leave to be Heard

23. Notice was published in *The West Australian* on 12 June 2004 and *The Weekend Australian* of 12-13 June 2004, giving notice of my appointment and inviting persons to give notice of an intention to seek leave to be heard and examine witnesses at the public hearings. The notice also invited public submissions. The notice was published on the Inquiry website ([www.joondalupinquiry.wa.gov.au](http://www.joondalupinquiry.wa.gov.au)).
24. No person has a right to appear before an inquiry of this kind except by leave: see Commissioner Lowe in the *Communism Royal Commission* (1949), M V McInerney, "Procedural Aspects of a Royal Commission", (1951) 24 ALJ 386 at 388 and Gowans QC in the *Land Deals Board of Inquiry* (1977), referred to in Hallett, Royal Commissions and Boards of Inquiry, second edition, Law Book Company, 1982, at page 195.
25. The power to impose conditions on a grant of leave to appear was considered by Commissioner Cole in the *Royal Commission Into the Building and Construction Industry*. In this instance it flows from the inherent, and "entirely unfettered", power which an inquirer has to control the proceedings (see Stephen J in *R v Collins ex parte ACTU Solo Enterprises Pty Limited*, 8 ALR 691 at 699), and is consistent with a long history of Royal Commissions imposing such conditions: see Commissioner Cole at paragraph 22, referring to McInerney, *ibid*, at 386 and 392.

26. Owen J in *Edwards v Kyle* (1995) 15 WAR 302 at 317 to 318, having set out seven general propositions relating to the scope of content to the duty of procedural fairness in relation to that inquiry, at paragraph 7 said:

*"The investigator must decide what is required so as to afford to the affected party a real and meaningful opportunity to be heard. The particularity with which the adverse material is to be identified, whether the party is entitled to adduce further evidence and whether he or she may insist on cross-examining witnesses are all decisions to be taken in the context of the particular fact situation.*

*No general rule can be enunciated but the gravity of the possible consequences for the party may well dictate the extent of the duty in a particular case."*

27. Applications for leave to appear were received from the legal practitioners set out in the table below.

Table 1: List of Legal Representatives

	LEGAL REPRESENTATIVES	CLIENTS
1.	Carol Adams	Steve Reksmiss
2.	Gail Archer	Warren Reynolds
3.	Ron Birmingham QC	Paul Kimber Carol Mackintosh Mike O'Brien
4.	Anthony Davies	Denis Smith
5.	Konrad Mony De Kerloy	Scott Ellis
6.	Robert Edel	Tom Stephens
7.	Nicholas Ellery	Tony O'Gorman
8.	Carmel Galati	Mark McCrory Peta Rasdien
9.	John Hammond	John Bombak
10.	Michael Hardy	Tim Brewer Louis Prospero
11.	Tony Heaver-Wren*	Michael Caiacob Sue Hart Allison Walker
12.	Richard Hooker	Kevin Robinson
13.	Joel Hubbard	Ruth Sutton
14.	Bill Langler	Kim Lindsay
15.	Su Lloyd	Paul Kimber Carol Mackintosh Mike O'Brien
16.	Colleen Martin	Tom Stephens
17.	Joseph McGrath	Kevin Robinson
18.	Denis McLeod	COJ Employees
19.	Tony Power	Denis Smith
20.	Steve Pynt	Warren Reynolds
21.	Howard Robilliard	Robyn Smith
22.	Brendan Taylor	Liam Bartlett
23.	Marco Tedeschi	Monica Juricev
24.	Tricia Townsend	Marianne Gomba
25.	Sean Docker	Randall Maple
26.	Darren Pratt*	Alison Walker

\*Mr Heaver Wren and Mr Pratt did not appear

28. In addition there were a number of witnesses that appeared before the Inquiry who were legal practitioners, namely Mr Chris Baker, Mr Andrew Burnett, Mr Neil Douglas and Mr Scott Ellis
29. Applications for leave to appear for various persons were granted, to enable their representation to make submissions in relation to the issue of whether the council has provided good government in the City of Joondalup and to cross-examine witnesses, limited to such cross-examination as would challenge or test the foundation for any adverse or unfavourable comments in relation to those persons. Unrepresented witnesses were afforded the same opportunity.
30. That limiting condition is directly referable to the fact that leave to appear is granted in order to accord procedural fairness to the witness represented. The terms of the condition are suggested by a dictum in the majority judgment in the *State of New South Wales v Cannellis* (1994) 181 CLR 309 as what it means to accord procedural fairness.
31. Some 35 written submissions were received prior to and during the course of the public hearings. At the close of proceedings the Inquiry received a further 37 closing submissions in response to Counsel Assisting's Submission.

### **Counsel Assisting and Administrative Staff**

32. Mr John Staude, a barrister practising at the Independent Bar in Western Australia was appointed by the Minister to assist me in this Inquiry. I granted him leave to appear before me to call witnesses and examine and cross-examine them whenever, in his discretion, he regarded it as necessary or appropriate in order to elicit evidence of relevance to the Inquiry. I also gave him leave to make such submissions to me on the law and the facts as he saw fit to assist me in forming a view as to whether there has been and, if so, to what extent there had been, a failure to provide good government in the City of Joondalup and what recommendations I should make to the Minister. Mr Staude performed his function very ably and with a high degree of skill and the circumspection, courtesy and independence one would expect of a member of the Bar.
33. It was part of the function of counsel assisting me to assemble and present evidence, which he regarded as relevant to the terms of reference of the Inquiry, with the assistance of Inquiry officers. It was, however, ultimately my function to determine what was relevant evidence to the determinations I regard as necessary to make such recommendations as I considered, in accordance with Section 8.22, to be appropriate.

34. I was also ably assisted by an executive officer, Mr Brendan Peyton and an investigative officer, Mr David Morris, both seconded from the Investigations Section of the Department of Local Government and Regional Development. Mr Peyton also recruited to assist the Inquiry further investigators, Mr Clive Spiring and Mr Terry Dobson, records management and administrative officers, Mr Geoff Corlett, Ms Ann Webb and Ms Gail Prgomet; and a law graduate, Ms Samantha Allan was articulated to Mr Staude to assist with legal research and preparation of evidence.
35. Some suggestions were made from time to time that the staff seconded from the Department were biased in favour of the Department in the manner in which they were assisting the Inquiry or that I had access to information from the Department which was not available generally. It was also suggested that information which was in the control of the Department was being selectively disclosed to me, and to others with an interest in the Inquiry, in a manner which protected the Department from criticism with respect to its involvement in the matters under investigation.
36. While the fact of the secondment of officers from the Department was a matter to be acknowledged in support of such allegations, I am satisfied from my own observations of the assistance provided by Mr Peyton and Mr Morris to both myself, Counsel Assisting and others participating in the Inquiry that they each provided assistance to this Inquiry in a manner which was true to the task of the Inquiry and independent of any allegiance which they might have been thought to have to the Department. I am satisfied that I, and others with an interest in this Inquiry, had access to all documents which fitted within the terms of the broadly cast summonses issued to the Department, and that the investigative officers assisting the Inquiry did not limit that access in any way. The findings I reach in this Report in relation to the Department, which do not shrink from criticism of the Department and its officers, bear out my view that my capacity to objectively assess the performance of the Department in relation to this matter was not compromised by any action or default on the part of those assisting me.

## **Information Gathering/Investigation**

37. During the initial stages of the investigation the Inquiry wrote to all councillors, the City of Joondalup and a number of other persons and organisations which were thought to be in a position to significantly assist the Inquiry in its early stages to obtain a broad understanding of relevant events. Potential witnesses were invited to attend voluntarily to be interviewed

by the Inquiry's investigators. As the Inquiry progressed through this information-gathering stage and into the early part of the hearing stage, further potential witnesses from the Department were identified and the same invitation was offered to these witnesses. These interviews were not under oath and witnesses who accepted the invitation had their interview digitally recorded. Each witness who was interviewed was subsequently given a CD recording of their interview.

38. A number of witnesses from the Eastern States were interviewed by an investigator and statements obtained. I also issued a number of summonses to agencies or firms that I felt may have information that could be relevant to the terms of reference. These summonses required the production of documents and, if complied with, I excused personal appearance.
39. In summary the Inquiry has collated information from many sources, including the City of Joondalup, three legal firms, two local governments in New South Wales, two universities, the WA Police Service, the former ACC, the Department of Local Government and Regional Development and a number of other organizations and 73 individual witnesses. The many thousands of documents obtained from these sources were recorded and labelled. The documents expected to be tendered or referred to in evidence were indexed and collected in 27 lever arch files. These files have been referred to during the Inquiry's proceedings as the "*Chronology of Evidence*". The contents of the Chronology increased as the Inquiry unfolded. The Chronology was scanned electronically and circulated by CD ROM to witnesses and their representatives. The electronic copy was updated regularly.
40. During the Inquiry's hearings these documents were put to witnesses who had any connection with their creation or who may have taken them into account in arriving at any decision or in taking any action. Explanations were sought, as were appropriate, as to the meaning and significance attached to them and to what extent they affected any decision made or action taken.
41. Upon such documents being established to be relevant in the course of evidence of witnesses, and after considering and ruling upon any objection made to the use which may be made of such documents, I admitted into evidence the documents to be considered in arriving at decisions in this Inquiry. A list of documentary exhibits was compiled and is set out on a CD ROM attached to this report.

## **Public Hearings**

42. Public hearings were conducted in 2004 in the Town Planning Appeals Tribunal with the kind permission of the then chairman Mr Peter McGowan. With the establishment of the Statutory Administration Tribunal in January 2005 it became necessary to find a new hearing room. Chief Judge Michael Holden of the Family Court of Western Australia graciously afforded the Inquiry the facilities of a court room and judges' chambers in the Commonwealth Law Courts building.
43. The Inquiry sat to hear evidence on a total of 112 days between 22 July 2004 and 22 June 2005. Its proceedings occupied over 12,500 pages of transcripts.
44. Whilst procedurally witnesses were summonsed to appear on the first day of the public hearings (27 September 2004), every effort was made to avoid unnecessary inconvenience to witnesses and this was partly achieved with the compilation of a witness schedule, detailing the actual day it was expected to call each witness. This schedule was posted on the Inquiry's web page. Inevitably, changes were necessary and the web page was updated on a daily basis as the Inquiry progressed. I am satisfied that in most cases witnesses were given reasonable notice of their appearance times and every effort was made to accommodate requests for changes.

## **Summons of Witnesses**

45. A total of 79 summonses were issued of which 74 related to witnesses who were required to personally appear before the Inquiry and give evidence under oath or affirmation. Three witnesses gave evidence to the Inquiry without a summons being issued. Ms Janine Gollant was resident in the Kingdom of Bahrain during the course of the hearings and was not available to give evidence, however, she was contacted and invited to participate and transmitted a submission electronically in response to the submission of Counsel Assisting.

## **Out of State Witnesses**

46. It became necessary for the Inquiry to call witnesses from New South Wales, South Australia and Victoria. With the exception of Mr Denis Smith, witnesses from other States gave their evidence to the Inquiry's hearing electronically via video link. This method was both cost efficient and convenient for witnesses.
47. Persons involved in the matters under consideration were examined to ascertain their observation and recollection of relevant events, and were asked to respond to versions of events which were the subject of other evidence, or information provided to the Inquiry.

Witnesses were afforded an opportunity to agree or disagree put a contrary account or view, or provide an explanation which might bear upon any conclusion which might otherwise follow from other evidence.

48. The transcript of all evidence heard during the Inquiry is recorded on a CD ROM and is attached to this report.

### **Final Submissions and Report**

49. At the conclusion of the evidence, Counsel Assisting was directed to prepare and deliver a written submission, setting out the adverse conclusions, which might be drawn from the evidence. The submission was considered by me before it was delivered to the affected parties, in order to ensure that it comprehended any adverse conclusion or comment, which might be included in my report. It was then provided to parties the subject of an adverse comment and an order was made suppressing the further publication of those submissions. Submissions in response were received and considered before I prepared this report to the Minister, pursuant to Section 8.22 of the *LGA*. A list of the 37 submissions I received is contained in a table at the end of this chapter.

### **Website**

50. The Inquiry being a public inquiry was required to conduct its business in a manner that continually provided members of the public with appropriate information about the Inquiry's activities. The Inquiry's web pages displayed information of the times and dates of daily public hearings, the name and date of each witness called, the transcript of each day's public hearing and other information concerning the Inquiry that would assist interested parties and the public to be properly informed.
51. An analysis of the statistics concerning public use of the website reveals that from 13 July 2004, when data collection commenced, to the 27 September 2005 a total of 12,779 individual visits were recorded to the site. This is interpreted as averaging just under 1000 people per month accessing the site.

Table 2: Chart Showing Total Visits to Joondalup Inquiry Website

Summary					2004
<b>Reported period</b>	Year 2004				
<b>First visit</b>	13 Jul 2004 - 23:16				
<b>Last visit</b>	31 Dec 2004 - 22:26				
	Unique visitors	Number of visits	Pages	Hits	Bandwidth
Viewed traffic *	<b>&lt;= 1092</b> Exact value not available in 'Year' view	<b>2508</b> (2.29 visits/visitor)	<b>18153</b> (7.23 pages/visit)	<b>42565</b> (16.97 hits/visit)	<b>655.20 MB</b> (267.51 KB/visit)
Not viewed traffic *			<b>36449</b>	<b>36636</b>	<b>2.05 GB</b>

Summary					2005
<b>Reported period</b>	Year 2005				
<b>First visit</b>	01 Jan 2005 - 03:02				
<b>Last visit</b>	27 Sep 2005 - 07:53				
	Unique visitors	Number of visits	Pages	Hits	Bandwidth
Viewed traffic *	<b>&lt;= 4952</b> Exact value not available in 'Year' view	<b>10271</b> (2.07 visits/visitor)	<b>78337</b> (7.62 pages/visit)	<b>174763</b> (17.01 hits/visit)	<b>3.04 GB</b> (310.83 KB/visit)
Not viewed traffic *			<b>73623</b>	<b>74348</b>	<b>5.82 GB</b>

52. Whilst the majority of visits are from Australia it is also interesting to note that a number of visits have also come from other countries such as United Kingdom, New Zealand, USA and others.

Table 3: Chart Showing Total Visits to Joondalup Inquiry Website

Visitors domains/countries (Top 10) - Full list						
	Domains/Countries	Pages	Hits	Bandwidth		
	Australia	au	39449	97468	1.59 GB	<input type="checkbox"/>
	Unknown	ip	29057	57688	779.65 MB	<input type="checkbox"/>
	Commercial	com	8212	13395	635.67 MB	<input type="checkbox"/>
	Network	net	1161	4454	54.77 MB	<input type="checkbox"/>
	Old style Arpanet	arpa	154	420	5.91 MB	<input type="checkbox"/>
	France	fr	67	365	2.74 MB	<input type="checkbox"/>
	United Kingdom	uk	54	278	3.93 MB	<input type="checkbox"/>
	New Zealand	nz	50	191	1.32 MB	<input type="checkbox"/>
	USA Educational	edu	16	75	634.30 KB	<input type="checkbox"/>
	Singapore	sg	15	91	1.69 MB	<input type="checkbox"/>
	Others		102	338	5.77 MB	<input type="checkbox"/>

53. Statistics show the most popular pages that users accessed were the transcripts of the Inquiry's hearings and the witness schedule containing information on appearances of witnesses. This translates in real terms to a significant reduction in administration time and costs had these enquiries needed to be serviced by the Inquiry staff. The dissemination of this information on the web site achieved a convenient and effective manner of keeping the public and Inquiry participants informed.

Table 4: Chart Showing Most Popular Pages Accessed

<b>Pages-URL (Top 10) - Full list - Entry - Exit</b>				
<b>444 different pages-url</b>	<b>Viewed</b>	<b>Average size</b>	<b>Entry</b>	<b>Exit</b>
/transcripts.asp	24237	13.59 KB	1202	2029
/schedule.asp	15008	23.45 KB	525	1844
/transcriptsAdmin.asp	752	24.25 KB		10
/transcriptsSearch.asp	742	12.18 KB	13	39
Others	19671	103.57 KB	1254	4006

54. The website can be found at ([www.joondlupinquiry.wa.gov.au](http://www.joondlupinquiry.wa.gov.au) )

# Table of Submissions

## Opening Submissions

DOCUMENT NUMBER	RECEIVED FROM	DATE RECEIVED	POSITION	DESCRIPTION
A3 SUBMI 001	J W Davies	14/06/2004		Failure to Provide Good Government – Intent to Inquire Into Other Matters Coming to the Attention of the Panel
A3 SUBMI 002	Carol Mackintosh	23/06/2004	Councillor	Submission – Good Government at COJ
A3 SUBMI 003	Edmund Burton	25/06/2004		Defective Administration & Misrepresentation
A3 SUBMI 004 A3 SUBMI 004/01	Michael Norman	29/06/2004 08/07/2003	Conservation Advisory Committee	Conservation Advisory Committee Meetings with COJ Regarding Budget for Bush Maintenance Contract More Problems Surrounding Bush Maintenance Contract
A3 SUBMI 005	Michael Machin	01/07/2004		COJ Community Services – Warwick Adult Day Care
A3 SUBMI 006	Marjorie Apthorpe	02/07/2004		Payment of Legal & Other Fees as a Part of Termination of the CEO has Affected Day-to-Day Activities of COJ
A3 SUBMI 007	David Davies	02/07/2004	President – Connolly Residents Association	Factionalism at COJ Council Meetings
A3 SUBMI 008	Godfrey Lawson	02/07/2004		Effort & Support from COJ Councillors Regarding Planning Application
A3 SUBMI 009	Priscilla Lamb	02/07/2004		Declining Levels of Service Provided by Community Vision Aged & Disability Services
A3 SUBMI 010	John Varley	02/07/2004		Concerns Regarding Planning Process & Loss of Home
A3 SUBMI 011	Sue Hart	02/07/2004	Councillor	Submission – Good Governance at COJ
A3 SUBMI 012	D Biron	02/07/2004		Refusal of COJ to Properly Enforce Planning Laws of WA
A3 SUBMI 013	Stephen Magyar	02/07/2004		Failure to Provide Good Government at COJ
A3 SUBMI 014	Michael O'Brien	02/07/2004	Councillor	Submission – Good Governance at COJ
A3SUBMI 015/41 A3SUBMI 015/42 A3SUBMI 015/49 A3SUBMI 015/50 A3SUBMI 015/62 A3SUBMI 015/63 A3SUBMI 015/71 A3SUBMI 015/89	Ken & Marilyn Zakrevsky	02/07/2004 17/01/2005 14/10/2004 05/08/2004 08/11/2004 05/08/2004 05/08/2005 04/03/2005		Concerns Regarding Performance of Some Elected Members & Some Senior Administration at COJ Transcript of ABC Radio Public Phone-In – Emails & Letters Between Councillors, Mayor & CEO of COJ Performance of Senior Management at the COJ Inadequacy of Legal Advice Provided to the COJ Election Flyers Mullaloo Beach Precinct & Mullaloo Beach Tavern Redevelopment Gifts Register - Mr Baldwin's Fundraising – Allegations by Councillors – Six (6) Censure Motions
A3 SUBMI 016	Marie Macdonald	02/07/2004	Treasurer – Mullaloo Progress Association Inc	Governance – Performance of Denis Smith, Cr Baker, Cr Mackintosh & Cr Hurst – CEO's Appointment & Contract
A3 SUBMI 017	Helen & Peter Kraus	02/07/2004		Conduct of Suspended Councillors
A3 SUBMI 018	Vincent Cusack	17/01/2005	President – Southward Ratepayers & Electors Association	Newspaper Articles – Model Policy On Legal Representation Costs Indemnification – Report Of An Investigation In Terms Of Section 430 Of The Local Govt Act 1993 Into Warringah Council
A3 SUBMI 019	Craig & Caroline Rugless	06/07/2004		Ocean Reef Road Extension
A3SUBMI 020/203 A3 SUBMI 020	Michael Caiacob	02/07/2004 22/07/2004	Councillor	Submission – Good Government at COJ Submission – Good Government at COJ
A3 SUBMI 021	McLeods Barristers & Solicitors	14/07/2004	Legal Representative COJ	COJ's Application to Appear Before the Inquiry and be Represented by Legal Counsel

## CHAPTER 1

DOCUMENT NUMBER	RECEIVED FROM	DATE RECEIVED	POSITION	DESCRIPTION
A3 SUBMI 022	Mitch Sideris	23/07/2004	President – Mullaloo Progress Association Inc	Issues Regarding Whether or not There has Been a Failure to Provide Good Government at COJ
A3 SUBMI 023	Vincent Cusack	22/07/2004	President – Southward Ratepayers & Electors Association	Regarding the Provision or Absence of Good Governance by the Councillors of the COJ
A3 SUBMI 024	Don Carlos	27/07/2004	Mayor	Submission – Good Government at COJ
A3 SUBMI 025	Patricia Morigan	05/07/2004	Ocean Reef Coastal Stakeholders	Lack of Democratic Representation Since the Suspension of the Council
A3 SUBMI 026	Roy Phillips	13/08/2004		Factionalism at COJ Council Meetings
A3 SUBMI 027	Allison Walker	01/07/2004	Councillor	Submission – Good Government at COJ
A3 SUBMI 028	Mitch Sideris	21/09/2004	President – Mullaloo Progress Association Inc	Mullaloo Progress Association V City Of Joondalup
A3 SUBMI 030	Peter Stewart	18/12/2004		Submission on Joondalup Governance Review
A3 SUBMI 031	Barry Higgins	03/03/2005		Submission Disputing Evidence of Witness
A3 SUBMI 032	Michael Caiacob	10/03/2005	Councillor	Submission in Relation to Evidence of Witness – Freedom of Political Speech
A3 SUBMI 033	Michael Caiacob	13/03/2005	Councillor	Minutes of Council Meeting – 08/07/2003
A3 SUBMI 034	Michael Caiacob	14/03/2005	Councillor	Constitutional Law of Freedom of Political Speech v Defamation
A3 SUBMI 035	Barry Higgins	14/03/2005		Pamphlet – Justices of the Peace

## Closing Submissions

SUBMISSION NUMBER	RECEIVED FROM	DATED RECEIVED	POSITION	DESCRIPTION
A3 SUBMI 101	Steve Pynt of McDonald Pynt for Warren Reynolds	30/06/2005	Recruiter - MRA	Preliminary Submission Response to Counsel Assisting's Submission
A3 SUBMI 102	Peter Stewart	04/07/2005		Procurement & Appointment of CEOs Advice on Disruptive Public Behaviour at Council Meetings Scrutiny of Local Govt & Enforcement of Existing Rules
A3 SUBMI 103	Carmel Galati of Edwards Wallace for Peta Rasdien	11/07/2005	Journalist – The West Australian	Contents of Peta Rasdien's Statement
A3 SUBMI 104	Michael Caiacob	18/07/2005	Councillor	Further Submission Following Evidence on 22/06/2005
A3 SUBMI 105 (Addressed to Brendan Peyton)	Denis McLeod of McLeods for Peter Schneider	01/08/2005	COJ – Director Administration	Preliminary Submission Response to Counsel Assisting's Submission
A3 SUBMI 106 (Addressed to Brendan Peyton)	Denis McLeod of McLeods for Laurie Brennan	01/08/2005	COJ – Media Advisor	Preliminary Submission Response to Counsel Assisting's Submission
A3 SUBMI 107 (Addressed to John Staude)	Denis McLeod of McLeods for Peter Schneider	01/08/2005	COJ – Director Administration	Preliminary Submission Response to Counsel Assisting's Submission
A3 SUBMI 108 (Addressed to John Staude)	Denis McLeod of McLeods for Laurie Brennan	01/08/2005	COJ – Media Advisor	Preliminary Submission Response to Counsel Assisting's Submission
A3 SUBMI 109	John Turkington	13/08/2005	Councillor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 110	Lindsay Delahaunty	17/08/2005	COJ – Former CEO	Submission Response to Counsel Assisting's Submission
A3 SUBMI 111	Bruce Wittber	19/08/2005	Governance Review Panel Member	Submission Response to Counsel Assisting's Submission
A3 SUBMI 112	John Lyon	19/08/2005	Deputy State Solicitor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 113	Steve Magyar	22/08/2005	Former Councillor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 114	Michael Caiacob	22/08/2005	Councillor	Submission Response to Counsel Assisting's Submission

SUBMISSION NUMBER	RECEIVED FROM	DATED RECEIVED	POSITION	DESCRIPTION
A3 SUBMI 115	Quentin Harrington	19/08/2005	DLGRD - Director Governance & Statutory Support	Response to Letter from Brendan Peyton Regarding Confidentiality of Submissions
A3 SUBMI 116	Stephen Cole	22/08/2005	DLGRD - Director Capacity Building & Support Governance Review Panel Member	Submission Response to Counsel Assisting's Submission
A3 SUBMI 117	Cheryl Gwilliam	22/08/2005	DLGRD – Director General	Submission Response to Counsel Assisting's Submission
A3 SUBMI 118	Michael Hardy of Hardy Bowen for Tim Brewer & Louis Prospero	22/08/2005	Councillors	Submission Response to Counsel Assisting's Submission
A3 SUBMI 119	Cliff Frewing	25/08/2005	Governance Review Panel Member	Submission Response to Counsel Assisting's Submission
A3 SUBMI 120	Sue Hart	29/08/2005	Councillor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 121	Don Carlos	29/08/2005	Mayor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 122	Denis McLeod of McLeods for Clayton Higham	30/08/2005	COJ – Director Planning & Development	Submission Response to Counsel Assisting's Submission
A3 SUBMI 123	Denis McLeod of McLeods for Peter Schneider	30/08/2005	COJ – Director Administration	Final Submission Response to Counsel Assisting's Submission
A3 SUBMI 124	Denis McLeod of McLeods for Mike Smith	30/08/2005	COJ Manager Marketing, Communications & Council Support	Submission Response to Counsel Assisting's Submission
A3 SUBMI 125	Denis McLeod of McLeods for Laurie Brennan	30/08/2005	COJ – Media Advisor	Final Submission Response to Counsel Assisting's Submission
A3 SUBMI 126	Denis McLeod of McLeods for Helen Hill	30/08/2005	COJ – Executive Assistant to CEO	Submission Response to Counsel Assisting's Submission
A3 SUBMI 127	Denis McLeod of McLeods for Hazel Yarranton	30/08/2005	COJ – Executive Assistant to Mayor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 128	Ken Pettit for Minter Ellison	01/09/2005	Senior Counsel	Submission Concerning Jurisdiction on Behalf of Minter Ellison
A3 SUBMI 129	Janine Gollant	05/09/2005	Councillor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 130	John Hammond of Hammond Worthington for John Bombak	05/09/2005	COJ – Former Mayor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 131	Denis McLeod of McLeods for Mark Loader	05/09/2005	COJ – Former Manager Human Resources	Submission Response to Counsel Assisting's Submission
A3 SUBMI 132	Minter Ellison	06/09/2005	Advisor to COJ	Submission Response to Counsel Assisting's Submission
A3 SUBMI 133	Chris Baker	08/09/2005	Councillor	Submission Response to Counsel Assisting's Submission
A3 SUBMI 134	Lloyd & Associates for Mike O'Brien, Paul Kimber & Carol Mackintosh	13/09/2005	Councillors	Submission Response to Counsel Assisting's Submission
	Lloyd & Associates for Mike O'Brien, Paul Kimber & Carol Mackintosh	15/09/2005	Councillors	Submission Response with Annexures to Counsel Assisting's Submission
A3 SUBMI 135	Blake Dawson Waldron for Denis Smith	13/09/2005	COJ - Former CEO	Submission Response with Annexures to Counsel Assisting's Submission
A3 SUBMI 136	Darryl Schorer	19/09/2005	DLGRD – Principal Advisory Officer	Submission Response to Counsel Assisting's Submission
A3 SUBMI 137	Richard Hooker for Kevin Robinson	19/09/2005	COJ – Manager Audit & Executive Services	Submission Response to Counsel Assisting's Submission

## Tables of Witnesses

### Suspended Councillors

	SUMMONS NUMBER	SUSPENDED COUNCILLORS		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Date(s) of Appearance Cross-Examination
1	8/2004	Baker Chris	Legal Practitioner		18, 19 Jan, 5, 6, 21Apr	12 May
2	22/2004	Barnett Tanya (Resigned)			28 Feb	
3	9/2004	Brewer Tim	Chaplain		17 Nov	24 May
4	10/2004	Caiacob Michael		Yes	22, 23 Nov	31 May
5	7/2004	Carlos Don (Mayor)	Retired	Yes	12, 13, 14, 15, 18, 20, 21 Oct, 1, 15 Nov	6, 9 May, 1, 2 Jun
6	11/2004	Hart Sue	Home Duties		18, 22 Nov	23 May
7	12/2004	Hollywood John	Builder	Yes	29 Nov	11, 24 May
8	13/2004	Kenworthy Gerry	Accountant		2, 3 Mar	26 May
9	14/2004	Kimber Paul	Fire & Emergency Services Officer		14, 15, 21, 22 Feb	18 May
10	15/2004	Mackintosh Carol	Business Prop		28 Jan, 22 Feb	18 May
11	16/2004	Nixon Andrew (Resigned)	Nurse Manager	Yes	16 Dec	
12	17/2004	O'Brien Mike	Retired	Yes	23 Feb, 12, 13 Apr	17, 26 May
13	18/2004	Prospero Louis	Engineer		4 Mar	24 May
14	19/2004	Rowlands Peter	Transport Officer		16 Nov	
15	20/2004	Walker Alison	Business Prop	Yes	24, 25, 26 Nov	16 May

### Former Councillors

	SUMMONS NUMBER	FORMER COUNCILLORS		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
16	21/2004	Bombak John (Mayor)	Property Consultant		22, 26 Apr	2, 4 May
17	Not Issued	Kadak Paul – (Resigned - resides in Sydney, NSW)	Journalist	Not Applicable	1 Jun	
18	23/2004	Patterson Andrew	Accountant	Yes	11 Oct,	
19	24/2004	Hurst Judith	HR Officer		12 Oct,	

	SUMMONS NUMBER	FORMER COUNCILLORS		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
	<b>Not Issued</b>	Gollant Janine (Resigned, resides in Kingdom of Bahrain)	did not give evidence	Not Applicable		
20	60/2004	Magyar Steve	Vehicle Inspector		11 Mar	

## City of Joondalup Staff

	SUMMONS NUMBER	CITY OF JOONDALUP STAFF		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
21	25/2004	Loader Mark	Human Resource Manager		1, 11 Oct, 24, 25 Feb, 27 Apr	13, 25, 27 May
22	35/2004	Delahaunty Lindsay	Former CEO	Yes	1 Nov	31 May
23	02/2004	Smith Denis	CEO		6, 7, 8, 9 Dec	31 Jan 1, 2, 3 Feb
24	05/2004, 33/2004	Higham Clayton	Acting CEO/ Director, Planning & Develop.		29, 30, 31 Mar	30 May
25	34/2004	Robinson Kevin	Manager, Audit & Executive Services		14, 15, 17, 18 Mar	27 May
26	37/2004	Juricev Monica	Former H.R. Assistant		11 Oct	
27	62/2004	Hill Helen	Executive Assistant to CEO		27 Apr	
28	63/2004	Schneider Peter	Director, Financial Services, Assets and Commssioning, Information Management		14 Apr	27 May
29	64/2004	Smith Mike	Manager, Marketing, Communications and Council Support		14, 15 Apr	23 May
30	65/2004	Brennan Laurie	Media Advisor		10 Feb	
31	66/2004	Yarranton Hazel	Executive Assistant to Mayor		8 Apr	23 May
32	70/2004	Turkington John	Retired Former Director of Resource Management		8 Apr	26 May 10 Jun

## Department of Local Government and Regional Development

	SUMMONS NUMBER	DEPARTMENT OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
33	44/2004	Gwilliam Cheryl	Director General	Yes	8 Feb	10, 31 May
34	45/2004	Cole Steve	Director Capacity Building Member of Governance Review Panel	Yes	7,8 Feb, 8 Mar	11 May
35	46/2004	Harrington Quentin	Director Governance and Statutory Support	Yes	9 Feb	10 May
36	47/2004	Watson Duncan	Manager Compliance and Advice		9 Feb	

## CHAPTER 1

	SUMMONS NUMBER	DEPARTMENT OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
37	49/2004	Peyton Brendan	Principal Investigation Officer		9 Feb	10 May
38	50/2004	Morris David	Senior Investigation Officer		9 Feb	
39	48/2004	Schorer Darryl	Senior Advisory Officer	Yes	10 Feb	10 May
40	Not issued	Atlas Ataman	Former Senior Investigation Officer		12 Apr	1 Jun

## Other Persons

	SUMMONS NUMBER	OTHER PERSONS		Formal Interview Conducted Yes/No	Date(s) of Appearance Evidence-in-Chief	Cross-Examination
41	58/2004	Bartlett Liam	Journalist ABC Radio		18 Apr	26 May
42	32/2004	Burnett Andrew	City's Legal Advisor		1, 2 Dec	
43	55/2004	Cusack Vicent	Ratepayer/elector		9 Mar	20 May
44	01/2005	Davies David	Ratepayer/elector		11 Mar, 12Apr	20, 30 May
45	42/2004	Davies Tony	Legal Representative of CEO		Not Required to Appear	
46	27/2004	Douglas Neil	City's Legal Advisor		3, 13, 14, 15, 16 Dec	19 May
47	Not issued	Foster Graham	Candidate for CEO position		10 June	
48	11/2005	Frewing Cliff	Governance Review Panel		22 Jun	
49	41/2004	Langridge Martin	Auditor		17 Feb	11 May
50	06/2005	McCroory Mark	Journalist Joondalup Times		21 Apr	
51	09/2005	Mickle Ian	Governance Review Panel		22 Jun	
52	56/2004	Moon Monique	Ratepayer/elector		9 Mar	20 May
53	50/2004	O'Gorman Tony	Member of Legislative Assembly for Joondalup		18 Mar	30 May
54	04/2005	Primrose Wayne	Ratepayer/elector		10 Feb	
55	07/2005	Rasdien Peta	Journalist West Australian	Statement	Not Required to Appear	
56	38/2004	Reksmiss Stefan	Police Officer	Yes	23 Nov	1 Jun
57	26/2004	Reynolds Warren	HR Consultant	Yes	27, 28 Sept	5 May
58	28/2004	Ellis Scott	City Legal Advisor		1 Dec	6 May
59	54/2004	Sideris Mitch	Ratepayer/elector		9 Mar	20 May
60	36/2004	Smith Lloyd	HR Consultant	Yes	1 Oct,	5 May
61	49/2004	Stephens Tom	Former Minister for Local Government and Regional Development		1 Apr	
62	08/2005	Travers Ken	Member of Legislative Council		30 May	
63	10/2005	Whitber Bruce	Governance Review Committee		22 Jun	
64	57/2004	Whitby Reece	Journalist Channel Seven Perth		1 Apr	
65	61/2004	Zakrevsky Ken	Ratepayer/elector		8 Mar	20 May

## Evidence Received Via Video-Link

	SUMMONS NUMBER	EVIDENCE VIA VIDEO LINK		Location	Date(s) of Appearance
66	40/2004	Blackadder Stephen	General Manager, Warringah	NSW	11 March 2005
67	42/2004	Ferguson Mark	General Manager, Coff's Harbour	NSW	16 March 2005
68	03/2005	Gomba Mariane	Membership Officer, Planning Institute of Australia Stat Dec – (1 Feb 2005)	ACT	15 April 2005
69	43/2004	Hains Stephen	Candidate for CEO position	SA	11 March 2005
70	02/2005	Jellett Sue	Academic Registrar- Royal Melbourne Institute of Technology	VIC	15 April 2005
	Not issued	Kadak Paul	(see also Suspended Councillors table)	NSW	1 June 2005
71	05/2005	KDL Name Suppressed		NSW	15 April 2005
72	68/2004	Maple Randall	Human Resource Consultant, Watermark		8 March 2005
73	39/2004	Seabrook Thea	University of Technology , Sydney		14 March 2005 & 10 June 2005
74	69/2004	Smith Robyn	Wife of Denis Smith –former CEO	NSW	4 February 2005
	22/2004	Barnett Tanya (Resigned)	(see also Suspended Councillors table)	Albany WA	28 February 2005

## Agency Summons

SUMMONS NUMBER	SUMMONS ISSUED	AGENCY	INFORMATION PRODUCED
Not Issued	Request to Commissioner (Ms Irene Moss)	Independent Commission Against Corruption (ICAC)	Yes confirmed records
Not Issued	Request	Parliamentary Inquiry	No
1/2004	Chief Executive Officer (Mr Clayton Higham)	City of Joondalup	Yes
6/2004	Commissioner (Mr Kevin Hammond)	Corruption and Crime Commission	Yes
4/2004	Commissioner of Police	West Australian Police Service	Yes
3/2004	Director General (Ms Cheryl Gwilliam)	Department of Local Government & Regional Development	Yes
30/2004	Freehills	Freehills Lawyers	Yes
31/2004	Managing Partner (Mr Sean Larkin)	Minter Ellison Lawyers	Yes
29/2004	Mr John Fiocco	Fiocco's Lawyers	Yes



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## Defining Good Government

### The Concept of Good Government

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1. Local government is a creature of statute. The LGA recites in its long title that it is “*An Act to provide for a system of local government in Western Australia and to amend the Local Government Act 1960 and for related purposes*”.
2. Section 3.1(1) provides:

The general function of a local government is to provide for the good government of persons in its district.
3. Section 1.3 provides:
  - 1) This Act provides for a system of local government by —
    - a) providing for the constitution of elected local governments in the State;
    - b) describing the functions of local governments;
    - c) providing for the conduct of elections and other polls; and
    - d) providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.
  - 2) This Act is intended to result in —
    - a) better decision-making by local governments;
    - b) greater community participation in the decisions and affairs of local governments;
    - c) greater accountability of local governments to their communities; and
    - d) more efficient and effective local government.
4. It can be inferred from Section 1.3(2) that the legislature intended that local government would be improved by the provisions of the 1995 Act, which replaced those of the 1960 Act. It can also be inferred from that subsection that the legislature intended that the “good government” of the local government might be measured by the quality of (a) its decision-

making, (b) community participation in its decisions and affairs, (c) its accountability to its community, and (d) its efficiency and effectiveness.

5. Section 2.7 defines the role of the Council as follows:

- 1) The council -
  - a) directs and controls the local government's affairs; and
  - b) is responsible for the performance of the local government's functions.
- 2) Without limiting subsection (1), the council is to —
  - a) oversee the allocation of the local government's finances and resources; and
  - b) determine the local government's policies.

6. Section 5.36(1) and (2) place a duty on the local government in relation to the employment of the CEO as follows: :

- 1) A local government is to employ —
  - a) a person to be the CEO of the local government; and
  - b) such other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed.
- 2) A person is not to be employed in the position of CEO unless the council —
  - a) believes that the person is suitably qualified for the position; and
  - b) is satisfied\* with the provisions of the proposed employment contract.

\* Absolute majority required.

7. The LGA prescribes functions for the CEO of a local government, which are set out in Section 5.41 as follows:

- 1) The CEO's functions are to —
  - a) advise the council in relation to the functions of a local government under this Act and other written laws;
  - b) ensure that advice and information is available to the council so that informed decisions can be made;
  - c) cause council decisions to be implemented;
  - d) manage the day to day operations of the local government;
  - e) liaise with the mayor or president on the local government's affairs and the performance of the local government's functions;
  - f) speak on behalf of the local government if the mayor or president agrees;
  - g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees);
  - h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and

- i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.
8. The functions of a Mayor are also statutorily prescribed, in Section 2.8 as follows:
- The mayor or president —
- a) presides at meetings in accordance with this Act;
  - b) provides leadership and guidance to the community in the district;
  - c) carries out civic and ceremonial duties on behalf of the local government;
  - d) speaks on behalf of the local government;
  - e) performs such other functions as are given to the mayor or president by this Act or any other written law; and
  - f) liaises with the CEO on the local government's affairs and the performance of its functions.
9. Councillors are accorded the following functions by Section 2.10:
- 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.
10. The LGA prescribes the processes by which the Parliament intends will enable the provision of "good government" in terms of decision-making, community participation, accountability and efficiency and effectiveness. A failure to comply with these procedures may be indicative of a failure to provide "good government".
11. The view I have taken of the interpretation and application of the LGA is reinforced by the following extracts from the Second Reading Speech of the Minister in the Legislative Assembly [Hansard, Thursday, 31 August 1995, pp 7547-7551]:

*This new legislation will take local government in Western Australia into a new era as the current prescriptive legislation gives way to legislation which will provide a broad framework for the operations of local governments. This will bring about significant benefits for the efficiency and effectiveness of local governments and will improve management structures. However, there will be many checks and balances. In particular, the public will be given much more information about the operation of their local government and have many opportunities to participate in and influence the decision making process. The Government will also have power to ensure that local governments operate appropriately in all key areas.... Local governments will also have increased functional autonomy. In contrast with the specific powers in the current Act, local governments will have general powers*

*to make laws and provide services and facilities for the good government of people in their district. These are commonly referred to as general competency powers. However, this will be balanced with strict accountability requirements - a key reform. The actions of local governments will be reported in annual reports and there will be sanctions where standards of practice are not maintained. While recent investigations have found some irregularities in the practices of some local governments, they have particularly highlighted the need for improved administration, management and decision making processes within local governments. The Bill provides the legislative basis for this to take place...*

*The town or shire clerk will now be known as the CEO. A specified qualification will no longer exist for someone to hold the office. This provision will deregulate the labour market for CEO positions and provide councils with the autonomy to appoint the most suitable candidate. Similar to public sector management reforms elsewhere, the Bill provides for CEO's and designated senior staff to be employed under a performance-based contract which can be for a short term of not more than five years.*

12. Associate Professor Campbell-Sharman of the Department of Politics of the University of Western Australia, in a submission to the South Perth Inquiry, dated 29 June 2001, made the comment that:

*“‘Good government’ can refer either to the process by which decisions are made and implemented or to the nature of policy and decisions made by a public body. Even when the process of decision-making is open, accountable and responsive to the wishes of the relevant community bad decisions can be made in terms of their effect on the economic or social well-being of the community. Conversely, poor procedures may lead to decisions which are widely supported. Nonetheless, in a liberal democracy such as ours the procedural requirement is dominant so that any exercise of power or use of public resources can be effectively scrutinised. The process of government of public bodies must be open and accountable and free from improper and corrupt conduct.”*

13. That view, though not providing a clearly definitive statement of the concept, provides some help in considering the issue of what might amount to “good government”. Dr Harry Phillips and Dr Quentin Beresford, Lecturers in Politics and Government at Edith Cowan University, in a joint submission to the South Perth Inquiry, drew attention to a similar view, expressed in less modern terms, in a quote from John Stuart Mill's “Considerations On Representative Government“ in On Liberty (1859).

14. There is some discussion in the Report of the Inquiry into the City of Cockburn (2000) about the relationship between the concept of “failure to provide good government” and the concept of “impropriety”. The author observed at p45 that:

*“ (a) there could be a failure to provide good government even where there was no breach of the Local Government Act or other unlawfulness; and  
(b) it was appropriate...to investigate and report on conduct that may be unlawful, as well as conduct which may be improper.”*

15. Owen J in **Edwards v Kyle**<sup>1</sup> described the words “improper conduct” as “chameleon like, their meaning varying with the circumstances”.
16. Conduct has been exposed by the Inquiry which is capable of being characterised as “improper”, and some exposition of the meaning of that concept is appropriate. “ ‘Improper’ really means ‘wrongful’ – this is otherwise than by inevitable accident” (per Brett M.R., *The Warworth*<sup>2</sup>).

The Macquarie Concise Dictionary gives the word “improper” the following meanings:

- “Not proper; not strictly belonging, applicable or right; **an improper use for a thing.**
  - Not in accordance with propriety of behaviour, manners, etc: **improper conduct.**
  
  - Unsuitable or inappropriate, as for the purpose or occasion: **improper tools.**
  - abnormal or irregular.
17. The Federal Court in *O’Connell v Palmer*<sup>3</sup>, for example, in relation to the conduct of Australian Federal Police officers said:

*‘The New Shorter Oxford English Dictionary includes in its treatment of the word “improper” the meaning “unbecoming, unseemly, indecorous”. In our view the word “improper” appearing as part of the expression “improper conduct” in reg. 18(1)(d) of the Australian Federal Police (Discipline) Regulations 1979 (Cth) is used in the second sense of the Macquarie Concise Dictionary definition set out above. That is, we conclude that reg. 18(1)(d) is directed at conduct which may be*

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<sup>1</sup> (1995) WAR 302 at pages 313-4.

<sup>2</sup> 53 L.J.P.D. & A. 66.

<sup>3</sup> (1994) 53 FCR 429 at 434.

*regarded as lacking propriety or as unbecoming or unseemly in the circumstances. We do not regard the regulation as seeking to embrace in addition conduct which is merely technically irregular.'*

18. Brennan, Deane, Toohey and Gaudron JJ. said, more generally, in *Re Byrnes*<sup>4</sup> :

*"Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist of an abuse of power, the state of mind of the alleged offender is important... the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do."*

19. Whether or not the effect of decisions is "good" may depend upon whether the persons who have participated in the decisions have acted ethically, that is, have they done what they ought to have done. I will discuss in some detail below the circumstances in which decisions may be regarded as ethical or as lacking that quality. The category of conduct which may fail the test of being ethical is of broader compass than corrupt or improper conduct.
20. I am conscious of the fact that it might be said that both positive and negative aspects of the Council's performance should be taken into account in determining whether the Council has provided good government to the City. However, the matter I am appointed to inquire into, that is, whether there "has been a failure to provide good government", is not to be determined by assessing and balancing evidence of "good government" against evidence of a failure to provide "good government". As Thomas Jefferson said to John Norvell<sup>5</sup>: "History, in general, only informs us what bad government is." This is an inquiry into the recent history of events at the City of Joondalup. As such it is more apt, as the terms of reference require me to do, to report on what can be judged to be a failure to provide good government.

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<sup>4</sup> (1995) 81 A Crim R 138 at 147-148.

<sup>5</sup> (1807, Memorial Edition 11:223, <etext.lib.virginia.edu/jefferson/quotations)

21. The role which any positive contributions of the Council will play will be in providing examples reflecting the character of matters which might constitute the provision of “good government” by the Council, providing some flesh to the concept of “good government” as part of the process of judging whether there has been any “failure to provide good government”.
22. However, it is worth noting that positive results, in terms of service to the residents and ratepayers of the City, may merely reflect sound administration of the City. It will generally not be possible to attribute credit to the elected Council of the City for positive achievements without acknowledging that little can be achieved in a City without administrators willing and able to implement the policies of Council.
23. There is no help to be gained in defining or applying the concept of “good government” by reference to the body of case law which has considered the meaning and extent of application to be imputed to the words “peace, order and good government” used in the context of a power to make laws. That phrase or variations on that phrase may be found in constitutional provisions and statutes relating to state governments and local governments and other jurisdictions. The general view expressed about such a phrase is that it bestows a very broad power to legislate and does not create a limitation upon the power to legislate<sup>6</sup>. That does not assist in determining what constitutes “good government”.

### **Majority Rule versus “Good Government”**

24. It was suggested by some councillors in evidence that the fact that decisions have been made by the majority of councillors and lawfully is a complete answer as to whether good government has been provided by the Council to the City of Joondalup, that such decisions were made in accordance with a democratic process by the majority and that it is those who failed to accept the decisions of the majority who have failed to provide, or subverted the provision of, good government in the City of Joondalup.
25. Mr Peter Rowlands stated in evidence:

*PRESIDING MEMBER: So do I understand you to be saying that the majority is always right? That's what you - - ?---Oh, yeah, it is. The majority - - in a democracy, if it turns out to be wrong next - - down the track you can chuck them out. You know, but you've got to accept the majority rule. If you don't, the country*

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<sup>6</sup> See *Union Steamship Company of Australia Pty Ltd v King* (1988-89) 166 CLR; *Lynch v Brisbane City Council* (1961) 104 CLR 353; *Wake and Another v Northern Territory of Australia and Others* (1996) 109 NTR 1; *Goyma v Moore and Others* (1999) NTSR 146; *McLaughlin Holdings Pty Ltd v Darwin City Council* (1999) NTSR 145.

*will be ungovernable. If everybody goes and demonstrates on the streets and the country doesn't work, the thing's worthless. We've got no economy. The economy would collapse. People wouldn't invest in the country. It's typical - - you've got to accept the majority vote, and whinge at the next election and put your point forward, and then if you get - - the other people are chucked out, they - - you're right. That's what it's all about.*

*COUNSEL ASSISTING: There's a distinction though between the majority having authority and the majority being right?---Sorry?*

*Would you accept there's a distinction between the majority having authority - - ?--  
-Yeah. - - to make decisions and the majority being right in its decision, or correct?---If we believe we're right we're right; it's as simple as that. If other people don't - -*

*The majority might make wrong decisions?---Oh, I suppose in governments generally the majority can make wrong decisions and go - - can send the country into recession by making the wrong financial decisions. But that's politics, isn't it? Isn't it? It's as simple as that.*

*Well, it's true - - ?---We've got to accept at this stage they believe they are doing the right thing, and if it turns out in the long term it's not the right thing, well, it happens all the time in politics, doesn't it?*

*That, I suppose, is what I was asking you to accept; the possibility that the majority in this case might have been wrong?---I don't believe we were. And I really don't accept the possibility we were. All our legal advice points to what we did as correct.*

*Do it all again?---Yep. Afraid so.<sup>7</sup>*

26. Some councillors took a slightly different view, for example Mrs Allison Walker said in answer to a question:

*PRESIDING MEMBER: Do you understand the notion of being democratic to be anything other than ruling by majority? Does it mean something more significant than that?---Yes. Ruling by majority, but my understanding goes a little bit further than that; in that listening to what you're being referred to, because you are representing a wider community. You're not just representing yourself, you're representing a wider community, so you're not going in there to expound your own belief structures and systems, wherever they may come from, your political fervour or your upbringing or whatever, but you're going in there to be a representative of the community, so therefore you - - my understanding of it is that you listen to what the people say and what they want and what they're asking for instead of voting on your own personal views, which may be totally against what they're saying. For instance, you listen to what they say and then bring that into the debate rather than putting your own personal views in there<sup>8</sup>.*

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7 Ts 16.11.04, Page 1605

8 Ts 24.11.04 Page 2186 – 2187.

27. In considering the argument that majority decision-making is synonymous with democratic decision-making and “good government” one needs to identify the elements of a democratic process and the role which majority decisions of elected representatives may have in that process.

## Democracy

28. In the classical theory of democracy, which had its origins in sixth century (BCE) Athens, it is the people who govern<sup>9</sup>. However, democracy is a continually evolving concept<sup>10</sup>. From its –

*“parochial origins... it is only since roughly the late eighteenth century that the democratic ideal has been taken up once again and seriously advanced as a principle for the organization of political power [and] ...in the context of the emergence of modern societies ...[been] adapted in ways which distanced it significantly from the practices of ancient Athenians”<sup>11</sup>.*

29. In current parlance in Australia democracy is government by the people, either directly or through elected representatives<sup>12</sup>. According to the Commonwealth Curriculum Council, which develops “Discovering Democracy” units for teaching in secondary schools throughout the Commonwealth of Australia, a democracy is a form of society which favours equal rights, freedom of speech, a fair trial and tolerates the views of minorities<sup>13</sup>. McHugh J in *Theophanus v Herald & Weekly Times Ltd*<sup>14</sup> said –

*“In his Introduction to Democratic Theory<sup>15</sup> H.B.Mayo thought that the four essential principles of democracy were: (1) popular control of policy makers through elections held at regular intervals; (2) political equality; (3) political freedoms; and (4) when the representatives are divided, the principle that the decision of the majority prevails.”*

30. The International Parliamentary Union, which is an organisation of Parliaments of sovereign States established in 1889, working for the firm establishment of representative democracy,

9 Nethercote, J.R., Introduction Parliament & Bureaucracy, ed. J.R. Nethercote:Hale & Irenmonger, p 5; Thompson, J.B., Media and Modernity a Social Theory of the Media: Polity Press 1995, p 249.

10 Butterworths Australian Legal Dictionary.

11 Thompson, ibid, p 249; David Held, Models of Democracy: Polity Press, Cambridge 1987; David Held (ed.), Prospects for Democracy; John Dunne (ed), Democracy: The Unfinished Journey, 508 BC to AD 1993: Oxford University Press, Oxford 1992.

12 Commonwealth of Australia “Discovering Democracy”, [http://www.curriculum.edu.au/democray/dunits/keyterms\\_alpha.htm](http://www.curriculum.edu.au/democray/dunits/keyterms_alpha.htm) ., accessed 20/03/2005

13 Ibid.

14 (1994) 182 CLR 104 at 199-200.

15 (1960), pp 60-69.

adopted a Universal Declaration of Democracy at its 161st session at Cairo on 16 September 1997. The Declaration states in part, as follows:

### *FIRST PART- PRINCIPLES OF DEMOCRACY*

*Democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interests of the polity.*

*Democracy is both an ideal to be pursued and a mode of government to be applied according to modalities which reflect the diversity of experiences and cultural particularities without derogating from internationally recognised principles, norms and standards. It is thus a constantly perfected and always perfectible state or condition whose progress will depend upon a variety of political, social, economic, and cultural factors.*

*As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity of self-correction.*

*The achievement of democracy presupposes a genuine partnership between and men and women in the conduct of the affairs of society in which they work in equality and complementarity, drawing mutual enrichment from their differences.*

*A state of democracy ensures that the processes by which power is acceded to, wielded and alternates allow for free political competition and are the product of open, free and non-discriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit.*

*Democracy is inseparable from the rights set forth in the international instruments recalled in the preamble<sup>16</sup>. These rights must therefore be applied effectively and their proper exercise must be matched with individual and collective responsibilities.*

*Democracy is founded on the primacy of the law and the exercise of human rights. In a democratic State, no one is above the law and all are equal before the law.*

*Peace and economic, social and cultural development are both conditions for and fruits of democracy. There is thus interdependence between peace, development, respect for and observance of the rule of law and human rights.*

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<sup>16</sup> The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Declaration on Criteria for Free and Fair Elections and the Agenda for Democratisation..

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*SECOND PART – THE ELEMENTS AND EXERCISE OF DEMOCRATIC GOVERNMENT*

*Democracy is based on the existence of well-structured and well-functioning institutions, as well as a body of standards and rules and on the will of society a whole, fully conversant with its rights and responsibilities.*

*It is for democratic institutions to mediate tensions and maintain equilibrium between competing claims of diversity and uniformity, individuality and collectivity, in order to enhance social cohesion and solidarity.*

*Democracy is founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels ...*

*The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the peoples will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organise political parties and carry out political activities. Party organisation, activities, finances, funding and ethics must be properly regulated in an impartial manner in order to ensure the integrity of the democratic process.*

*...Democracy...goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs.*

*Public accountability, which is essential to democracy, applies to all those who hold public authority... Accountability entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms...*

...

*The state of democracy presupposes freedom of opinion and expression; this right implies the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media ...*

## Freedom of Speech and Association

31. The notion of the freedom to engage in political communication, as part of the democratic process, has been the subject of much judicial discussion. Freedom of opinion, including the right to protest against political decisions, is a fundamental human right in a democratic society<sup>17</sup>.

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<sup>17</sup> **Hubbard v Pitt** [1976] 1QB 142, 174, 178, 179 per Lord Denning, 183 per Stamp LJ, and 188,189 per Orr LJ; **Australian Capital Television Pty Ltd v The Commonwealth** (1992) 177 CLR 106 per Gaudron J at 211-2; Blackstone, **Commentaries**, 17<sup>th</sup> ed. (1830), vol. iv., chapter xi: "Offences against the Public Peace", p 151; **Re Alberta Legislation** [1938] 2 DLR 81, per Cannon J AT 119; **Retail Wholesale & Department Store Union v Dolphin Delivery Ltd.** (1986), 33 DLR (4<sup>th</sup>) 174, per McIntyre J at 183; **Melser v Police** [1967] NZLR 437, per McCarthy J at 445-6; **Watson v Trennery** (1998) NTR 1, per Angel J at 5 and Mildren J at 9; **Brown v Classification Review Board** (1998) 154 ALR 67.

32. French J said in *Brown v Classification Review Board*: “The value given by the common law to freedom of expression is high. Freedom of expression, particularly the freedom to criticise public bodies is regarded by the courts as one of the most important freedoms: *Halsbury’s Laws of England* 4th ed, vol. 8(2) para. 107. Courts applying common law principles may be expected to proceed on an assumption of freedom of expression and look to the law to discover exceptions to it: *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 203.”
33. There is a freedom to communicate about government and politics implied in the Australian Constitution. The Constitutional implication does not require absolute freedom of political communication. A law may prohibit or control speech or conduct so long as it is reasonably appropriate, adapted to or proportional to the purpose to be achieved, when viewed against its incursion on freedom of communication<sup>18</sup>. The tests for implying freedom of political communication apply to State law as they do to Commonwealth law: *Levy v Victoria*<sup>19</sup>; as was demonstrated in *Stephens v West Australian Newspapers Ltd*<sup>20</sup>.
34. Mason CJ, Toohey and Gaudron JJ in *Theophanus* quoted the statement of Barendt<sup>21</sup> that:
35. McHugh J in *Australian Capital Television Pty Ltd v The Commonwealth*<sup>22</sup>, suggested that Australians:

*“political speech” refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.*

*“possess the right to participate, the right to associate and the right to communicate. That means that, subject to necessary exceptions, the people have the constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to effect voting at an election for the Senate or the House of Representatives.”*

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18 *Levy v Victoria* (1996-1997) 189 CLR 579, per Brennan J at 595, Dawson J at 609, Toohey and Gummow JJ at 614-5, McHugh J at 617, 624, Gaudron J at 617-9, Kirby J at 562, 644-7; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-1, 76-7, 94-5; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157, 169, 217-8 and 234; *Theophanus v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126, 146, 151 and 178-9; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 235; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299, 324, 336-7 and 387; *Langer v The Commonwealth* (1997) 186 CLR 302 at 344; *Muldowney v South Australia* (1996) 186 CLR 352; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-2 and 567-8; *Kruger v The Commonwealth* (1997) 190 CLR 1 per Gaudron J at 126-8; *Quigley* at [84]-[88].

19 Per Gaudron J at 618-9, Kirby J at 643-4

20 (1994) 182 CLR 211.

21 *Freedom of Speech*: Clarendon Press, Oxford 1985, p 152.

22 At 232; see also at 227.

36. Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth*<sup>23</sup> said:

*The notion of a free society governed in accordance with principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally. International law also suggests general principles of freedom of political communication and freedom of association.*

37. The International Convention on Civil and Political Rights (ICCPR), Article 19 provides that:

*Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally or in writing or in print, in the form of art, or through any other media of his choice.*

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*For respect of the rights or reputations of others*

*For the protection of national security or of public order (ordre public), or of public health or morals.*

Article 20 of the Universal Declaration of Human Rights states:

*Everyone has the right to freedom of peaceful assembly and association.*

Article 22 of the ICCPR states:

*Everyone shall have the right to freedom of association with others...*

*No restrictions may be placed on the exercise of this right other than those which are necessary in a democratic society in the interests of national security or of public order (ordre public), or of public health or morals or the protection of the rights and freedoms of others...*

38. Residents and ratepayers in the City of Joondalup and their elected representatives are entitled to the full exercise of freedom of speech and freedom of association in their participation in the public affairs of local government in the district of Joondalup
39. As an administrative law decision-maker, presiding over an Inquiry of this kind (regardless of any political opinions I might be free to hold, and obliged to hold in order to exercise my

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<sup>23</sup> At 212.

duty to vote at State and Federal level) I would be expected to accord those rights to all persons the subject of this Inquiry in the course of the process of decision-making leading to any conclusions reached as to the behaviour of members of the public and elected representatives of the local government: *Minister for Immigration and Ethnic Affairs v Teoh*<sup>24</sup>.

40. As an administrative decision-maker acting appropriately, therefore, I am guided in my approach to the assessment of events in the City of Joondalup by statements such as the following:

The Honourable Tony Fitzgerald, in the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Queensland, 1989)<sup>25</sup> who said:

*Good Government is more likely to result if opposition, criticism and rational debate are allowed to take place, appropriate checks and balances are placed on the use of power and the administration is open to new ideas, opposing points of view and public scrutiny.*

Kerr J in *Ball v McIntyre*<sup>26</sup> said:

*I recognize that different minds may well come to different conclusions as to the reaction of a reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that a so-called reasonable man is reasonably tolerant and understanding, and reasonably contemporary in his reactions.*

*I may disapprove of what you say, but I will defend to the death your right to say it.*<sup>27</sup>

41. A political communication may appeal to the emotions rather than reason. The constitutional implication “protects false, unreasoned and emotional communications as well as true, reasoned and detached communications”: *Levy v Victoria*<sup>28</sup>; *Cohen v California*<sup>29</sup>.

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<sup>24</sup> (1995) 183 CLR 273.

<sup>25</sup> 1989, p. 358; quoted in Electoral and Administrative Review Commission Report on Review of the Preservation and Enhancement of Individual Rights and Freedoms, August 1993, Brisbane Serial No 94/R5, p258.

<sup>26</sup> (1996) 9 FLR 237.

<sup>27</sup> A quote that is generally, though somewhat spuriously, attributed to French philosopher, Voltaire. The quote appears in none of his works, but is thought to have been coined by academics who believed it encapsulated the nature of his philosophy.

<sup>28</sup> per McHugh J at 623 and Toohey and Gummow JJ at 613.

Scalia J said in *Schenk v Pro Choice Network of Western New York*<sup>30</sup>:

*[A]s a general matter we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.*

*It is in relation to the speech which “grates most unpleasantly against sensibilities that judicial vigilance must be at its height”<sup>31</sup> if the Courts are to play their proper role in attaining the ends of representative democracy<sup>32</sup>.*

## Role of the Media in a Democracy

*[M]edia institutions have a particularly important role to play in the development of a deliberative democracy. For they are the principle means by which individuals acquire information and encounter different points of view on matters about which they may be expected to form reasoned judgments. They also provide individuals with a potential mechanism for articulating views which have been marginalized...<sup>33</sup>*

42. Abraham Lincoln said: “Let the people know the facts, and the country will be safe.” Thomas Jefferson went further when he said: “If it were left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”<sup>34</sup>
43. The role of the media has been significant in the events under inquiry. The media has provided information to councillors about matters beyond their direct experience which was relevant to their deliberative functions, including:
- a) information of events in relation to the CEO in his employment in New South Wales and his evidence to the District Court of New South Wales;
  - b) the articulation of the different points of view of individuals and groups of electors, residents and ratepayers; and
  - c) the opinions of journalists, who might be seen to be expressing a view not vested in any particular interest, but expressing a representative view of the general public.

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29 (1971) 403 US 15 at 26.

30 (1997) 137 Law Ed 2d 1 at 26-27; quoted by Kirby J in *Levy v Victoria*, at 641.

31 *Young v American Mini Theatres Inc*, 427 US 50 (1976) at 87-88 per Stewart J, Brennan, Marshall and Blackman JJ concurring.

32 see also *Terminiello v Chicago*, 337 US 1 (1948).

33 Thompson, J.B., *The Media and Modernity a Social Theory of the Media*: Polity Press 1995.

34 Krinsky, George A., *The Role of the Media in a Democracy A Free Press: Rights and Responsibilities* United States Information Agency C:\Documents and Settings\Valued Customer\My Documents\A JI. Role of Media in Democracy.htm

44. The media has also provided the City with an opportunity to express its point of view through authorised media statements of the Mayor and CEO, and provided Mayor Carlos with an opportunity to present his minority view and has reported directly on events which occurred in Council meetings, enabling the public to have some understanding of the process of local government that has been engaged in by councillors.
  
45. The media reporting has been important both to the role of councillors and the participation of the public in the democratic process occurring in the City of Joondalup. Councillors, if they are to perform their task as elected representatives in today's society, are obliged to take note of and participate in the important role which the public media plays in communicating both to them and from them to the public arena. They are not obliged to absorb uncritically everything which may be printed or broadcast, but they are obliged to take note of matters which are communicated to them in that way which are relevant to their deliberative functions. Having taken note of such matters, they are obliged to investigate further where it appears that what is reported may reasonably be something they should be aware of, and may have an effect upon the way in which they carry out their functions, or where the publication of facts or opinions may be likely to impact adversely upon the interests of the local government. That investigation should be aimed at ascertaining the accuracy and implications of what might have been reported and placing them in a position to take whatever steps may be appropriate in response to such matters as may be determined to be in the best interests of the local government.

### **Deliberative Democracy**

46. Deliberative democracy is the form of democracy which is appropriate to local government. It is –

*a conception of democracy which treats all individuals as autonomous agents capable of forming reasoned judgements through the assimilation of information and different points of view, and which institutionalizes a variety of mechanisms to incorporate individual judgements into collective decision-making processes. The deliberative conception of democracy focuses attention on the processes by which judgments are formed and decisions are taken. Individuals are called on to consider alternatives, to weigh up the reasons and arguments offered in support of particular proposals and, on the basis of their consideration of particular points of view, to form reasoned judgments...[T]he process of deliberation is crucial, for it is*

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*through this process, through the weighing of arguments and different points of view, that individuals come to form their wills.*

*The process of deliberation is necessarily open-ended. As more information is available and as individuals consider the arguments and claims advanced by others, they may question and gradually modify their original views...This open-ended process of argument and counter-argument, claim and counter-claim, may be brought to a temporary close by a vote, which provides an index at a particular point in time of the views of individuals who have engaged... in a process of generalized deliberation. It follows that, within the framework of deliberative democracy, the majority principle provides a justifiable basis for decision-making<sup>35</sup>.*

47. The deliberative democratic approach was a feature of decision-making of the Council of the City of Joondalup. It involved individuals gradually modifying their original views. What is in issue in this Inquiry is whether the deliberations were adequate. In other words, whether they formed reasoned judgments or whether the decisions were, in the circumstances, reasonable.
48. Deliberative democracy is not always consistent with direct participatory democracy. As Thompson says –

*To engage in a process of deliberation does not require individuals to gather together in a shared locale to express their views and to listen to the opinions of others; it does not presuppose that citizens assemblies, or some other type of gathering, is the only legitimate (or the most appropriate) forum for deliberation. On the contrary, it may well be that in some contexts and in some respects citizen assemblies obstruct rather than facilitate the process of reasoned, level-headed deliberation. Rather than encouraging the careful weighing-up of alternatives, assemblies may arouse the passions and induce individuals to take decisions on the basis of considerations which have little to do with reasoned judgment.<sup>36</sup>*

49. An issue in this Inquiry is whether direct participatory democracy failed as deliberative democracy in the course of both Council meetings and public meetings in relation to the affairs of the City of Joondalup during the period the subject of this Inquiry.
50. The LGA, together with the Standing Orders and Code of Conduct of the City of Joondalup describe a form of representative participatory deliberative democracy. It is to the standards

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<sup>35</sup> Thompson, *ibid*, p 255.

<sup>36</sup> Thompson, *ibid*, p 256.

set in those provisions understood in the context and the principles of democracy discussed above that one must look to examine the conduct of the Councillors of the City of Joondalup in order to arrive at a conclusion as to the quality of government they were providing to the City.

### Majority Decisions

51. Notwithstanding the democratic principle that the decision of the majority prevails where there is a division of opinion, a majority decision is not necessarily a democratic decision. In order to be democratic, a decision must be consistent with the principles of democracy of the kind outlined above, including that it be truly deliberative.
52. In addition, as Lord Hailsham in The Dilemma of Democracy<sup>37</sup> observed, a democracy must observe restraints if it is to truly govern “in the interests of the people”. He suggests that government must include “freedom limited by a sense of moral responsibility under a law defined by reference to moral principles as well as utilitarian convenience”. He suggests in relation to a democratic system that –

*“If it does not respect these limits it will disintegrate, and, if it abandons them, it will be as odious and foolish as an authoritarian regime pursuing the same lines of policy. The popular vote is a legitimate exercise of sovereignty, but does not mitigate folly or excuse incompetence...”*

53. In other words a majority decision must also be an ethical decision in order to satisfy Lord Hailsham’s view of what constitutes a decision consistent with principles of democracy.
54. If the government being provided, in accordance with a democratic process of majority decision-making, is not good government because the majority decisions are not ethical decisions, then there is a failure to provide good government. There might be democratic majority decision-making, but it may fail Lord Hailsham’s test of being decision-making with a sense of moral responsibility. It must satisfy that test in order to be government in the interests of the people.

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37 Lord Hailsham, *The Dilemma of Democracy Diagnosis and Prescription* Collins, St James Place, London 1978, pp 35-36.

## Democracy and Coercive Powers

55. The democratic system is more complicated than the simple principle of majority decision-making of elected representatives, particularly where, as in Australia one has a multi-layered form of government. For example, this Inquiry and the Ministerial decision which will follow it are being conducted in accordance with a process which is not directly democratic, in the sense that it has been put to a popular vote. A Panel Inquiry under the LGA has coercive powers and conclusions reached following an Inquiry and the decision which the Minister may make on the basis of such conclusions are not matters which are to be determined by a majority view of any body. The process, of course, exists within a democratic system, because the Minister and the Panel Inquiry are exercising statutory powers which have been vested in the Minister by the statute and the Minister has, in turn, vested in the Panel Inquiry by a decision pursuant to that statute.

## Ethics

56. Ethics seeks to determine the principles that justify behaviour as good or bad. Timpson states that:

*Public administration ethics is a complex endeavour. To understand its uniqueness, you must understand that it involves responsibility, professionalism, integrity, accountability, benevolence, fair and equal treatment, fidelity, democratic responsibility, trust and competence.*<sup>40</sup>

Cetinic-Doral, quoting Timpson<sup>41</sup> suggests that –

*“(local governments) are abstract, legal authorities and a set of relationships, with no moral obligations of their own. It is only the individuals in the organisation who can have a sense of moral obligation; therefore, ethical responsibility is imposed on employees (and Councillors)”.*<sup>42</sup>

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38 Stean, P., *Ethics and Governance: Ethics, Local Government Management*, August/September 2000.

39 Cetinic-Doral, L.J., “The Role of Ethics in Local Government: A Western Australian Perspective

40 Timpson, R.B., *Ethics and Public Administration: the Anatomy of an Ethical Dilemma in a Local Government Setting*. Ph D Thesis. Michigan: UMI Dissertation Services 1997, p 138.

41 *Ibid*, p 10.

42 *Ibid*, p 3.

## CHAPTER 2

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As Thoreau says –

*It is truly enough said that a corporation has no conscience; but a corporation of conscientious men [and women] is a corporation with a conscience.<sup>43</sup>*

Justice Neville Owen in the HIIH Royal Commission Report said:

*Right and wrong are moral concepts, and morality does not exist in a vacuum. I think all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply those tenets in the decision-making process. The education system—particularly at tertiary level—should take seriously the responsibility it has to inculcate in students a sense of ethical method.*

*In an ideal world the protagonists would begin the process by asking: is this right? That would be the first question, rather than: how far can the prescriptive dictates be stretched? The end of the process must, of course, be in accord with the prescriptive dictates, but it will have been informed by a consideration of whether it is morally right. In corporate decision making, as elsewhere, we should at least aim for an ideal world.*

Theodore Roosevelt said –

*We cannot afford to differ on the question of honesty...Honesty is not so much a credit as an absolute prerequisite to efficient service to the public. Unless a man is honest, we have no right to keep him in public life; it matters not how brilliant his capacity.*

57. The key test as to whether the decisions made were good, or moral, is to ask the question whether they were reasonable in the circumstances which then existed, and secondly, were they appropriate to the circumstances. To answer those questions, elaborating upon what Timpson said<sup>44</sup>, one must also consider whether (where applicable) the decisions were:

- (a) responsible: morally accountable to the people on whose behalf the local authority is governing<sup>45</sup>;

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43 Thoreau, H.D., "Resistance to Civil Government, or Civil Disobedience" Webtext created by Jessica Gordon and Ann Woodlief, Virginia Commonwealth University, 1999  
<http://www.vcu.edu/engweb/transcendentalism/authors/thoreua/civil/> accessed 20/03/2005.

44 Timpson, R.B., Ethics and Public Administration: the Anatomy of an Ethical Dilemma in a Local Government Setting. Ph D Thesis. Michigan: UMI Dissertation Services 1997, p 138.

45 Shorter Oxford English Dictionary.

- (b) in accordance with applicable professional standards, including those standards set out in the Code of Conduct of the local government;
- (c) made with integrity; based on sound moral principle, uncorrupted virtue, uprightness, honesty and sincerity<sup>46</sup>;
- (d) benevolent: with a disposition to do good<sup>47</sup>;
- (e) fair and according equal treatment to those affected;
- (f) faithful to the institutions and principles at stake;
- (g) in accordance with democratic principles;
- (h) consistent with any obligations of trust; and
- (i) competent: sufficient, as a response to all the relevant circumstances<sup>48</sup>.

## Protest and Civil Disobedience

58. If it is established that decision-making is not ethical or tempered by moral responsibility, then any steps taken by those who may be of the view that the Council is not providing good government (being steps by way of opposition to the majority or in disobedience to the law or public mores in relation to order) are irrelevant to the question of whether or not the Council has failed to provide good government. Steps taken to challenge the actions of a Council, which the challengers may perceive to be failing to provide good government, are peripheral to the question of whether there has been a failure to provide good government by the Council. It follows that the actions of any persons who may have challenged the Council by means which might be said to defy or ignore the usual democratic process of accepting the will of an elected majority are largely peripheral to this Inquiry.
59. The means by which a challenge has been mounted to the majority decisions of Council, however, may properly be the subject of comment and recommendations made as to steps which might be taken to avoid such a situation arising in the future. It is not desirable that a government which is conducted in accordance with the democratic practice of majority decision-making should be prevented from governing by means which are not lawful and democratic.

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<sup>46</sup> Shorter Oxford English Dictionary.

<sup>47</sup>The opposite of "malevolent": desirous of evil to others: Shorter Oxford English Dictionary.

<sup>48</sup> Shorter Oxford English Dictionary

60. Geoffrey Blainey AC, addressing the Senate of the Commonwealth of Australia in September 2000 in relation to the Centenary of Federation described democracy as “the minority’s willing acceptance of decisions without plotting revolution or taking up arms.” A live democracy, he said, “largely depends on the culture, a set of public attitudes in which defeat whether in sport or politics, is accepted calmly and even graciously.”
61. Democratic processes of the Western world generally, however, allow for, or at least do not seek to absolutely quash, a range of protests against, or resistance to, the decisions of elected representatives and legally formed governments. Such protest is generally accepted as deserving of sanction, but not to the point of obliteration. It allows for a certain level of civil disobedience as a means to draw attention to the failure of a government to make decisions which are for the common good.

*“Civil disobedience is a form of protest in which protestors deliberately violate a law. Classically, they violate the law they are protesting, ... but sometimes they violate laws which they find unobjectionable, such as trespass or traffic laws... The purpose of civil disobedience can be to publicize an unjust law or a just cause; to appeal to the conscience of the public; to force negotiation with recalcitrant officials...”*<sup>49</sup>

62. In answer to the argument that civil disobedience cannot be justified in a democracy, Thoreau argued that sometimes the constitution is the problem, not the solution. Martin Luther King, Jr, pointed out that legal channels of change may be open in theory but closed or unfairly obstructed in practice.
63. As this Report details by way of its findings, Mr Carlos, in so far as he was a member of the public, and other members of the public who took an interest in the issue tested the tolerance of our democratic system; registering their protest at what they perceived to be a failure to provide good government. To the extent that they exceeded the bounds of the law or decorous conduct they were engaging in civil disobedience and could properly expect that the processes for enforcing the law and decorum would be brought to bear.
64. However, Mr Carlos engaged in such behaviour while remaining in office as Mayor. In doing so he adopted a position which was not ethically justifiable.

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49 Suber, P., “Civil Disobedience” in Christopher B. Gray (ed.), *Philosophy of Law: An Encyclopedia*, Garland Pub. Co., 1999, II.110-113; <http://www.earlham.edu/~peters/writing/civ-dis.htm> accessed 20/03/2005.

65. Breaches of the Code of Conduct by Mayor Carlos were described by Mr Cole in his departmental reports and the Report of the Governance Review Panel and otherwise detailed in this Report. Such behaviour can be classified as a form of civil disobedience towards the specific rules of conduct set out in the City's Code of Conduct. Acts of civil disobedience are, by definition, inappropriate behaviour, which a legal process cannot sanction as acceptable. It could not be otherwise than desirable that Mr Carlos might have chosen alternative means to pursue his cause. He could have resigned and stood again for election. As Mr Cole said in evidence (11.5.05), however, an election campaign of that kind may not have contributed to the better government of the City.

### The Council-Watchers' Protest

66. The events which culminated in the meetings of 25 November and 1, 2 and 3 December 2003 and the deputation of councillors to the Minister to seek their own suspension had the character of a revolutionary event<sup>50</sup>. Those events did not have the dimensions of revolutions of national or international significance. The degree of disorder which accompanied them was significantly less than some of the bloodless revolutions, such as the "Velvet Revolution"<sup>51</sup>, which have occurred in some countries.
67. What occurred can be seen as a modest form of revolutionary behaviour or protest. It was a response which was built upon the concerns of a group who can be characterised as the "Council-watchers". They were a loose collection of individuals who had a range of reasons for being interested in attending Council meetings and lobbying councillors. One of them, Mr Steve Magyar, was a former elected councillor. Most of them were members of local

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50 Political revolutions are often characterised by violence, and the vast changes in power structures that can often result in further, institutionalised, violence, as in the Russian and French revolutions (with the "Purges" and "the Terror", respectively). A political revolution is the forcible replacement of one set of rulers with another (as happened in France and Russia), while a social revolution is the fundamental change in the social structure of a society, such as the Protestant Reformation or the Renaissance. However, blurring the line between these two categories, most political revolutions have basic philosophical or social underpinnings which drive the revolution.

([www.http://en.wikipedia.org/wiki/Revolution](http://en.wikipedia.org/wiki/Revolution))

51 The "**Velvet Revolution**" (Czech: *sametová revoluce*, Slovak: *nežná revolúcia*) (November 16 - December 29, 1989) refers to a bloodless revolution in Czechoslovakia that saw the overthrow of the communist government there.

It started on November 16, 1989 with a peaceful student demonstration in Bratislava. One day later, on November 17, 1989, another peaceful student demonstration in Prague was severely beaten back by the communist riot police. That event sparked a set of popular demonstrations from November 19 to late December, and a general two-hour strike of the population on November 27. By November 20 the number of peaceful protestors assembled in Prague had swelled from 200,000 the day before to an estimated half-million. With other communist regimes falling all around it, and with growing street protests, the Communist Party of Czechoslovakia announced on November 28 they would give up their monopoly on political power. Barbed wire was removed from the border with West Germany and Austria on December 5. On December 10, the Communist President Gustáv Husák appointed the first largely non-communist government in Czechoslovakia since 1948, and resigned. Alexander Dubček was elected speaker of the federal parliament on December 28 and Václav Havel the President of Czechoslovakia on December 29 1989. ([http://en.wikipedia.org/wiki/Velvet\\_Revolution](http://en.wikipedia.org/wiki/Velvet_Revolution))

residents and ratepayers associations or local sporting associations and several appear to have been associated with the Combined Residents Group.

68. Their interest in the affairs of the local government led them to question the probity of the qualifications of Mr Smith and to support and provide information to Mayor Carlos and those councillors who also came to question Mr Smith's probity. The Council-watchers were joined in their concern by journalists such as Mr Liam Bartlett and others who began to raise the issue of Smith's probity on the radio, on television and in the print media. By that means it came to the attention of a broad group of the residents of the State, and those with an interest in the affairs of local government in the City of Joondalup were sufficiently concerned about the issue raised to demonstrate their concerns by attending a number of meetings in the City's Council Chamber.
69. The response they perceived the Council as making to the issue was such as to cause those at the meeting to become rowdy. The majority councillors apparently decided that they could not continue to govern in the face of this display of public sentiment, culminating in the meeting on 2 December 2003 and a deputation to the Minister requesting their own suspension.
70. Mayor Carlos did not have the executive power to achieve adherence by the Council to the virtues of honesty and integrity which he espoused in relation to the circumstances of Mr Smith. The majority councillors were not prepared to be led by Mayor Carlos. They chose to give no credence to the fact that the district's electors had chosen him as their leader. He was unable to persuade a majority of the elected representatives to his position that Mr Smith's honesty and integrity should be the subject of investigation.
71. However, he had the support of a group of interested members of the public. That support compelled the majority of elected representatives to abandon their position and legal powers as elected representatives. That result was attended by a degree of disorder in the conduct of meetings of the Council which the public attended.
72. What occurred at those meetings was enough to disgust the members of the Governance Review Panel. That is not surprising. No one who believes in and is working towards good governance could be other than repelled by witnessing a revolution in progress. Those engaged in the "revolutionary" activity apparently saw it as the alternative to what they saw as an abandonment of principles of honesty and integrity by the majority of councillors.

73. The maintenance of honesty and integrity is an important value which must be measured carefully against the value which we place, as a democratic society, in the maintenance of order. A revolution is never desirable, but, Thoreau and Martin Luther King said, “may sometimes be necessary.” In the circumstances which obtained at Joondalup it could have been avoided.
74. There were a number of other steps which could have been taken which would have been consistent with the democratic process. For example, the Mayor and the councillors who agreed with him could have resigned and gone to an election on the issue. Interested electors could have approached the Minister and sought suspension of the Council pursuant to the Act.
75. The Governance Review Panel, in its report, described what the members witnessed at the meetings in November and December as a descent into “mob rule”. They were critical of Mayor Carlos for his conduct of meetings and attributed to that conduct the events which took place.
76. The description of the events as “mob rule” is fortunately only strictly accurate to a limited extent. The members of the public who attended the meetings of the Council never took over or ruled the City. They were demonstrating in a “rowdy” manner to their elected representatives that they would not tolerate quietly the Council’s manner of dealing with the Smith issue. Those demonstrations ultimately resulted in the majority of councillors on 2 December 2003 resolving to close the Council meeting. To the extent that the actions of the members of the public or “mob” in attendance caused the closure of the meeting prematurely that could be described as “mob rule”. What then occurred was a spontaneously convened public meeting in a private venue.

## **Public and Private Meetings**

77. Horsley states:

*“In meetings is to be found the best practical expression of the democratic way of life in action as it has evolved in our communities. Through the exchange of ideas on proposals and problems of common concern, by concentrating on the possibilities of reaching agreement and on the overall welfare of the organising body, and by ensuring that every decision reflects the opinion of the majority of those who choose to vote, the proceedings of properly conducted meetings exhibit, in general, the elements of realistic and practical democracy...”*

*“...Facts can be brought to light about each proposal to enable the group to get to the heart of the matter and understand exactly what issues need to be considered. Implications and alternatives are to be taken into account, opinions aired, and the whole matter intelligently discussed with a view to arriving at a unanimity of thinking. This is not always possible and, when it is not, the eventual decision reflects the majority viewpoint as to what is in the best interests of the organisation”<sup>52</sup>*

78. Meetings of the Council of a local government are private meetings, even though by statute they are required to be held with open doors<sup>53</sup>, except in particular circumstance where there is a resolution otherwise. Members of the public are permitted to be present as spectators in the public gallery with limited rights to ask questions, but they do not participate in the transaction of business by the local government<sup>54</sup>.
79. A public meeting is one to which members of the public are invited, either expressly or tacitly, to attend and participate<sup>55</sup>. The common law does not recognise any special right of public meeting<sup>56</sup>. The right of assembly arises from the individual liberty of the subject<sup>57</sup>. ***Halsbury’s Laws of England***<sup>58</sup> states:

*The most important liberties of the subject which have been created and elaborated ... include ...the right of public meetings, which means that any persons may meet together so long as they do not thereby trespass upon private rights of property, or commit nuisance, or infringe the law relating to public meetings or unlawful assemblies.*

80. As mentioned above, the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations provides in Article 20 that everyone has the right of peaceful assembly and association. The Declaration does not have any force in itself, but its principles have been embodied in Article 21 of the International Covenant on Civil and Political Rights which Australia ratified in 1948. Australia ratified the Optional Protocol to that Covenant in 1991, resulting in Australian citizens having the right to appeal to the Human Rights Committee of the United Nations if a municipal law of Australia unduly

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52 Lang, A.D., *Horsley’s Meetings Procedure, Law and Practice*, 4th edition, Butterworths 1998, p 1-2, para. 1.1.

53 *Berglund v Graham* [1937] VLR 162; cf *Tellby Corp. v mason* [1908] 1 Ch 457; cf *Taylor v Phelan* (1869) 6 WW & AB (L) 242.

54 Lang, *ibid*, p 10, para 1.18

55 *Gooden v Davies* [1934] VLR 143; *Gooden v Harkes* [1934] VLR 258; *Fox v Allchurch* [1926] SASR 384, *McDowall v Bourke* [1920] SALR 344, *Berglund v Graham* [1927] VLR 162; Lang, *ibid*, p 11, para. 1.20.

56 *Leslie v City of Essendon* [1952] VLR 222.

57 *Duncan v Jones* [1936] 1 KB 218; Lang, *ibid*, p 11, para 1.20; Magner, E.S., *Joske’s Law and Procedure at Meetings in Australia*, 8<sup>th</sup> edition The Law Book Company Limited 1994, p 5; Lang, *ibid*, p 73, para. 7.13.

58 3<sup>rd</sup> ed., Vol 7, para 418; Lang, *ibid*, p 72.

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restricts the right of peaceful assembly<sup>59</sup>. This reflects the common law position that public meetings for lawful purposes are not forbidden, and may be held at any time and place, provided the persons present have a right to occupy the place<sup>60</sup>.

81. There is no general right to hold meetings either on public property<sup>61</sup> or on private property<sup>62</sup>. Persons present at a public meeting that is held on private premises are there only by the leave and licence of the promoters of the meeting and not as of right. Consequently if they do not leave when they are required to do so by the chairperson or promoters of the meeting they become trespassers and may be removed<sup>63</sup>. The chair of a meeting on private property, being conducted with the authority of the lawful occupier, is the authorised agent of the occupier for the purposes of requesting members of the public at a meeting on private property to leave.<sup>64</sup> It is not part of the duty of the police to assist in the ejecting of trespassers from private property, but at the request of the chair or promoters of a meeting or the occupier of the premises the police may, if they choose, assist in ejecting trespassers. The police have no more right to attend meetings on private premises than any other person and require the leave and licence of the occupiers of the premises or the promoters of the meeting in order to justify their presence<sup>65</sup>. The police only have a power to arrest if a breach of the peace is committed<sup>66</sup>. A breach of the peace is committed where there is actual violence or a threat of violence or fear to bystanders of ordinary courage and firmness<sup>67</sup>.
82. The Council meeting on 2 December 2003, once the councillors voted to adjourn it, ceased to be a Council meeting. When the public remained in the Chamber they were conducting the public meeting on private property. The Mayor had no authority as Mayor (or chair of an authorised meeting) once the Council meeting closed. The occupier of the premises was the City of Joondalup. The members of the public had been in attendance at the Council meeting by right, pursuant to the LGA section 5.23, which declares that Council meetings are open to the public<sup>68</sup>. It would have been open for the City, through the agency of the Mayor or the CEO, immediately the meeting concluded, to require them to leave. If that had been done then they would have become trespassers. That was not done. The Mayor in fact invited

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59 *Magner, ibid*, p 5

60 *Lang, ibid*, p 11, para. 1.20.

61 *Bailey v Williams* (1873) LR 8 QB 118; *Magner, ibid*, p 6.

62 *Brighton Corp. v Packham* (1908) 24 TLR 63; *Magner, ibid*, p 6.

63 *Wood v Leadbitter* (1845) 14 LJ Ex 161; 13 M & W 838; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; *Magner, ibid*, p 6; *Lang, ibid*, p 73, para 7.12.

64 *Lang, ibid*, p 74, para 7.15.

65 *Magner, ibid*, p 8.

66 *Magner, ibid*, p 7.

67 *Magner, ibid*, p 8; *Lang, ibid*, p 73.

68 Section 5.23(2) empowers a Council or Committee to close a meeting when it deals with matters affecting employees, personal affairs, a contract, legal advice, a trade secret, commercial or financial affairs and other matters specified in that subsection.

them to stay (which exceeded his authority) and the CEO did not take any step in that regard. The members of the public, therefore, remained in the Council Chamber by licence of the City, and did not become trespassers.

83. The conduct of Mayor Carlos, in his conduct of Council meetings, of which the Governance Review report was highly critical may have contributed to or encouraged the members of the public in their behaviour, but it was not the cause of the events which took place. It was the decisions of the majority of councillors, starting with the decision on 17 December 2002 followed by decisions on 18 February 2003 and 24 June 2003<sup>69</sup> in which they declined to address the issue of Mr Smith's probity, which caused the public to behave in the way which they did at Council meetings and public meetings on 25 November and 1, 2 and 3 December 2003.
84. The conduct of Mayor Carlos, in presiding over the public meeting on 2 December 2003, was a "revolutionary" act. It was disrespectful of the other elected members and the decorum with which the Council Chamber should have been treated. However, it was not an act of government of the City, it was an exercise of freedom of political speech, freedom of association and freedom of assembly, which are freedoms accorded to all citizens. It was a matter for the political judgment of Mr Carlos and those present as to whether or not the majority councillors continued to be deserving of their respect because of the decisions they had made. It might be said that it was a harsh judgment to fail to accord them respect in all the circumstances, but it was nevertheless a matter of judgment for those people expressing their individual and collective political opinions.
85. This "revolutionary" meeting was described in the media as 'rowdy' and a descent into "anarchy". It was a backward step in terms of the preservation of the culture of democracy to which Professor Blainey referred and it ought not to be regarded as a process which should be emulated; at least where there is another process consistent with democratic principles available. The better course would have been for the Mayor and councillors of the same view to have resigned and subjected themselves to the vote of the people in the resulting election, if their resignation did not result in the suspension which shortly after occurred.

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<sup>69</sup> It was only following those decisions that the Council obtained legal advice, and the Council decisions on 24 June 2003 and following remained consistent and reflected legal advice, which was, I turn, significantly pre-conditioned by the decisions made prior to June 2003.

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## Ethics and Breaches of the Code of Conduct

86. The City of Joondalup Code of Conduct<sup>70</sup> relevantly provides:

(1) *A Code of Conduct is determined by the values and ethical standards on which it is based. The Council of the City of Joondalup believes that acting ethically is central to its public accountability, the successful achievement of its vision and the performance of its role.*

...

(2) *Ethical standards*

*The Code of Conduct is governed by three ethical standards:*

(a) *Respect for Persons*

*This standard requires that we treat other people as individuals with rights to be honoured and defended, and empower people to claim their rights if they are unable to do it for themselves. We encourage honest relationships by being truthful and sincere when dealing with others.*

*It is our respect for the rights of others that qualifies us as members of a community, not simply as individuals with rights, but also with duties and responsibilities to others.*

(b) *Justice*

*This standard requires that we treat people fairly, without discrimination, and with rules that apply equally to all. We ensure that opportunities and social benefits are shared equally among individuals, with equal outcomes for disadvantaged people. We uphold the laws of the Council of the City of Joondalup and comply with the relevant State and Federal legislation.*

(c) *Beneficence*

*This standard requires that we do for others what we would like done for ourselves – that we do good, and not harm others. We must be aware that the strong have a duty of care to the weak, dependent and vulnerable and uphold the rights of those who are unable to do so. We shall contribute to the well-being of the individuals and society by exercising due diligence and duty of care to others.*

...

(3) *Enforcement of the Code*

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<sup>70</sup> The following relevant extracts from the Code of Conduct of the City of Joondalup are numbered sequentially. The structure of the Code would be improved and more readily accessible if the paragraphs of the Code were numbered.

*(a) Any Council employees, Elected Members or Committee Members having concerns with the actual, perceived, potential, intended or unintended breach of either the specific provisions or the spirit of the Code of Conduct, or any provisions of the Local Government Act or such regulations or local laws created thereunder, should discuss those concerns with the CEO where such matters relate to Elected Members or employees, or the Mayor in the case of matters involving the CEO.*

*(b) Matters the subject of such reports shall be treated in the strictest confidence until such time as an appropriate investigation has been undertaken.*

...

*(4) Use of Confidential Information*

*Elected members, Committee Members and Employees shall not use confidential information to gain improper advantage for themselves or another person or body in ways which are inconsistent with their obligation to act impartially in the public interest; or to improperly cause harm, detriment or impairment to any person, body or the Council.*

*(5) Personal Behaviour*

*Elected Members, Committee Members and Employees shall:*

...

*perform their duties impartially to the best of their ability and in the best interests of the community, uninfluenced by fear or favour;*

*deal with all sections of the community in an open, honest and forthright manner;*

*act in good faith (i.e., honestly, for the proper purpose and without exceeding their power) in the interests of the Council and the community; ...*

*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 their official or professional duties, which may cause or is likely to cause any reasonable person unwarranted offence or embarrassment;*

*always act in accordance with their obligations of fidelity to the Council and not publicly reflect adversely upon any decision of the Council or the Executive Management Group; and*

*where practicable, be available for discussion with members of the public following Council and Committee meetings.*

*Elected members should represent and promote the interest of their community as a whole, while recognising their particular duty to their own constituents, in accordance with their role as defined by the Local Government Act 1995.*

...

*(6) Civic Leadership*

*As the appointed leader of the community of Joondalup, the Mayor shall demonstrate the highest level of civic conscience, impartiality and personal conduct.*

...

(7) *Honesty and Integrity*

*Elected Members, Committee Members and Employees shall:  
observe the highest standards of honesty and integrity;  
be frank and honest in their official dealings with each other; and  
bring to the notice of the Mayor or CEO any dishonesty on the part of any other  
Member, Committee Member or Employee;  
endeavour to resolve serious conflict through initial discussion facilitated by either  
the Mayor, or the CEO.*

(8) *Relationships between Elected Members, Committee Members and  
Employees*

*(a) An effective Elected Member or Committee Member will work as part of the  
City of Joondalup team with the CEO and the other Members and employees. That  
team work will only occur if Elected Members, Committee Members and  
Employees have mutual respect and co-operate with each other in order to achieve  
the City's corporate goals and implement the City's strategies...*

*(b) To achieve this effectiveness in teamwork, all Elected Members and Committee  
Members will :-*

*...*

*Refrain from publicly criticising employees in a way that casts aspersions on their  
professional competence and credibility;...*

87. In the same way that the case law discussed above confirms that freedom of speech is not absolute, and that curbs upon that freedom must be proportional to the purpose to be achieved, there are similar limits to be placed upon values which are expressed absolutely in a Code of Conduct. In circumstances such as the present it is apparent that some elements of the Code of Conduct recited above, if read in absolute terms, may be regarded as in conflict with one another. For example, it may be the case that in order for the Mayor, in the circumstances in which he found himself, as a minority voice seeking to observe the “highest level of civic conscience” and pursuing the cause of ensuring that an employee observed “the highest standards of honesty and integrity”, where councillors and the employees were not showing him “mutual respect and co-operation”, was entitled to “publicly reflect adversely upon... decision[s] of the Council” and was no longer obliged to “[r]efrain from publicly criticising employees in a way that casts aspersions on their professional competence and credibility”.

88. Mike Nelson in *The Challenge of Implementing Codes of Conduct in Local Government Authorities*<sup>71</sup> points out that –

*Both levels of formal leadership, elected and appointed, are vital players in the effective development and implementation of Codes of Conduct. It is the leadership that shapes cultural norms – the way things are done...[T]he leadership...must...be seen to be modelling the values of [the] organisation in practice. The ethical intention of leaders and their real-time behaviours must be coherent; leaders must do as they say. Staff and customers will very quickly discern any gap between 'espoused values' and 'values in use'. If that gap between stated values and actual practice begins to exceed the levels of normal human infallibility, then levels of trust and respect for the leadership will begin to diminish, perhaps to dysfunctional levels.*

## Complaints of Breaches of the Code of Conduct

89. In a number of instances councillors appear to have pursued complaints of breaches of the Code of Conduct or the LGA in order to embarrass the individual whose conduct is complained of. The motives for the complaints may have been variously;
- a) to embarrass them into silence;
  - b) to pressure them into conformity; or
  - c) to tap a potential for political advantage which may arise at the next local government election.
90. The latter motive is reflected in the form of electoral material which emerged at the 2003 election, e.g. the Baker drafted flyer intended to enhance the electoral prospects of Mayor Bombak which drew attention to issues concerning certain alleged decision-making, claims for expenses and an alleged investigation relating to sitting councillors running for election as Mayor. Of course, the making of unwarranted allegations with the effect of embarrassing an elected member is itself a breach of the Code of Conduct
91. The amendment of the LGA to enable punitive action against individual councillors may have the effect of increasing substantially the *ad hominem* focus of councillors and provide a more effective and immediate means of playing out rivalries between them. It may divert

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<sup>71</sup> Bishop and Preston (ed), *Local Government Public Enterprise and Ethics*, Federation Press, 2000.

even more attention away from the process of governing the local government than is the case in the present circumstances. If councillors believe they can subject a fellow councillor to an investigation and potential adverse finding, they may pursue that course vigorously and with increased enthusiasm. If such an amendment is otherwise desirable then it should be accompanied by a process of speedy identification and summary dismissal of frivolous and vexatious complaints, particularly those which are, themselves, a breach of the Code of Conduct.

### **Censure Motions and “No Confidence” Motions**

92. Renton<sup>72</sup> points out that a censure motion is a form of reprimand of an office bearer and serves as an indication of the meeting’s feelings on the issue at hand. It is not to be regarded as affecting future actions.
93. Renton<sup>73</sup> suggests that if the alleged offence of an office bearer is “considered serious enough and the resignation of the office-bearer or office bearers concerned is desired, a want of confidence motion (often called a “no confidence motion”) can be moved...If the motion is carried, the persons named should resign from their offices...” They are, of course, free to recontest in the resultant election.
94. That proposition is correctly expressed not as a mandatory but an ethical response. It is also a response which is dependent upon the expressed pre-conditions being in existence. The council did not ever move to express “no confidence” in Mayor Carlos. I would not conclude that the behaviour of Mr Carlos which gave rise to the censure motion of 18 February 2003 was such as to suggest that the Council should have moved a no confidence motion in him or that he should have resigned; nor was it clear that those who voted in favour of the censure motions expected or desired that he would resign. It was a motion devised in haste without careful consideration or advice and seemed more designed to embarrass and perhaps silence Mr Carlos than to precipitate his resignation. In any event I find that there was no reasonable basis for censure at that time.
95. The decision of the Council on 18 February 2003 censuring Cr Carlos was not consistent with the democratic principle of according freedom of speech to the holder of a minority

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<sup>72</sup> Renton, N.E., *Guide for Meetings and Organisations*, 6<sup>th</sup> edition, The Law Book Company Limited 1994, Vol. 2, p. 189, para 12.70.  
<sup>73</sup> *Ibid*, para 12.71.

opinion. Cr O'Brien, for example, pointed out in the course of debate on 18 February 2003 his belief in the principle of freedom of speech and voted against the motion on that basis.

96. Mr Bombak, Mr Baker, Mr Kimber and Mrs Mackintosh have expressed the view to the Inquiry that they voted to censure Carlos because they suspected his motives and/or attributed to him a motive of pursuing a campaign to investigate Mr Smith's qualifications in order to further his campaign to run for Mayor of the City. If any of them had suspected Cr Carlos motives or that he had been pursuing a campaign to run for Mayor (which the weight of the evidence does not support), it is still the case that a proper consideration of the evidence was sufficient to justify Cr Carlos advocating an inquiry by the Council<sup>74</sup>.

It therefore remains that had councillors properly considered the evidence available to them at that time, there was a reasonable basis for suspicion as to Mr Smith's having inaccurately represented his qualifications,

There was, therefore, no proper basis for moving or supporting the censure motions.

## Ethics and Officers

97. The City of Joondalup Code of Conduct refers to the obligations of subordinate officers to the CEO. Under the heading "Compliance with Lawful Orders" it provides:

*"Employees shall obey any lawful order given by any person having authority to make or give such order, with any doubts as to the propriety of the order being taken up with the superior of the person who gave the order and, if resolution cannot be achieved, with the CEO..." (p.14)*

98. Under the heading "Reporting of Unacceptable or Illegal Behaviour" it provides:

*"Employees are encouraged to, in the first instance, report unacceptable behaviour to the relevant Supervisor or Manager. Behaviour of a serious nature must be reported directly to the CEO."*

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<sup>74</sup> See the advice of Scott Ellis of Freehills, 11 February 2003, Ex 0112DSE12, p 1147 and 14 February 2003, Ex 0112DSE14, p 1156

## Compliance With Directions of the CEO

99. The Inquiry examined the contribution of officers of the City to the decisions which were made by the Council in terms of the advice which they provided or failed to provide to the Council. Officers below the CEO were engaged in giving advice upon matters which affected his position, while they remained subject to his direction
100. City officers have a duty to act ethically. They have the benefit of the Code of Conduct to guide them in their actions. If directed by a superior officer to act in a manner which is illegal, improper or otherwise contrary to the Code of Ethics, then they have an ethical duty to challenge that direction. An officer also has an obligation to act in accordance with the terms of his or her employment and to acknowledge the boundaries of the law which, in the present instance, include the LGA which empowers the CEO of a local government to direct all other members of the administration of a local government. Disobedience to or disregard of a lawful order may amount to misconduct justifying dismissal or misconduct reportable under the *Corruption and Crime Commission Act 2003*.
101. An employee has an obligation under the LGA Section 5.70 to disclose a direct or indirect financial interest or proximity interest if providing advice or a report to the Council. Regulation 34C (2) and (3) of the Local Government Administration Regulations 1996 provide that —

*“a code of conduct is to contain a requirement that a council member or an employee is to disclose any interest he or she has in any matter to be discussed at a council meeting that will be attended by that member or employee” or “in respect of which the member or employee has given or will give advice.”*

102. It is the responsibility of the employee with the interest to comply with the LGA, regulations and Code of Conduct in that regard. However, it may be apparent to other officers within the local government that a particular officer is acting or may be about to act in breach of such provisions. An officer has a responsibility, in the interests of good government of the local government, not to merely ignore such matters
103. An officer may be placed in an invidious position where he or she has conflicting indications as to what is ethically appropriate arising out of conflicting principles in the Code of

Conduct or a conflict between an ethical principle in the Code of Conduct and a contractual duty to obey a direction of a superior officer. That may require the officer to make a value judgment as to which of the conflicting principles and obligations should be followed, based on the seriousness of the matters in question, and take a range of steps, singly or cumulatively, in ascending order of seriousness, to –

- (1) Challenge the direction
- (2) Report the matter to a higher authority
- (3) Disobey the direction
- (4) Resign.

104. An officer cannot be open to adverse comment on the basis of a value judgment conscientiously made. However, depending on the judgment made, it may have a negative or positive effect upon the provision of good government within a local government; or, at least may fail to contribute to good government or prevent a failure to provide good government; when it was open to take a step which contributed to good government or prevented a failure to provide good government.

### **Whistle-blowing**

105. Where a conflict of interest is obvious, as was the conflict between Mr Smith's interest in his contract and his statutory duty to provide advice to the Council on that matter, there is no legal obligation on any employee of the City or any other person to bring it to the attention of the employee with the conflict of interest or the Council. Nor is there any obligation on any officer below a CEO to report a Code of Conduct breach of that kind by the CEO. However, it would be a positively ethical act for an officer to bring it to the attention of the person involved, in this case the CEO, and if no action was taken to conform to the Code of Conduct, to bring it to the attention of the Department or an authority such as the Corruption and Crime Commission.

106. The Code of Conduct provides a process for protection of whistleblowers:

*“The CEO is to ensure that Employees who report unacceptable or illegal behaviour of Elected members or Employees (that is, whistleblowers) are not in any way disadvantaged or victimized because of their actions.”*

107. That provision in the Code of Conduct would have its limitations where the behaviour complained of might be that of the CEO. The Code of Conduct requires an amendment in that regard, which is recommended in the concluding chapter to this Report.
108. As the Code of Conduct points out, the *Corruption and Crime Commission Act 2003* provides protection in respect of voluntary reporting of possible corrupt conduct to the Commission. If the proposal discussed late in this report for a new mechanism for the supervision of the CEO of local authorities is taken up, then similar protections need to be provided for in respect of the reporting of misconduct by a CEO.

## **Dysfunctionalism**

109. The decisions of the Council in 2003 had a causative link to the events which then followed. They were the catalyst to the events which resulted in the descent of the Council into a state where it was ultimately incapable of governing. However, the primary test to be applied by this Inquiry is not to ask whether the local government reached a state of being incapable of governing itself, but whether it in fact failed to provide good government. However, the extent of such failure and the Council's capacity to govern (for whatever reason) are legitimate matters to be taken into account in arriving at a recommendation to the Minister as to whether the Council should be dismissed or reinstated.

## **Suspension**

110. The reasons which the Minister articulated for suspending the Council are essentially irrelevant to any conclusion or recommendation this Inquiry is called upon to make. This Inquiry is not reviewing the Minister's decision. The facts which may have given rise to the Minister's decision to suspend the Council may or may not be among the facts which this Inquiry may find to be relevant to the matters which are to be taken into account in determining whether there has been a failure to provide good government and any recommendation to be made as to reinstatement or dismissal.



## CHAPTER 3

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## Part 1

### Selecting a New CEO

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#### The Inaugural Council

1. The City of Joondalup was established on 1 July 1998, upon the partition of the City of Wanneroo by a Ministerial Order made in February 1998 of the then Minister for Local Government, the Hon. Paul Omodei, MLA, following a Panel Inquiry which had been ordered by the Minister to follow up matters raised by recommendations of a Royal Commission into that local government. The City was administered by Commissioners until 11 December 1999 when the first Council elections were held. The Council comprised 14 elected members representing seven wards and a directly elected mayor.

2. The elected members were:

Mayor	Mr J Bombak
Lakeside Ward	Cr P Kadak
	Cr L A Ewen-Chappell
Marina Ward	Cr D S Carlos
	Cr S P Magyar
North Coastal Ward	Cr A Nixon
	Cr J F Hollywood
Pinnaroo Ward	Cr A A Walker
	Cr P Rowlands
South Ward	Cr T Barnett
	Cr A W Wight

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South Coastal Ward

Cr A L Patterson

Cr G Kenworthy

Whitfords Ward

Cr J A Hurst

Cr C Mackintosh

### **Cr Carlos**

3. Cr Don Carlos, who had run second to Mayor Bombak in the Mayoral election, was elected as Deputy Mayor. Cr Carlos had spent most of his working life in the Royal Australian Air Force where he attained the rank of Wing Commander. After retiring from the RAAF after 20 year's service he joined BHP, now BHP Billiton. He retired in 1999, having worked for BHP for 18 years and decided to engage in community work, including giving assistance to senior citizens in the preparation of their annual tax returns. With the encouragement of work colleagues, he decided to run for mayor and councillor. He lost the mayoral election to Mr John Bombak by a narrow margin.
4. Initially, his main concerns as a councillor included the rating system, the out-sourcing of community services, and the annual budget. Cr Carlos was also outspoken on the issue of funding Granny Spiers, a charitable welfare organisation. On these issues, Cr Carlos found himself offside with a significant number of elected members, including Mayor Bombak. In August 2000 Cr Carlos chaired, in the absence of Mayor Bombak, the Council's budget meeting. The budget had been the subject of discussion in previous meetings and briefing sessions. To the surprise and disappointment of a number of elected members, Cr Carlos, having read Mayor Bombak's speech, spoke against the budget, arguing against the Administration's recommendations: 0206DSC146. A number of councillors lost a degree of confidence in Cr Carlos for the manner in which he dealt with the budget.
5. In relation to the retention of Mr Delahaunty as CEO Cr Carlos' main concern was the level of his remuneration. He was concerned that the CEO's total remuneration package exceeded that of the State Premier and was instrumental in obtaining the then Minister's permission for the City to approach the Salaries and Allowances Tribunal to obtain its assessment of fair and proper remuneration for the CEO's position. Assessments had by that time been obtained from two private consulting firms.
6. On the evidence Cr Carlos was a conscientious and determined representative and unafraid to speak his mind, even at the cost of personal popularity on Council.

## Mayor Bombak

7. Mr Bombak is presently a manager in a real estate firm in Joondalup. He obtained a Diploma of Real Estate Management in the 1980s from Perth Technical College: T9278 22/4/05.
8. Mayor Bombak had previously been a councillor of the City of Wanneroo (in 1997 – 1998) and previously of the City of Stirling from (1986 – 1993). His interest in local government had stemmed from his involvement with the Karrinyup-Gwelup Ratepayers Association. Mr Bombak described his relationship with Mr Delahaunty as strained. At T9247 22/4/05 and following, he criticised Mr Delahaunty for:
- his advice in relation to the election of the deputy mayor in the inaugural council.
  - his requests of him as Mayor to speak to two elected members regarding expenditure claims for travel and home office equipment respectively.
  - conveying information from the previous Director General of the Department of Local Government and Regional Development (“DLGRD”) regarding the possible suspension of the Council which Mr Bombak regarded as untrue.
  - his failure to put policies in place regarding Mayoral expenditure (for which Mayor Bombak was publicly criticised),
- and other matters. Mr Delahaunty addressed all these matters in his evidence, referring to supporting documents. The conclusion to be drawn from the evidence is that there was no matter of substance for which Mr Delahaunty could be reasonably criticised, and that Mr Bombak’s lack of experience and personal skills in performing the function he was elected to contributed significantly to his perception that there was any defect in the manner in which Mr Delahaunty was performing his function.
9. At T9265 22/4/05, however, Mr Bombak said that the Council was satisfied with Mr Delahaunty’s performance as CEO. He referred to a degree of frustration which he experienced and said he told Mr Delahaunty at one stage that he would like to see him in a field of candidates and would support him if he were the best: T9266 22/4/05. Mr Bombak thought there was a “*purple circle*” at Joondalup comprising the seven or eight managers beneath Mr Delahaunty who he said were referred to as “*Delahaunty’s generals*”: (T9271 22/4/05). He said he had first heard the term in the 1980s in the context of Local Government Managers Australia, or its equivalent at that time.

10. Mr Bombak's concerns appeared to reflect the interests of the local business community at Joondalup, and in particular the Joondalup Business Association which, he said at T9269 22/4/05, was "looking for someone to deliver on major projects" when it came to identifying the appropriate type of person to appoint as CEO of the City of Joondalup.

### **Lindsay Delahaunty**

11. Mr Delahaunty was formed in the mould of an old-school local government official. He obtained from TAFE (or its equivalent) a Diploma in Local Government (Clerk) and Diploma in Local Government (Treasurer), and later obtained a Graduate Diploma in Management from Curtin University. He had occupied senior positions in the Shire of York, City of Melville, City of Perth, and City of Wanneroo before electing, when the City of Joondalup was created, to be its first CEO. Thus, as he said, he "built the City of Joondalup from the ground up". He had a five year contract that was due to expire on 5 July 2001. He commenced on a package of \$150,000.00 per annum with a \$5,000.00 per annum annual increment, and an annual "market movement" adjustment upon a satisfactory annual performance review.
12. Mr Delahaunty made it quite clear in his evidence that he had a difficult relationship with Mayor Bombak whom he described as wanting to play a greater role in the day to day management of the City than the LGA Act allowed: T1272 1/11/04. This included having private meetings with Council officers. He said that Mayor Bombak showed little interest in team building amongst councillors. Nor did he appear to Mr Delahaunty to be interested in becoming familiar with the Standing Orders upon which it was the CEO's function to advise him.
13. At T1279 1/11/04:

*COUNSEL ASSISTING: I suppose that in your role as CEO you have to be adaptable to the personality and style of the Mayor at the particular time? --- Yes, that is correct, and I think that extends to the councillors. Again, there are all sorts of personalities that are involved but I think that particularly the CEO must be available to all of them and try to be seen to be impartial in his dealing with them.*

*Now do I fairly conclude from what you have said that your relationship with Mayor Bombak wasn't ideal? --- No. I would have to say that I felt that he had trouble interpreting where his role finished – started and finished – and where the CEO's role started and finished, and I did have occasions where I think he might have been quite happy to have had the joint role of Mayor-CEO and felt that he could have quite capably handled that, but that wasn't to be, of course.*

14. Notwithstanding that the Mayor and some other elected members would have preferred a more entrepreneurial administrator, the evidence is clear that Mr Delahaunty was a sound CEO of good repute. It is noteworthy that following his departure from the City of Joondalup in September 2001 Mr Delahaunty was appointed to his present position as CEO of the City of Stirling, the largest local government in Western Australia.

### **The Decision Not to Renew Mr Delahaunty's Contract**

15. In the latter part of 2000 and the early months of 2001, Council examined its options in relation to the position of Chief Executive Officer. Mr Delahaunty's contract was due to expire in July 2001. One option was to renew his contract as allowed by Section 5.39(4) of the LGA and the terms of his current contract of employment. On 29 December 2000, the City entered into an agreement with Mr Delahaunty to extend his existing contract of employment until 4 September 2001 and to extend the time limit for conclusion of discussions regarding a new contract of employment until 28 February 2001, in order to enable further information to be received by the City.
16. Negotiations were entered into between a Committee comprising Mayor Bombak, and Cr Carlos and Cr Barnett on behalf of Council and Mr Delahaunty, but failed to reach a satisfactory conclusion for both parties. As a result of this the Council deliberated on what course of action to take at its ordinary meeting on 27 February 2001 and resolved as follows:

*That:*

- (1) on 29 December 2000, the City entered into an agreement with Mr Delahaunty to extend his existing contract of employment until 4 September 2001 and to extend the time limit for conclusion of discussions about a new contract of employment until 28 February 2001, in order to enable further information to be received by the City;*
- (2) due to events beyond the control of the City, that information has not been received. Accordingly, the Council has not been able to have meaningful discussions with Mr Delahaunty in light of that information;*
- (3) in light of the above, and with the concurrence of Mr Delahaunty, Council resolves that:*
  - (a) the Mayor, Deputy Mayor and Councillor Barnett have further discussions with Mr Delahaunty during the period 27 February 2001 until 9 March 2001 and that they report back to Council at the next meeting after 9 March 2001;*
  - (b) without prejudice to the further discussions with Mr Delahaunty, the Manager Human Resources does provide to the next meeting of Council a*

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*report on the process of identifying a new Chief Executive Officer, identifying four Human Resource Consultants qualified to assist in the process of selecting a new Chief Executive Officer, should the need arise.*

17. Further negotiations were entered into by the concerned parties, however, as before, no agreement was concluded and so as such at its ordinary meeting on 13 March 2001, Council resolved:

*That Council NOTES:*

- (a) Discussions have been held with the Chief Executive Officer concerning the possibility of the City entering into a new contract of employment with the Chief Executive Officer. That proposal is not acceptable to the City. As a result, the City and the Chief Executive Officer have not come to an agreement concerning further employment. In addition, the City has considered a proposal from the Chief Executive Officer as per his further employment.*
- (b) Absent any agreement, the Chief Executive Officer's contract of employment will come to an end on 4 September 2001 by agreement of the parties, in accordance with the terms of the contract of employment and the agreement between the Chief Executive Officer from the City recorded in the letter dated 29 December 2000.*

*In light of the above the Council resolves that:*

- (1) the City not enter into a further contract with Mr Delahaunty extending his existing contract of employment.*
- (2) the Council further consider, at its next meeting, the most appropriate means by which the most suitable candidate for the position of Chief Executive Officer after 4 September 2001 could be identified.*
- (3) Mr Lindsay Delahaunty be invited to apply for the position of Chief Executive Officer once the selection process has been determined.*

Mr Scott Ellis, solicitor, of Freehills Lawyers, was in attendance to give legal advice.

18. The evidence of Mr Magyar was that his reason for voting not to renew Mr Delahaunty's contract was that he was disappointed with his advice regarding changes to the Council's decision-making processes that he perceived to reduce the Council's accountability to the community: T6984-6986 11/3/05. He was concerned that the processes that applied at the City of Wanneroo, of which he had been an elected member, were set out differently by Mr Delahaunty at Joondalup. Specifically, there were briefing sessions instead of committees, and the second public question time at Council meetings was abolished as well as questions with and without notice. He said he had lost confidence in Mr Delahaunty although when he had worked with him at Wanneroo he liked him and thought he did a good job.

19. Mr Patterson gave evidence that from December 1999 to March 2001 he thought the City was being well governed. He had no desire to change the CEO and thought that the City was operating very well: T 514 11/10/04. The only issue that he believed was raised for not extending Mr Delahaunty's contract was that he was seeking a pay increase, which a number of councillors were opposed to: T 520 – 521 11/10/04.
20. Ms Hurst stated that she believed Mr Delahaunty's contract was not extended because the City had a new Council and councillors wanted to have a chance to see what they wanted in a CEO. She said that Mr Delahaunty only wanted a minimal increase in salary, so the main issue was that he wanted a five year and not a one year contract: T 630 – 631 12/10/04.
21. Mr Rowlands gave evidence that he voted not to renew the contract because Mr Delahaunty did not support getting shared services off the ground, referring to an information technology proposal involving neighbouring cities. He also said that the salary was a "*sticking point*". Also, Mr Rowlands was in favour of getting superannuation for City employees down to 9%, which Mr Delahaunty did not seem to support: T 1515 16/11/04. Mr Rowlands viewed Mr Delahaunty as "*old fashioned*" because he refused to outsource services (T1537), "*not on the ball*" (T1537) and "*dragging his feet*" on the issue of saving ratepayers money by the use of shared services (T1538). He was in no doubt that Dennis Smith performed better than Mr Delahaunty (T1604).
22. Mrs Walker said that she would have liked Mr Delahaunty to stay. She had spoken to him around June 2001, after the recruitment process was underway and he told her that he did not want to remain: T 2107-2108 24/11/04. He had declined to accept an invitation to apply for the position.
23. Mr Hollywood gave evidence that he thought Mr Delahaunty was doing a good job, even though he may not have agreed with him on some issues. Mr Hollywood accepted how Mr Delahaunty ran things. He said he was aware that Mayor Bombak and Mr Delahaunty did not get along very well, so he did not push for Mr Delahaunty's contract to be renewed, but said that if he had applied for the job, he would have voted for him to be appointed again as he was running the City fairly well. Mr Hollywood said that he did not really have a strong view one way or the other as to whether Mr Delahaunty's contract should be renewed: T 2376 26/11/04.
24. Mr Nixon gave evidence that he never agreed with the decision to discontinue Mr Delahaunty's services. He said that it became apparent that Mr Delahaunty and Mayor

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Bombak had a strained relationship, and he recalled Mayor Bombak making comments that an alternative to Mr Delahaunty should be sought. Mr Nixon said that he had no problems with the way that Mr Delahaunty ran the City and observed that the City did win a number of national local government awards during the latter part of his tenure: T 3730 16/12/04.

25. Mrs Mackintosh observed in evidence that the City of Joondalup inherited Mr Delahaunty from the City of Wanneroo when that city was split. For the inaugural Council Mr Delahaunty was the only CEO of whom they had any experience. This meant that when his contract came up for renewal it was only fair that the position be opened up, although Mr Delahaunty could apply. She said that she had no reason to think that he was not suited to the position. She was aware that Mr Delahaunty and Mayor Bombak did not get along: T 4397 28/1/05. Mrs Mackintosh thought that at one point the Council was offering Mr Delahaunty a one year renewal, which was unacceptable to him and that he wanted a guaranteed increase every year in the order of \$5,000.00. Mrs Mackintosh thought Mr Delahaunty would have applied if he believed he was the right candidate: T 4397 28/1/05.
26. Ms Barnett, who was a member of the committee which looked at the question of renewal of the CEO's contract, gave evidence that she objected to Council looking for another CEO. She thought that a longer period should be allowed for the completion of major projects. She in fact requested not to be on the selection committee because of this and her relationship with Mayor Bombak because of the way that he treated Mr Delahaunty, by trying to humiliate him, which horrified her: T 6429 - 6430 28/2/05. Ms Barnett's view was that Mayor Bombak was not satisfied with Mr Delahaunty: T 6431 28/2/05.
27. Mr Kenworthy gave evidence that he did not have any problems with Mr Delahaunty. He was aware of the view that the job should be thrown open, but that was not his view as he was able to work well with Mr Delahaunty. Mr Kenworthy said he did notice friction between Mayor Bombak and Mr Delahaunty but he did not get involved. Mr Kenworthy said that even though he did not agree with the CEO position being thrown open, he thought that he voted in favour of it as he was aware that the majority of councillors were going to vote for it and Mr Delahaunty would have the opportunity to apply for the job: T 6531 – 6532 2/3/05. Mr Kenworthy said Mr Delahaunty's remuneration was not a problem for him as the City was the second biggest local government authority in Western Australia and the figure he was being paid was not unreasonable: T 6533 2/3/05.
28. Mr Kadak believed that the length of Mr Delahaunty's tenure was one of the issues regarding Mr Delahaunty's contract, as he wanted a longer contract than the Council was

willing to offer. Mr Kadak said that he did not think that the idea of a shorter contract renewal for Mr Delahaunty was a bad idea, as Mr Delahaunty had implemented some large changes in the City, such as the City Watch Security Programme and privatising leisure centres and after 18 months to two years an assessment could be made as to whether those projects had worked out. Mr Kadak felt that Mr Delahaunty should have demonstrated his faith in the changes by linking the length of his contract to the period when the success of those changes could be assessed: T12064-12065 1/6/05.

29. Mr Turkington gave evidence that he observed the relationship between Mr Delahaunty and Mayor Bombak to be terrible. He did not know the reasons why their relationship was this way and believed everyone in the organisation was “*caught in the crossfire*”: T 8512 8/4/05. Mr Loader believed the relationship between Mayor Bombak and Mr Delahaunty had broken down “*irretrievably*”: T 315, 29/9/04.
30. A great deal of evidence was received about the reasons which elected members had, or perceived others as having, for not extending Mr Delahaunty’s contract. Some elected members wanted him to stay, some were neutral, and others had particular reasons for change, such as Mr Magyar. On all of the evidence, however, it is not possible to discern any reasons on which there was any real consensus as to why it was in the interests the City not to extend the incumbent’s tenure. The issue of the level of the salary packages which Cr Carlos raised as a reason for his concern about a renewal of the contract, had been resolved by the obtaining of independent advice and Mr Delahaunty’s offer to accept a package of \$190,000.00, significantly less than the sum of \$220,000.00 to which he would have become due under his existing contract. There seems to have been no substantial reason for Council not to have agreed to a renewal. One such expressed reason, which is not sufficiently substantial to have justified the decision, was Mayor Bombak’s wish to have Mr Delahaunty compete in a field of candidates.
31. No good reason can be found in the evidence for Council not to have renewed Mr Delahaunty’s contract. Council had only been elected for a year and was inexperienced. Mr Delahaunty, on the other hand, had a great deal of experience and ability. Desire for more entrepreneurial leadership is an insufficient basis for discarding a wealth of experience in the complex field of executive management of a local authority. Any suggestion that Mayor Bombak and Mr Delahaunty could not work together (which is denied by both Mr Bombak and Mr Delahaunty) would not, of itself, be a sufficient basis for not renewing the contract of a CEO.

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32. The statutory duties of the Mayor and CEO to liaise with one another (*Local Government Act 1995*, Sections 2.8 (1) (f) and 5.41(e)) are important. Equally important is the need to devise methods of fulfilling this statutory function without being influenced by matters of personality. Dispute resolution procedures may be appropriate to be employed to resolve any such difficulties. In the end, however, the tenure of a Mayor is more transitory than that of a CEO and the role of the CEO is more comprehensive for a local authority than that of a Mayor. If a choice must be made between a CEO and a Mayor, in terms of the effect on the governance of the local authority, on such an ephemeral basis as a personality clash, then an elected Council should not dispense with the services of a CEO. In the circumstances, the decision to dispense with his services without good cause was folly. It is difficult to recognise any benefit whatsoever to the City of Joondalup from that decision.
33. There was no sufficient rational basis for the Council failing to offer Mr Delahaunty a renewal of his contract and, consequently, no sufficient rational basis for the Council deciding to engage in the recruitment process which resulted in the appointment of Mr Denis Smith. It is put in submissions for Mr Bombak that Mr Delahaunty's failure to accept the invitation to apply may have been because of a reluctance to compete in a field of candidates. There are a number of other possible reasons why it might be speculated that Mr Delahaunty did not respond favourably to that invitation. The real issue is whether the Council ought to have placed him in that position. There was not a sufficiently cogent reason for so doing. There was no considered view taken by the Council as to whether or not the renewal of Mr Delahaunty's contract, as against the recruitment process adopted, would better contribute to the good government of the City. Any reticence of Mr Delahaunty to adopt ideas or a style which some Councillors favoured is not necessarily an indicator that he was not a CEO who was making the best available contribution which might be made to the good government of the City.

### **Selection Process**

34. On 27 March 2001 Council received a report from the Manager, Human Resources, Mr Mark Loader, who identified three options for the recruitment process, namely, conducting it in-house, outsourcing it to an external agency, or outsourcing it with in-house assistance. Mr Loader's report identified a group of five suitable human resource consultants which was narrowed down to three after a presentation and interview process conducted by Mr Loader and Mr Barun Dutta, Manager, Contract Management: 2909ML4.

35. Council resolved on that date to:
- (a) establish a chief executive officer's selection committee consisting of the Mayor and one councillor from each ward (Crs Kadak, Carlos, Nixon, Kenworthy, Walker, Wight and Hurst), the second ward councillor as deputy (Crs Ewen-Chappell, Magyar, Hollywood, Patterson, Rowlands, Barnett and Mackintosh);
  - (b) set a quorum of five members;
  - (c) note that the Manager, Human Resources, would provide professional advice to the committee when required;
  - (d) agree to outsource the recruitment process to an external human resource consultant;
  - (e) invite three of the consultants that had been approached – Gerard Daniels Australia, Lyncroft Consulting and Recruiters Australia Ltd - to provide a presentation to the next briefing session of the Council to be held on 3 April 2001; and
  - (f) consider the cost of the consultancy and the allocation of those costs.

The decision to appoint the selection committee was carried by an absolute majority in accordance with LGA Section 5.8.

## **Mark Loader**

36. Mr Loader came to his position at Joondalup following a number of years experience in human resources at Edith Cowan and James Cook Universities. From the former he obtained a Bachelor of Business (Human Resources). He had also worked for some years in the union movement as an industrial advocate and held a TAFE Certificate in Industrial Advocacy. He commenced at Joondalup in February 2000. He had not previously been involved in the selection and appointment of a CEO and his overall experience of local government was clearly limited at the time when the selection process was undertaken.

## **Selection of Recruitment Consultant**

37. Mr Loader subsequently reported to Council, by memorandum dated 29 March 2001, on the criteria upon which the nominated consultants would be evaluated: 2909ML7. In his report of the Council meeting on 27 March 2001 (2909ML4) Mr Loader set out the estimated costs of the project as being \$40,000.00 - \$50,000.00 for a successful placement from WA to approximately \$53,000.00 - \$73,000.00 for an interstate placement. Gerard Daniels Australia ("GDA") indicated a fee of 20% of the total remuneration package, Lyncroft \$25,000.00 and Recruiters Australia Ltd ("RAL") \$20,000.00. Mr Loader indicated that

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additional costs would be national advertising \$7,500.00, local advertising \$2,500.00, interstate visits \$5,000.00 and relocation costs \$20,000.00.

38. At a briefing session on 3 April 2001 proposals were received from the three consultants and oral presentations were made by their representatives: 2909ML8. Evaluation sheets were completed by the 11 elected members in attendance: 2909ML9. Mr Nixon admitted in evidence that he had failed, through carelessness, to score GDA on a number of criteria. Although GDA obtained the highest scores, an error in the compilation of the scores resulted in RAL being selected. The individual score sheets reveal that Cr Kenworthy's scores for Lyncroft were entered against Management Recruiters Australia ("MRA") (a business name used by RAL for its business of senior executive recruitment), giving that firm an extra 68 points, and depriving Lyncroft to the same extent.
39. The scores given to each consultant were tabulated and it was ascertained that the consultancy which had attained the highest score was MRA with 936 points, followed by GDA with 886 points and Lyncroft with 663 points.
40. On examination of the scores as transferred onto the final matrices, it was ascertained that despite 11 councillors evaluating the presentations, it appeared that 12 scores were tabulated for MRA, 11 for GDA and 10 for Lyncroft.
41. From an examination of the individual score sheets, it is obvious that the score sheet that Cr Kenworthy had completed for Lyncroft had been included with MRA's score sheets, thus providing them with an additional 68 points. Removing this 68 points from MRA's total score would provide an accurate score for MRA of 868 points. This would have the effect of elevating GDA to first place, MRA second with Lyncroft remaining in third.
42. RAL's subsequent appointment was therefore accidental and did not reflect a true evaluation of the merits. It is extraordinary that such an obvious error was made and that no officer or elected member questioned the mistaken result. The decision of Council on 10 April 2001 appointing RAL specified that the Managing Director, Mr Warren Reynolds, should oversee the assignment. A number of witnesses gave evidence that Mr Reynolds made a most impressive presentation. A set of overhead projection slides prepared for the presentation (1210DSC1) emphasised:
  - RAL's status as a national recruitment company.

- Identification of major customers of RAL.
  - Experience in CEO selection including placement of
    - i. General Manager, Campbelltown City Council
    - ii. General Manager, Bankstown City Council
    - iii. General Manager, Newcastle City Council
    - iv. Deputy General Manager, Sydney City Council
  - The experience of the nominated consultants who are to conduct the assignment, Mr Meredith and Mr Hince.
  - The depth of experience and strength of knowledge of the Perth candidate market.
  - The support available through Watermark International Search through their experience and database of candidates for the local government sector.
  - The two tiered recruitment process and set timeframes.
  - RAL's insurance cover in respect of professional indemnity.
43. Mr Reynolds gave evidence that RAL gave options for different kinds of fees so that the City of Joondalup could choose what structure would most suit their needs. In the end they chose a search process with a maximum fixed fee of \$20,000.00 which he explained was a reasonably large job for a small fee. He would normally expect a fee of 25-30% of the total salary package: T85-86 27/9/04. When questioned why he took on this job for such a low fee he explained that he wanted to build a relationship with the City of Joondalup to enhance the possibility of further work through them. He also cited the fact that he thought that it was an interesting assignment to be involved in, and thought that Mr Loader and Mayor Bombak were interesting people. He said: *"I liked what I saw of John and what he was trying to do in the Council. It was a role I [thought] we could make a contribution to"*: T101-102 & 149 27/9/04.
44. Whilst the error in the collation of the scores is the most obvious explanation for the outcome, a number of observations on the process of selection should be made.
45. When scoring the three recruitment consultants to decide which was the most appropriate, the only information the selection committee had was the presentations, the written proposals and the scoring matrices: T300-301 29/9/04 and 3731 16/12/04. There was an opportunity to ask questions during the presentations but there was no formal interview as such: T526 11/10/04. According to the selection committee Mr Reynolds gave a highly polished presentation which obviously swayed Council's decision to appoint RAL, on the proviso that Mr Reynolds did the job. This is evidenced by councillors' scoring RAL highly

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for knowledge of the LGA. The rational basis for so doing is suspect. Mr Reynolds in evidence admitted that he had not read the LGA before the presentation and had little experience in local government recruitment.

46. It is unclear to what extent any councillor based the decision to engage RAL upon the content of the overhead slides which highlighted experience of a number of similar appointments in New South Wales. If they did so, then that may have provided a rational basis for concluding that the firm had relevant experience in recruitment of a similar kind to the present task, but is still not a basis of the scoring on knowledge of the LGA of Western Australia. Mr Reynolds did not represent that he or the WA operation of RAL had any local government knowledge or experience. In the circumstances that ought to have been enough to eliminate RAL's application.
47. On the evidence it appears unlikely that the slides were actually displayed during the presentation, or if they were, given much attention, but a set was retained by Cr Carlos and it is therefore likely that they were, at least, distributed to the members of the committee at some stage.
48. The scoring sheets of the interview panel were inaccurately completed by a number of the councillors in that they were, in evidence, unable to justify their scores on a number of different criteria. The evidence indicated that a number of councillors evaluated the candidates subjectively, rather than strictly in accordance with the objective criteria which had been set out. These instances also suggest that there was not enough information gleaned from the interview process for them to make a well informed rational decision.
49. It does not appear to have been a formal interview process, which might have resulted in a more incisive analysis of the attributes of the candidates which the scoring sheets were intended to focus upon. The evidence of most councillors makes it clear that they were influenced by the presentation of Mr Reynolds, which obviously reflects his good public relations skills. That may be one attribute of a good recruiter, but the disproportionate significance it was given is indicative of a poor decision-making process being engaged in by the Council. The exception to this appears to have been Mayor Bombak who, according to his score sheets (2909ML9, pp 37, 51 and 58), clearly scored Gerard Daniels significantly higher on all criteria than RAL or Lyncroft. However, Mayor Bombak supported what he saw as the "*consensus decision*" to select RAL (T9275 AND 9281).

50. On 10 April 2001 Council resolved to appoint RAL to assist in the recruitment process: 2909ML9. This item was the subject of a report that outlined the result of the presentations by the short-listed recruitment consultants. Council was advised that on the balance RAL were the preferred consultants provided that Mr Reynolds oversaw the assignment and played an active role in the process.

51. The officer's report summarised the RAL proposal as follows:

*“Recruiters Australia offered a two-tier approach:*

*Tier One - Advertised Recruitment: A flat fee of \$16,000.00.*

*Tier Two - Should advertised response not deliver the calibre of candidate require for the position then Executive Search processes would be commenced on authorisation.*

*An additional fee structure (if required) was \$4,000.00. The maximum total fee for Advertised/Search assignment \$20,000.00. This does not include costs associated with advertising, travel, relocation and incidental expenses. These costs vary in accordance with the amount of extra processes are involved in attracting potential applicants. It is estimated that the advertising and relocation costs may reach \$38,000.00.”*

52. That GDA scored highest is not at all surprising. Its managing director Mr Lloyd Smith gave evidence that the company was highly experienced in local and state government placements in Western Australia. Notwithstanding that it proposed a higher fee structure; the company's depth of experience in public sector recruitment was outstanding as was the quality of its written proposal: 2909ML3.

53. Mr Lloyd Smith had a BA from the WA Institute of Technology and had been involved in recruitment since 1980. He had experience in placing CEO's for the WA Municipal Association, the Eastern Metropolitan Regional Council, the City's of Stirling, Subiaco, Nedlands, Mandurah and South Perth, the Town of Claremont and the Shire of Manjimup. In addition, the company, in conjunction with the Public Sector Standards Commission had been involved in a number of high level State public sector appointments including the Auditor General, the State Ombudsman and Directors General of the Ministry of Justice and the Department of Minerals and Energy, and CEO's of the Department of Training, the Ministry of Fair Trading and the Fremantle Port Authority.

54. All of these positions involved a comprehensive executive search. GDA's proposal annexed a draft position description containing key result areas and key performance indicators and

displayed a keen awareness of the requirements of local government. The proposal recommended national and State newspaper advertising as well as an executive search process to locate candidates in target organisations. In this regard, the proposal indicated that it would, where possible, document information on these people, detailing: “*name, current position, employer and supporting information relating to their previous career and any industry comment on their perceived reputation*”. Under the heading “*due diligence*” the proposal promised that an initial reference check would be undertaken for short listed candidates and that, after interviews, at least three reference checks would be made, if possible, involving reports from a superior, a peer and a subordinate in order to provide a “*cross-sectional analysis of competence*”. The proposal also stated that a summary report would be made on each recommended short listed candidate and there would be a report on the final shortlist, including:

- Consultant summary of the candidate;
- Copy of original curriculum vitae;
- Results of reference checking;
- Verification of employment history;
- Confirmation of academic qualifications and professional memberships; and
- An interview schedule confirming date, time, venue and other arrangements, notably travel.

55. The proposal prepared by Mr Ray Hince and Mr Chris Meredith for RAL indicated that the company operated through four businesses, one of which was called Management Recruiters Australia: 2709WR1. The proposal described its local experience as follows:

*“The Western Australian office of Recruiters Australia has extensive experience in the Perth and national markets. Our executive search and selection experience spans all industry sectors including professional services, manufacturing, resources, oil and gas, aviation, FMCG, agricultural, finance, government, medical and pharmaceutical, and distribution. The types of positions we have recruited for include: senior executives, financial controllers, manufacturing managers, project managers, human resource professionals, and exploration geologists.”*

56. Its methodology involved an initial client briefing and the development of an Assignment Specification incorporating “*details on the company, the position, the person and the employment conditions*” which would be made available to candidates during the interview process. It offered two recruitment options: advertisement and executive search. The

proposal indicated that applicants would be required to submit applications in writing. The proposal then stated:

*“Upon receiving written applications, we will screen all applicants with regard to their qualifications and attributes for the position for which they have applied. The screening will be conducted against pre-determined selection criteria as specified in the assignment specification.”*

57. Mr Reynolds explained that “screening” meant that information provided by the candidate would be compared with the job description: T84 27/9/04.
58. The short listing process was stated to involve a standard interviewing format based on behavioural techniques which would enable the consultant to obtain vital information with regard to the applicant’s employment history/work record, education and overall suitability and that an interview report summary would be completed for each applicant. Under the heading “presentation of shortlist” the proposal stated:

*“Following the consultant interviews, the consultant will meet with City of Joondalup and provide a briefing on each candidate. The briefing and follow-up discussions will narrow the field to a shortlist, normally two to four candidates.”*

59. The information gathered during the consultant interviews on the shortlist candidates will be summarised in a Confidential Report on each candidate. This summary will highlight the following information:
- Personal style
  - Career summary
  - Relevant skills and attributes
  - Candidate self-assessment
  - Remuneration
  - Availability
60. In addition to the Interview Report Summary, a copy of the applicant’s resume would be included. As to reference checks, the RAL proposal said that a minimum of three reference checks would be made on the preferred candidate and would “generally be obtained verbally, from recent and current managers of the applicant”. The proposal offered a replacement guarantee for a senior executive of 12 months.

61. Under “*Terms and Conditions*”, the proposal stated:

*“As a result of interviews conducted with all individuals to be considered for positions, we will endeavour to provide correct and accurately stated individual employment history and qualifications that we will record. Through this process, we will rely on the information that is supplied to be accurate. No responsibility can be accepted for incorrect information supplied. It is you, the client organisation, who will make the final decision to recruit the individual.*

*When you conduct a final interview, you must satisfy yourself as to the person’s suitability based on their employment history, relevant qualifications, and fit with the job specification.”*

## **The Decision Not to Advertise**

62. Legal advice was received from Clayton Utz, solicitors, on 10 April 2001 that there was no obligation on the City to advertise the position of Chief Executive Officer: 2909ML14. Nevertheless, Mr Loader recommended to Mr Reynolds by letter of 17 April 2001 that in the interests of transparency the position should be advertised nationally: 2902ML16.
63. On 21 May 2001 members of the committee requested that the Manager of Human Resources seek a legal interpretation of Section 5.37 of the LGA in terms of whether the advertisement for a CEO needed to specify the exact salary component: 2909ML22. Mr Loader subsequently requested this advice from Mr Hardy of Clayton Utz on 28 May who provided his advice on 30 May 2001: 2909ML24. The advice given was that the total value of all remuneration and benefits must be specified. Mr Hardy was of the view that the salary had to be specified. Mr Loader gave evidence that this advice was sought as some of the councillors were trying to reduce the superannuation component. This meant changing the structure of the remuneration package and questions were raised about how to do this whilst complying with the LGA: T331 29/9/04. The City did not want to deter any potential applicant who may be appropriate for the position by advertising a total remuneration cost: T334 29/9/04.
64. Mr Reynolds advised the City in relation to the costs of advertising. The Council wanted to look at candidates from the east coast, in which case advertisements would need to be placed in *The Australian*, *The Financial Review*, *The Sydney Morning Herald*, *The Age*, *Adelaide Advertiser* etc. This, he advised the selection committee, was a large and expensive process, quoting \$11,000.00 for advertisements in just *The Age* and *The Financial Review*. MRA did

prepare an advertisement for Council to consider, but after discussions the selection committee decided to go in favour of executive search. The reasons cited for this were that it was the cheaper option and most likely to be able to target specific candidates that Council wanted to look for. The fact that the LGA required the salary package to be advertised was not the major factor, rather it was the fact that candidates were wanted from the east coast and the costs in relation to that: T97-98 27/9/04.

65. On 11 June 2001 the committee met and Mr Reynolds informed them that Mr Delahaunty had verbally declined to apply for the position: 2909ML25. They were also informed of legal advice the City had received that there was no legal requirement to advertise, but that if the position was advertised then the remuneration package and salary component would have to be stated. Mayor Bombak, as chairman of the committee, requested Mr Loader to seek legal advice from Mr Ellis of Freehills as to whether there should be a written invitation to Mr Delahaunty to apply for the position. Mr Loader said that he was asked to speak with Mr Ellis to seek a process by which the Council's invitation to Mr Delahaunty to apply for the position could be formally put to Mr Delahaunty. This was sought as some councillors were of the view that he should have his contract renewed. It was then determined that Mr Ellis and Mr Reynolds write and speak to Mr Delahaunty about the position: T336 29/9/04. The committee agreed that "*should the recruitment consultant not find suitable applicants then the City would advertise the position*". This would be determined at a full Council meeting: 2909ML25.
66. Council never resolved not to advertise the position. A motion should have been put to Council that the position not be advertised and an executive search be conducted. This is a formal defect in the decision-making process. Mr Loader was the officer most closely involved with the process. The evidence is that he had very limited experience in advising Council on such matters at that stage. As a consequence, it apparently did not occur to him that the manner of recruitment ought to have been the subject of a resolution of Council. Advising and informing Council is a matter for which a CEO is ultimately responsible. Mr Delahaunty had declared an interest in the recruitment process on the basis that he had been invited to apply for the position of CEO. He was, therefore, standing back from the process at that stage and his advice was not sought by any of the participants. The error was caused by a failure to advise by the Administration, but is probably best understood as an oversight which had no significant consequences.

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67. Mr Delahaunty gave evidence that he had grave concerns about the CEO's position not being advertised which he believes he expressed to Mr Loader and Mayor Bombak: T1293-4 1/11/04. As noted above at paragraph 59, Mr Loader regarded it as desirable in the interests of transparency that the position be advertised. Mrs Mackintosh said that cost was the major factor for her in deciding not to advertise as advertising would lead to an influx of candidates which would be time-consuming and costly for the City. She did not feel that the requirement of advertising the total salary package, leading to an inflexibility in negotiating with candidates was a factor in not advertising: T4403 28/1/05.
68. Ms Barnett gave evidence that she thought the position should be advertised and thought that benefit would be gained from maximum exposure using all possible avenues. She thought that headhunting alone was not suitable for the person that the City of Joondalup needed: T6439 – 6440 28/2/05.
69. Mr O'Brien said that the decision not to advertise was based on the legal advice that if the position was advertised then it would have to specify the remuneration. He understood that executive search gave greater flexibility and Council wanted to get the best person it could. Mr O'Brien said that he was happy that the position was not advertised as it was not a mandatory requirement. He said that he did consider that it could both advertise and conduct an executive search: T6025 23/2/05.
70. Section 5.36 of the LGA provides -

*“Where a local government advertises the position of CEO, the local government is to state in the advertisement the salary and the total value of all remuneration and benefits available to the CEO.”*

71. According to the Report of the Inquiry into the City of South Perth (2002) –

*The process adopted by Council in appointing a CEO..., without any advertising of the position, was not adequate in the circumstances of the significance of the statutory role that the appointee was to perform. The process failed to have regard to the public interest in the process being seen to be open and fair; failed to have regard to the City's interest in ensuring that the Council and its staff, residents and ratepayers could have confidence that the best person available had been selected for the position, and failed to provide that the selected incumbent was in a position of confidence, in knowing that he had been through an open, fair and transparent process of selection.*

72. The *Local Government Amendment Act 2004* amended the LGA to repeal Section 5.36(4) and replace it with a provision which makes it compulsory to advertise the position of CEO in the manner prescribed in the regulations. Regulation 18A(2)(a) of the *Local Government (Administration) Regulations 1996* (as subsequently amended) provides that the details of the remuneration and benefits offered must be included in the advertisement. It is a suitable legislative response to the unsatisfactory consequences of the failure to advertise the CEO's position which emerged from the South Perth Inquiry. In the case of Joondalup a mandatory advertising process would have required the candidate to formally apply for the position. This would have affected the significance given to representations made in the application.

### **City's Contract With Crestline Pty Ltd**

73. On 27 April 2001, Mr Reynolds, as State Director of RAL, wrote to Mr Loader including two copies of their "Confirmation of Assignment" for acceptance by the City. On 30 May 2001, Mr Loader, on behalf of the City, wrote to Mr Reynolds as the appropriate officer of MRA, informing him of certain information that the City had received regarding RAL going into voluntary liquidation and Mr Reynolds' status with the company. This letter was responded to by Mr Reynolds as Managing Director of Management Recruiters Australia (2909ML27), who advised that:
- Recruiters Australia had sold all of its operating entities and was no longer involved in the recruitment industry;
  - MRA had been purchased by himself and others ;
  - Crestline Pty Ltd which was owned by him and other senior executives of RAL Ltd had purchased all of the operating business facilities, intellectual property and the assignment of all contracts from MRA;
  - Mr Reynolds and his associates had maintained their involvement as a part of a national network.
74. Upon receipt of this information, Mr Dutta identified several concerns regarding the process of assignment of the contract and forwarded these concerns to Mr Loader by e-mail, copied to Mr Kevin Robinson and Mr Delahaunty. These concerns focused on the following points:
- Mr Reynolds had not provided enough detail regarding his claimed purchase of MRA.
  - The status of Mr Reynolds at the time of his purporting to represent RAL in the competitive quotation process was in doubt as he had claimed in his letter to the City that he had not been a part of RAL since January 2001.

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- Even though RAL had not returned the contract, an invoice for work had been received from them and a purchase order raised.
- The contract stated that assignment or novation could only be agreed to by the Principal and this was agreed to in the resolution of Council appointing RAL.

75. Mr Dutta recommended that:

- Council be informed of the facts by way of a full report on the matter;
- Council decide and resolve on the matter of reassignment of the contract.

76. No report on this matter was in fact sent to Council for either its information or decision. The change of contractor is not minuted. On 2 July 2001 a contract, for the provision of consultancy services for the recruitment of a CEO for the City, was executed by City and Crestline Pty Ltd: 2709WR7. The contract recites the original resolution of Council to award the contract to “*Recruiters Australia Limited*” and, due to the voluntary administration of “*Recruiters Australia Limited*” the City’s approval of the assignment of the contract to Crestline. The terms of the contract expressly incorporated the terms of the RAL proposal. On 3 July 2001 MRA returned the signed contract, together with a business names extract for MRA and relevant insurance documents.

77. The manner in which the consultancy was re-assigned from RAL to Crestline Pty Ltd was unsatisfactory. It should, as Mr Dutta recommended, have involved a decision of Council. A significant feature of the presentation on behalf of RAL was that it was a national organisation. Indeed, the only local government recruitment experience the company could point to was in NSW. Mr Reynolds was asked in the course of his evidence, whether he had previously been involved in the appointment of a CEO. He was able to refer to an assignment for Anglican Homes and another for RAAF Association Homes. He admitted that those assignments were the closest to which he could refer in terms of comparability with the appointment of a CEO at the City of Joondalup: T156 28/9/04. If the assignment had gone to Council for decision then further consideration might have been given to the merits of the selection.

### **Council Elections: 5 May 2001**

78. On 5 May 2001 the second Council elections were held, involving half of the councillors elected in December 1999. As a result of the elections, Cr C Baker replaced Cr Magyar in Marina Ward, Cr P Kimber replaced Cr Ewen-Chappell in Lakeside Ward and Cr M

O'Brien replaced Cr Wight in South Ward. Cr J Hurst was elected by Council to be Deputy Mayor.

## The Assignment Specification

79. Mr Reynolds prepared a draft Assignment Specification which set out the following selection criteria under the heading "The Candidate" (2909 ML23):

### Qualifications

*It is likely the successful candidate will possess tertiary qualifications in an appropriate business discipline, supported by extensive experience at senior executive level, directing the business and financial operations of large and diverse organisation.*

### Required skills/knowledge

- (i) Strong knowledge of contemporary and management principles and practices within commerce or government at a strategic level.*
- (ii) Well developed knowledge of corporate planning principles.*
- (iii) Extensive knowledge of contemporary human resource management principles.*
- (iv) Knowledge of statutory legal and contractual obligations.*
- (v) Highly developed written and verbal communication skills.*

### Experience

- (vi) Extensive experience in the senior management position with local government or senior executive roles within the commercial or public sectors.*
- (vii) Development and management of a wide ranging portfolio of operational programs within multi-faceted organisations.*
- (viii) Extensive strategic planning and management.*
- (ix) Extensive involvement in the management of human, financial and community resources.*

### Personal attributes

- (x) Strong and highly flexible interpersonal skills.*
- (xi) Able to handle multiple projects concurrently.*
- (xii) Ability to diplomatically negotiate with a wide variety of business people.*
- (xiii) High levels of initiative and commercial acumen.*
- (xiv) Personal commitment to the degree of quality service.*

80. On 21 May 2001 documents comprising the Assignment Specification were tabled at a meeting of the committee to select a new CEO. It was suggested that changes to these documents be forwarded to Mr Loader by the close of business on Monday, 29 May 2001,

with a report to then be prepared for Council: 2909ML22. The documents were tabled again on 11 June 2001: 2909ML25.

81. Section 5.36(2) provides that a person is not employed as a CEO unless the Council “believes that the person is suitably qualified for the position”. In this context “qualified” is not limited to vocational or academic qualifications, but comprehends all the attributes required for the position. The Assignment Specification may be taken as stipulating, under the heading “*The Candidate*”, such attributes.

## Recruitment Process

82. The recruitment of a CEO for the City of Joondalup comprised a multi-staged process:
- (a) the compilation of a list of suitable candidates by the recruitment consultant;
  - (b) the interviewing of some of those candidates by the recruitment consultants;
  - (c) the formulation and recommendation to Council of a short list of candidates by the recruitment consultant;
  - (d) the interviewing of short listed candidates by a Council Committee arriving at a hierarchy of preferred candidates;
  - (e) the further canvassing by telephone of the preferred candidates by the recruitment consultant;
  - (f) a recommendation to the Council by the recruitment consultant of a preferred candidate;
  - (g) a resolution by the Council to direct that an offer be made to the preferred candidate; and
  - (h) the candidates acceptance of the offer.
83. From May 2001 MRA staff undertook research to ascertain suitable candidates for the position. This involved the compilation of a list of CEOs from local governments in WA and interstate, local government associations, aged and health care organisations, government departments and general business organisations: 0505WR25. Mr Reynolds said that he contacted the Department of Local Government in NSW to assist him to identify local governments of comparable size to Joondalup. The list was annotated to show contacts made with various persons to ascertain their interest. Persons who expressed an interest were requested to forward a CV for consideration.

84. With the support of a Council resolution on 12 June 2001 Mr Reynolds travelled with Mr Loader to Adelaide, Sydney, Melbourne and Brisbane where they conducted 14 interviews. One of the candidates was Mr Denis Smith, then General Manager of Warringah City Council in New South Wales. On 18 June 2001 he sent his curriculum vitae to Mr Rod Beecroft of MRA: 2709WR5. Mr Smith was interviewed in Sydney on 28 June 2001. Mr Loader's evidence was that he took a passive role in the interviews. He was only present to provide information about the City. Mr Reynolds, in consultation with Mr Loader, narrowed the field to nine candidates in respect of which profiles, in the form of confidential reports, were prepared.
85. As a result of the initial interview process the shortlist of candidates to be considered by councillors was reduced by Mr Reynolds to a total of nine candidates including Mr Smith. A document containing short profiles of each of the nine candidates short listed was discussed with councillors at the Committee meeting to select a new CEO on 16 July 2001 and it was agreed that this shortlist should be reduced to six and for that purpose Mr Reynolds was requested to create a fuller candidate profile for each. These candidate profiles were forwarded to councillors by Mr Loader with an explanatory memo on 20 July 2001. Councillors were asked to rank the candidates in order of preference. These rankings were returned to Mr Loader who tabulated the results and identified the top six candidates who were to be invited for interview.
86. The candidate profiles were in the form of detailed "*confidential reports*", which contained in each case detailed work history and academic achievements under the headings "*career summary*" and "*formal education*". In some cases there was supplementary information about professional associations and memberships. None of the reports contained an original CV or resume of the candidate, but each contained the information one would expect to find in such documents. The confidential reports also included, in each case, a "*consultant's summary*".
87. Of the nine candidates there were four from interstate, three of whom were CEO's of local governments and five from Western Australia, two of whom were CEO's of local governments. As well as the nine individual confidential reports, Mr Reynolds also prepared a summary containing short profiles of each of the candidates: 1310DSC2. In all but one case the summary referred to academic qualifications as well as work experience. In the exceptional case (candidate D) there was no mention of academic qualifications, although the candidate possessed a Master of Business in Administration, a Master of Arts (Planning)

and three graduate diplomas as well as a number of technical college certificates. In the case of Mr Smith the confidential report contained the following summary:

*“Denis is an outstanding executive with an excellent education and first class experience. He has a strong communication style and demonstrates an excellent understanding of both local government and commercial enterprise based on his personal style, his experience and education I have no hesitation in recommending him for your consideration for the CEO’s position with Joondalup.”*

88. The report was qualified, as were all, by the following statement:

*“The contents of this report have been compiled from verbal information supplied during interview and in writing by the candidate. In preparing this report and in subsequent reference checks, we will endeavour to ensure the accuracy of this information and will verify it where possible. However, it is important to note that Denis Smith’s references have not been checked at this time, and accordingly, our recommendation is made without their benefit.”*

89. In the case of other candidates, such as Mr Stephen Hains, a recommendation was made in the summary of the report referring to his education and employment history. In fact, education was one of the factors referred to as the basis for the recommendation of each of the candidates. In the case of Mr Hains, Mr Reynolds did not accept the proposition that his high level of academic achievement distinguished him from other candidates.

90. Notwithstanding the express reference to a tertiary education in an *“appropriate business discipline”* as a selection criterion in the Assignment Specification, Mr Reynolds was emphatic that an academic education was not an important consideration. He said, for example, that *“demonstrated ability is much more important than something you did 20 years ago at school”* and said this was a view which he had held for most of his life. He himself had no university degrees. At T175 28/9/04 there was the following exchange:

*COUNSEL ASSISTING: You didn’t turn your mind when you were considering the needs of the City of Joondalup to the candidate’s academic qualifications? --- Not in any particular way, nor did anybody else bring that up with me to be something that was a clear requirement of the role. It was not a mandatory requirement. I don’t remember it being discussed at any length from the perspective of “this is a mandatory requirement of the role”.*

*But as a personnel consultant, having regard to the nature of the job, the demands that it made on the person that does it, that person being the interface between a large organisation and an elected body of members, didn’t you consider that that person*

*might have to have some academic background? --- Absolutely not. Many of the people that I meet in management day to day, have recruited, dealt with, wouldn't have any – well, not qualifications but tertiary education at all other than what they had learnt in the role over a period of years, particularly in that age group. I wouldn't have considered that a requirement.*

*Well, do you think you should have considered it? --- No, I don't think I should have considered it.*

*So it didn't even cross your mind that there might be - -? --- It didn't cross my mind that there would be a requirement for the role, no.*

*What about desirable? It would be desirable for the role that the person had a suitable academic background? --- My viewpoint of that would be would it add value to the candidate's capability to do the job? My viewpoint of that would be "no".*

91. The Assignment Specification was then put to Mr Reynolds:

*COUNSEL ASSISTING: Didn't you say, Mr Reynolds – and the transcript will answer the question at the end of the day in any event – that you didn't consider whether tertiary qualifications were either necessary or desirable for this position? --- That's my personal opinion, but the reality of documents that were put together and put forward is that it was likely because people in these roles often have them.*

*I specifically asked you before, taking you to the assignment specification, whether you had considered the need for, the desirability of academic qualifications, and you said you never considered it; isn't that correct? --- Okay. That's probably – probably inappropriate wording on my behalf. I would consider whether it is necessary or not, and I did not consider it necessary for people to have those qualifications to do this role. And I certainly have expressed that opinion on multiple occasions. (T180 28/9/04)*

92. Later, he said that he thought the reference in the Assignment Specification to tertiary qualifications was “*very redundant ... in the process of choosing candidates*”. He was asked about the statement “*Denis is an outstanding executive with an excellent education and first class experience*”:

*COUNSEL ASSISTING: And you described his academic background as excellent. Now, why did you use that word? --- It's a word that I probably use pretty commonly in describing people that I have interviewed or put forward. It's a word that I commonly use.*

*What would you have used if he had an MBA? --- Probably “outstanding”.*

*What would you have used if he had a doctorate? --- No idea at the time. Its something that –*

*“Most outstanding”? --- Quite probably.*

*So were you simply paying regard to the fact that he possessed tertiary qualifications? --- I certainly – you know, I think its an indication that a person has done some study previously in their career and dedicated themselves to something early in their career. I think that’s probably a good thing in terms of dedication. Whether it has relevance to the person’s performance is another matter.*

93. Mr Reynolds said that he had a number of meetings with Mayor Bombak who he described as “very proactive” in the process: T170 28/9/04. He said Mayor Bombak had a very clear idea of what he wanted. Two matters that stood out were organisational restructure of the City and development projects. Mr Reynolds said he met with the Joondalup Business Association:

*“That was another group that we were asked to talk to. And what they desired in a CEO, obviously they wanted someone who was entrepreneurial and going to create business and business opportunities.” (T172 28/9/04)*

### **Councillors’ Views on Tertiary Qualifications**

94. Mr Patterson was of the view that the successful candidate for the CEO’s position would have had tertiary qualifications relevant to the position, such as in business or town planning. Mr Patterson stated that he would not select a candidate on the basis of them having tertiary qualifications, but he would have expected the successful candidate to possess tertiary qualifications due to the status of the position. He said “what tertiary qualifications tend to do these days is give you a ticket to apply for a certain range of positions, but in the final decision-making process, I don’t think they’re all that relevant”: T549-551 11/10/04. Mr Patterson gave evidence that he assumed that by the time information was presented to him on the top three candidates, their qualifications had been checked: T555 11/10/04.
95. Ms Hurst gave evidence that what tertiary qualifications the CEO had was not a high priority and was not particularly discussed. She agreed with Mr Patterson’s view that tertiary qualifications enable someone to apply for the position, but considered that experience is what “lands the candidate the job”. She expected that the eligible candidates presented to the selection committee would have some sort of tertiary educational background. It was

not a high priority, but a desirable criterion used to distinguish between two otherwise identical candidates: T637-640 12/10/04. Ms Hurst stated that if, in the course of the interview, a candidate was asked for proof of their qualifications and the candidate could not prove the qualifications they represented, she would not have chosen that candidate for the position as it would indicate a lack of honesty and the possibility that the candidate misrepresented their qualifications: T667-668 12/10/04.

96. Mr Carlos said that his preference was always that someone had tertiary qualifications as the City had young university graduates who were working their way up the Administration and he said he would find it difficult to accept a candidate who did not have tertiary qualifications as they would not have the ability to lead these people: T764-766 13/10/04. Mr Carlos also believed that tertiary qualifications were important as the City was promoting itself as the “*Learning City*” and needed a CEO that could mix with the heads of organisations such as TAFE, Edith Cowan University and the Police Academy. He said that on the information he was given, he was satisfied that all of the candidates possessed such qualifications: T777-778 13/10/04. Mr Carlos said he regarded tertiary qualifications of such importance that he asked questions of candidates regarding their qualifications during the interviews: T788-791 13/10/04. Mr Carlos said that if Mr Smith did not have a Bachelor of Business or a Diploma in Environmental Studies or a Diploma in Town and Country Planning, as the selection committee accepted he had, he may not have been selected for an interview for the position as all the other candidates had fairly good academic qualifications: T797-800 13/10/04.
97. In his evidence, Mr Rowlands stated that if, during the interview process, the selection committee discovered that Mr Smith did not have the Bachelor’s degree that was on his CV then he probably would not have been hired, or even interviewed for the position if it was discovered earlier. Mr Rowlands said that such a decision would not be made on the basis of a perception that the person was not honest, but he could not give a reasonable explanation as to why that person should not be interviewed. When the same hypothetical situation was put to Mr Brewer, he said that it would put in doubt that person’s eligibility for the position: T1696 17/11/04.
98. Mrs Walker expected that the successful candidate would have tertiary qualifications, probably from a university: T2265 25/11/04. She thought that tertiary qualifications were important as most, if not all, of the senior staff at the City had tertiary qualifications at a university level, so the successful candidate would at least have to be their equal in this

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respect in order to deal with his subordinates adequately. Mrs Walker believed that experience and qualifications were weighted equally: T2270-2273 25/11/04. Mrs Walker was very impressed with the fact that Mr Smith had a degree in business management as it fulfilled the requirement of a tertiary qualification. She was also impressed with his qualifications in environmental and pollution studies and town and country planning as they were important to Joondalup: T2274-2278 25/11/04. Mrs Walker gave evidence that she recalled Cr Carlos asking questions of candidates regarding their qualifications during the interviews: T2284-2287 25/11/04.

99. Mr Hollywood said that he left it to MRA to head-hunt the best person for the job, with the appropriate qualifications, but he did not get involved in any discussion on what field the qualifications should be in. Mr Hollywood was not concerned if the successful candidate did not have tertiary qualifications, as he wanted a CEO who was interested in issues such as the environment, conservation, youth and music. However, if a candidate did not have the educational qualifications claimed on their CV, then Mr Hollywood said he would not expect them to make the shortlist. He was not focused on the issue of qualifications, but did expect someone else to focus on it: T2383-2387 26/11/04. Mr Hollywood said that he was impressed with Mr Smith's qualifications in environmental and pollution studies: T2389 26/11/04.
100. Mr Nixon gave evidence that he thought it was reasonable for a CEO to possess tertiary qualifications: T3733 16/12/04. He said that he would have differentiated between candidates on paper if one or more of them did not have a tertiary degree, and given its high significance. In that instance those candidates lacking tertiary qualifications would have to provide extensive evidence of achievement in their previous positions: T3738 16/12/04.
101. Mr Baker said that he was aware that it was not a mandatory requirement for the CEO to have tertiary qualifications. He said that it was not a concern for him and he was focusing more on whether the candidate could do the job: T4133-4134, T4137-4139 18/1/05. Mr Baker stated that he, nevertheless, took into account the fact that Mr Smith had some tertiary qualifications: T4154 18/1/05.
102. It was frequently recited in evidence that Joondalup styled itself "*The Learning City*". It accommodates a campus of Edith Cowan University, TAFE WA West Coast and the WA Police Academy. The City's population, the size of its work force, and the high level of professional qualification of its senior officers, not to mention the high remuneration

package which the position offers, would suggest that appropriate tertiary qualifications would be strongly indicated for its CEO. In a local government of Joondalup's proportions it is difficult to argue that the complex role of a CEO as set out in Section 5.41 would not be significantly enhanced by the person having a high level of formal education. Whilst the LGA does not mandate any level of education as a pre-requisite for appointment, Section 5.36(2) requires a person selected to be "*suitably qualified*".

103. The New Shorter Oxford Dictionary relevantly defines "*qualified*" as "*possessing qualities or qualifications fitting or necessary for a certain office, function, or purpose*".
104. The significance given by some witnesses to the absence of a statutory requirement relates to the fact that under the previous Act there were regulations which prescribed the educational and professional qualifications necessary to be held by persons occupying senior local government positions. It may now be the case, as many witnesses stated, that a person may qualify by experience alone, but commonsense and experience would indicate that it would be exceptional and not expected that a person would qualify for the position of CEO of the second largest local authority in this State without possessing a tertiary education.
105. University education serves not only to impart specialised vocational training, but also to develop critical thinking and the capacity for rational thought. Moreover, as the philosopher Herbert Spencer put it, "*Education has for its object the formation of character*". Tertiary education is undertaken widely in our community for vocational purposes and for its own sake. The attainment of a tertiary qualification is generally a cause for celebration and congratulation because it represents the fruit of personal effort and cost over a sustained period. An award by a university officially recognizes the satisfaction of a formal academic standard through examination or assessment.
106. That being the case, it was surprising to hear Mr Reynolds opine that tertiary qualifications were not necessary or desirable and say that he would have little regard for a candidate's educational achievements unless they were essential. Yet, the Assignment Specification he prepared specified, as a desirable attribute of a candidate, that he or she possess "*tertiary qualifications in an appropriate business discipline, supported by extensive experience at senior executive level*", and in reporting on the eligibility of candidates, he relied on education as a criterion for recommendation.

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107. Mr Reynolds' actions are a more reliable indicator than his evidence of the importance which he actually gave to formal education in the selection process. As for the councillors' evidence, it may be observed that all who were asked agreed that, although tertiary qualifications were not a mandatory requirement for the position, they were relevant and desirable and likely to be possessed by the successful candidate, along with relevant experience: see Mr Bombak (T9277-8); Mr Baker (T4133-4); Mr Hollywood (T2383-7); Ms Walker (T2270-3). The process of recruitment was appropriately reliant upon tertiary qualifications as among the qualifications making the candidates suitable for the job, in compliance with Section 5.36(2) of the *Local Government Act 1995*, at the stage of the process when the recruitment consultant formulated and recommended to Council a shortlist of candidates.

### Conclusions

- A. There was no sufficient rational basis for the Council's decision not to offer Mr Delahaunty a renewal of his contract and, consequently, no sufficient rational basis for the Council's decision to advertise the position and engage in the recruitment process which resulted in the appointment of Mr Denis Smith.**
- B. The Council engaged in a poor decision-making process when appointing RAL as recruitment consultants.**
- C. The Administration should have submitted the requested assignment to Crestline Pty Ltd of the consultancy contract offered to RAL to Council for a decision based on a report on the relative merits of Crestline Pty Ltd as against RAL and the other candidates.**
- D. Tertiary educational qualifications comprised one of the criteria upon which the recruitment consultant relied upon in recommending candidates to the Councillors of the City for consideration for appointment to the position of CEO.**
- E. The process of recruitment was appropriately reliant upon tertiary educational qualifications as among the qualifications making the candidates suitable for the job, in compliance with Section 5.36(2) of the *Local Government Act 1995*, at the stage of the process when the recruitment consultant formulated and recommended to Council a short list of candidates.**

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## Part 2

### A Question of Degree

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#### Mr Denis Smith

1. Mr Smith was born on 4 January 1948 in Sydney. He went to high school there and was awarded an Intermediate Certificate in 1962 (0912DIS29) and a Leaving Certificate in 1964 (0912DIS28). Then aged 16 years, he obtained a cadetship with the Department of Lands in NSW: (T3067 and T3070 7/12/04). He attended Sydney Technical College and was granted a certificate of completion of a Land and Engineering Survey Drafting Certificate Course on 31 December 1968 by the Department of Technical Education of NSW.
2. He then took up work in local government as an Assistant Town Planner with the Campbelltown City Council in 1969: (T3071 7/12/04). He was appointed as Deputy Chief Town Planner of Campbelltown in 1974 with responsibility for up to 15 people. He was later appointed as the Chief Town Planner in 1976 and continued in that role until 1980: (T2891 6/12/04).
3. Mr Smith worked at Baulkham Hills Shire Council as Chief Town Planner from 1981 to 1986. He then joined Gutteridge Haskins and Davey Pty Ltd, a firm of consulting engineers, planners and environmental scientists, and eventually rose to the position of Director of Planning, Environment and Urban Design in its NSW division. In 1994 he applied for and was appointed to the position of Director of Planning, Environment and Development at Coffs Harbour City Council. In January 1998, Mr Smith commenced at Warringah Council as the Director, Service Group. In May 1998 he was appointed to the position of General Manager of Warringah. The then Mayor, Cr Sam Danieli, released a press statement indicating that Mr Smith's qualifications consisted of a Diploma in Town and Country Planning, Post Graduate Diploma in Environmental and Pollution Studies and Bachelor of Business (Management) from the University of Technology Sydney: (1103SJB3).

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4. In 1971 he completed an examination for a Certificate of Qualification as Town and Country Planner under the *Local Government Act 1919 (NSW)*. The examination was conducted by the Local Government Examination Committees: (2311SRR3.3). Consequently he was awarded an Interim Certificate of Certification as a Town and Country Planner on 14 March 1972: (2311SRR3.6). On 30 November 1976 he was granted a full Certificate of Qualification as Town and Country Planner.
5. In relation to his certification as a town and country planner Mr Smith said that the examinations were administered by the Local Government Examination Committees in Sydney in conjunction with the Royal Melbourne Institute of Technology:

*“Can you explain what the connection with the Royal Melbourne Institute of Technology was? --- Yes, they were connected to the Royal Australian Planning Institute for membership through the Royal Australian Planning Institute and they provided study notes, tapes and other supporting documents for the subject matter for the certification as a town and country planner in NSW.*

*Were the examinations in fact conducted by the Local Government Examination Committees? --- To the best of my ability, yes.*

*Did you receive any award from the Royal Melbourne Institute of Technology? --- There was a document which is equivalent to – titled Diploma in Town and Country Planning.*

*Do you have that document? --- I do not.*

*Were you given that document? --- Yes.*

*Its not the case, is it, that you think that the studies that you did would have made you eligible for that award had you applied for it? --- No, that’s not correct.*

*Is it that the fact that you retained no documents that you have ever done any studies at or under the auspices of the Royal Melbourne Institute of Technology? --- If you’re referring sir to study notes, I do not have, I do not have them – some, now we’re talking, over 30 years ago. No.*

*No statements of academic record? --- The statement of academic record came from the certification as a Town and Country Planner. It was the way of undertaking the examinations in the subject matter.*

6. The Inquiry received evidence from Ms Sue Jellett, the Academic Registrar of the RMIT University. Ms Jellett stated that the University maintained extensive and comprehensive records of student enrolments, student examinations, student payments and student conferrals: (T8981 15/4/05). In the case of a student enrolled in the period from 1970 to

1972 the student's enrolment form would be kept and there would also be awards of applications made, examinations, monies paid, certificates produced and awards conferred: (T8982 15/4/05). Ms Jellett said that a qualified archivist had conducted two thorough searches and could not find any record of Mr Smith having received any award from RMIT.

7. The processes of this Inquiry do not cast any onus upon Mr Smith to establish any fact or to displace any fact of which there may be some evidence. Yet, he cannot support his claim to have a diploma in Town and Country Planning awarded by the Royal Melbourne Institute of Technology with any more than his own assertion. Against that assertion is the fact that the University has no record of him in any student files, student graduation cards, student revenue cards, certificate register, associate diploma register, fellowship and associate diploma register, external course studies file or student examination results for the period 1969 to 1973. That RMIT offered a course in Town and Country Planning in 1970 and 1971 through its former Department of External Studies does not take the matter any further or raise any doubt. It is also of particular significance that Mr Smith did not claim to have such an award when he applied for his position at Coffs Harbour.
8. A CV supplied with an application by Mr Smith for the position of Director of Planning, Environment and Development at Coffs Harbour Council in 1993 ("*the Coffs Harbour CV*") does not mention a Diploma of Town and Country Planning but states, "*Certified Town and Country Planner in conjunction with the Royal Melbourne Institute of Technology, Certificate of Qualification of Town and Country Planner Ordinance Number 4 (NSW)*": (1603MJF4). By way of contrast, a CV supplied with an application by Mr Smith to Judith Watson & Associates on behalf of Warringah Council for a position of Director, Service Group ("*the first Warringah CV*") states that Mr Smith's qualifications include a "*Diploma in Town and Country Planning*" in addition to the certification as a Town and Country Planner as previously described: (1810DSC33).
9. In a CV provided by Mr Smith to Mr Randall Maple of Ward Howell International in 1978 for the position of General Manager of Warringah ("*the second Warringah CV*") a Diploma of Town and Country Planning was also stated as well as the certification: (1810DSC34). In the "*condensed*" CV provided to MRA acting on behalf of the City of Joondalup in 2001 ("*the Joondalup CV*") the diploma and certification were stated in the same manner: (1410DSC20).

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10. Mr Smith was asked at (T3073 7/12/04) whether he undertook any tertiary studies whilst he was employed at Campbelltown City Council. He said he had undertaken a course in environmental and pollution studies at the Faculty of Science at the NSW Institute of Technology which he completed in the spring semester of 1973. Upon completion of this course he obtained the following certificate dated 8 April 1974:

*“This is to certify that Denis Ian Smith has satisfied the requirements of the extension course in environmental and pollution studies within the Faculty of Science (in the spring semester 1973).” (0612DIS12)*

11. He was taken to a course outline which described the course as being of 14 weeks duration requiring 4 hours’ attendance per week. He agreed that the document (part of 2311SRR17) described the course he did: (T3075 7/12/04) . That document stated:

*“No formal awards are to be offered for these courses but it is proposed to issue statements to students to the effect that they have successfully completed a particular extension course.”*

He was then examined at (T3079 7/12/04):

*COUNSEL ASSISTING: I suggest that, being an extension course, it wasn’t for any award --- I don’t share that view.*

*What award was it for - ? --- After the –  
– other than a certificate of completion? --- After the issuing of the extension course a certificate that you had completed the exercise you had the opportunity of applying for a diploma in environmental and pollution studies.*

*...  
Well the handbook says, Mr Smith, “no formal awards are to be offered for these courses”. On what basis do you say that you would get a diploma for completing a one semester extension course in environmental and pollution studies? --- I’m saying, Sir, that was what the situation was.*

*How do you know that? --- Because I was there and I applied for it.*

*What’s the basis of your statement of knowledge? --- My statement of knowledge is that when I completed it I applied for it.*

*So what was the response? --- I obtained it.*

*What’s that? --- A diploma in environmental and pollution studies.*

*Where is that document? --- I haven't got it, Sir.*

*Where is it? --- I've got no idea.*

*--- You would expect would you not, that if you were awarded a diploma in environmental and pollution studies, if that award existed, at the University of Technology, Sydney, that they would have a record of that? --- One would expect so.*

*Are you aware that inquiries have been made that reveal there's no record of you being given any such diploma? --- I am not.*

12. Mr Smith agreed that he had described this as a “*post-graduate qualification*”. Asked on what basis he did so he referred to the course outline which states: “*The courses are aimed at a person of graduate or equivalent level in formal education, but a non-graduate with appropriate experience, interest and work situation may be admitted to a particular course*”. Mr Smith indicated that he completed the course over a period of 12 months although the information provided by the University indicated that it involved only four hours of instruction per week for 14 weeks. Mr Smith admitted that it was in respect of this course that he claimed to have what was described in the Coffs Harbour, Warringah and Joondalup CVs as “*Post-Graduate Diploma, Environmental and Pollution Studies, Faculty of Science, NSW Institute of Technology*” (but without reference to the Faculty of Science in the Warringah CV).
13. Another document produced by Mr Smith, issued by the University of Technology, Sydney, on 15 March 1990 was a certificate that read as follows:

*“Continuing professional education programme. This is to certify that Denis Smith has certified the requirements of the course in managerial skills.”*
14. Ms Thea Seabrook is the academic registrar at the University of Western Sydney. She was previously the Director of Student Administration at the University of Technology, Sydney: (T7111 14/03/05). The University had previously been known as the Institute of Technology, Sydney.
15. Ms Seabrook stated that, whilst at UTS, she had received a request to check the University’s records of students and awards: (T7111 14/03/05). The University offered extension courses in addition to award courses. She described award courses as being courses where students

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were awarded either a diploma, bachelor's degree, bachelor's honours degree, post graduate certificate, post graduate diploma, master's degree or PhD: (T7111 14/03/05).

16. Ms Seabrook stated that in 1973 the then Institute of Technology did not offer a diploma course in environmental and pollution studies: (T7118 14/3/05). In a letter she sent to Detective Sergeant Reksmiss in the course of his investigation on 16 July 2003 (2311SRR17) she stated:

*“The management skills course was offered through the Centre for Management Studies in the faculty of Business in 1989. This course consisted of a series of modules offered over the semester. The University has a record of a D Smith satisfactorily completing the course in 1989 (the certificate would have issued in 1990).”*

17. Ms Seabrook said that her staff carried out a computer search as well as a search of microfiche records of award courses and of paper archives. She understood that an issue had first arisen in relation to Mr Smith's qualifications in 2002 when a request was made to the Registrar of the University. More recent searches had been done in the second half of 2004.
18. Ms Seabrook produced documents that indicated a “D Smith” had satisfied the requirements of an extension course in managerial skills.
19. Ms Seabrook did not identify Mr Smith's certificate (2311SRR3.7) but said it was typical of the type of certificates that were issued around that time for continuing professional education. She said it was not an award. She was then taken to the certificate from the Institute of Technology Sydney (2311SRR3.8) that read:

*“This is to certify that Denis Ian Smith has satisfied the requirements of the extension course in environmental and pollution studies within the Faculty of Science (in the spring semester 1973).”*

20. She said that the Institute of Technology did not have a diploma course in environmental and pollution studies at that time: (T7118 14/3/05). She said a diploma or post graduate diploma course would normally consist of 8 to 12 units of between 3 and 4 hours face-to-face teaching with each unit being taken over a semester. The number of hours described in

the course outline for the environmental and pollution studies course was roughly the number of hours for a single unit or subject: (T7120 14/3/05).

21. In evidence at (T3082 7/12/04) Mr Smith was asked whether he had any award other than the certificate of completion of the course in managerial skills:

*COUNSEL ASSISTING: Were you given any award other than this certificate? --- No, I was not.*

*Did you ever receive a diploma in managerial skills? --- No, I have not.*

*Did you ever receive a diploma in business management? --- No, I have not.*

*So the only diplomas that you say you have are the diploma in Town and Country Planning and a diploma in Environmental and Pollution Studies? --- That is correct.*

22. Mr Smith was then taken to the certificate he was given for doing the course in managerial skills which he said was a document he had referred to in his CV:

*COUNSEL ASSISTING: How do you describe it in your curriculum vitae? --- I think, Sir, you sighted those documents on various occasions. I will have to go to each of the respective documents if you want me to precisely answer that question.*

23. The Coffs Harbour CV states the following qualification: “*Post Graduate qualification, Business Management, University of Technology, Sydney, 1990*”. Mr Smith agreed that this referred to the managerial skills course. He said it was a post-graduate qualification because all the persons attending the course were graduates or otherwise eligible to do the course on the basis of expertise and experience. Mr Smith was examined about his description of the certificate:

*COUNSEL ASSISTING: What do you mean by the word “qualifications” when you use it in your CVs? --- A form of certification that you have undertaken the course.*

*Now, can I suggest to the extent that this is a qualification, that it’s a certificate that you satisfied the requirements of the course in managerial skills? --- I don’t understand the question.*

*Can I suggest to you in regard to the meaning that you have just given to qualifications, that this qualification is one that you would describe as a certificate? --- I wouldn’t describe it as such.*

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*Satisfaction of a course – of course requirements? --- I disagree.*

*Its not a diploma, is it? --- I never said it was, Sir.*

*Its not a degree, is it? --- Definitely not.*

*Were you concerned to give the impression that you had a qualification in business management? --- No, I did not intend to.*

*Why did you put that information in the application? --- That's my interpretation of the course that I undertook.*

24. He was then asked about his application for the first position he held at Warringah as Director, Service Group. He admitted that “*relevant tertiary qualifications*” were an essential criterion for the position and that he indicated in his letter of application that his qualifications addressed that criterion. Mr Smith’s letter to Judith Carpenter & Associates dated 27 October 1997 stated:

*“I hold formal tertiary qualifications in business management, environmental management, urban and regional planning and surveying. I am also an accredited mediator with the Australian Commercial Dispute Centre.” (1810DSC33)*

25. Mr Smith did not accept that the description “*business management*” overstated the subject of the managerial skills course: (T3085 7/12/04). The first Warringah CV describes the following qualification which is highlighted in bold on the document:

*“Post Graduate Qualification, Bachelor of Business (Management)  
University of Technology, Sydney, 1990”.*

26. The second Warringah CV describes a qualification in the same terms as does the Joondalup CV, although without stating the year. Mr Smith said that the reference to Bachelor of Business (Management) in these documents was an error which he could not explain. In relation to the first Warringah CV he said it was prepared by staff at Coffs Harbour City Council who would have had information in front of them in order to prepare the document. He accepted that the words did not come from any certificate that he possessed. He had not sought to ascertain the cause of the error: (T3086 7/12/04). It was not Mr Smith’s position that the words “*Post Graduate Qualification, Bachelor of Business (Management)*” should be interpreted as describing his participation in some post-graduate course (which was a construction that some witnesses, including his wife, were prepared to place on it).

27. Mr Smith's evidence in the Inquiry that he did not have a diploma in business management or managerial skills contradicts his evidence on oath to Judge Gibson in *Jones v. Sutton*, in particular:
- Q. What is the post graduate qualification that you hold from the University of Technology?*
- A. It is in business management.*
- Q. What is it called?*
- A. Its called a Diploma of Business in Management.*
- Q. And when did you obtain that?*
- A. It would have been in the early 1990s.*
28. When it was put to Mr Smith by Mr McClintock SC in that case that he held neither a Diploma in Environmental Pollution Studies nor a Diploma in Business Management he said, "*That is not correct*".
29. As between the Coffs Harbour CV and the first Warringah CV the principal differences with respect to the description of qualifications are the addition of the words "*Bachelor of*" in the second to read "*post graduate qualification, Bachelor of Business (Management)*", and the addition of "*Diploma in Town and Country Planning*". Mr Smith could give no reason why the latter was not cited as a qualification in the Coffs Harbour CV but said he intended it to be included in his application to Warringah: (T3098 7/12/04). Yet, he did not recall how the document was prepared. Another difference is that a qualification described as "*Land and Engineering Survey Drafting Certificate, NSW Institute of Technology, 1968*" was described in the Coffs Harbour CV, and in the second, as "*Land and Engineering Surveying, NSW Institute of Technology*".
30. The only certificate fitting either of those descriptions amongst the documents produced by Mr Smith to this Inquiry is the certificate that he completed the Land and Engineering Survey Drafting Certificate Course at the Sydney Technical College. He has no such certificate from the Institute of Technology. Mr Smith's explanation for this was that the College ceased to exist and became the Institute of Technology. He agreed however that he completed the certificate at the Technical College and that the certificate was issued by the Department of Technical Education NSW: (T3131 7/12/04).

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31. The Inquiry heard evidence from a witness, described as KDL (to protect her privacy) who said that she worked for Mr Smith at Coffs Harbour and typed the first Warringah CV. She said that he provided her with a handwritten document and she typed the application from it: (T9007 15/4/05). She then gave Mr Smith a copy of the document. She did not change the wording that she was given. She said that she had from time to time typed letters to solicitors, job applications and CVs for Mr Smith and that he had asked her to keep this quiet: (T9007 15/4/05).
32. Mr Smith said at (T3101 7/12/04) that the staff who would have prepared the document were likely to have been Margaret Cole or KDL. KDL was a personal assistant allocated to Mr Smith. Mr Smith's identification of her as one of two persons who were likely to have prepared the document amounts to reasonable corroboration of her testimony. KDL gave evidence that when Mr Smith left Coffs Harbour she gave him a floppy disk containing the personal work she had done for him: (T9003 15/4/05).
33. There is no reason to think that Mr Smith in applying for a position at Warringah for which an essential criterion was relevant tertiary qualifications, would not ensure that any qualifications he professed were accurately recorded on his CV and so described in the letter of application. The evidence is clear that Mr Smith represented to Judith Carpenter & Associates that he held a formal qualification in business management which he described as a "*Post-Graduate Qualification, Bachelor of Business (Management)*" and that he professed a Diploma in Town and Country Planning and a Post-Graduate Diploma in Environmental and Pollution Studies. He held none of these academic awards.
34. When Mr Smith applied for the position of General Manager at Warringah, he submitted his application to Mr Randall Maple of Ward Howell International (which became Watermark Search International). It is apparent from the form of the letter to Mr Maple that it was based on the earlier letter to Judith Carpenter & Associates. The format of the document and the wording are exactly the same except for changes necessary to take account of the different position being applied for and the experience obtained in the first job at Warringah. It is noted that the year in the date field was unchanged (1997) but the second application

was in 1998. Both letters addressed the essential criterion of relevant tertiary qualifications and contained a representation that Mr Smith considered himself suitable for the position by reason of both his qualifications and his experience.

35. When challenged as to his evidence in *Jones v. Sutton* that he had a Diploma of Business in Management he could give no satisfactory explanation. He said, “*I had no documents in front of me at the time to accurately depict precisely the title of any of the qualifications*”: (T3113 7/12/04).
36. At (T3106 7/12/04) Mr Smith said that he regarded his certificate of completion of the course in managerial skills as a relevant tertiary qualification in business management. He also denied that he described the qualification as a “*Bachelor of Business (Management)*” untruthfully to enhance his prospects of selection: (T3105 7/12/04).
37. At (T2914 6/12/04) Mr Smith said that he was asked to provide a CV to MRA by Mr Beecroft as a matter of some urgency, and accordingly, the Joondalup CV was prepared in 24 to 48 hours: (T2941). Mr Smith described how the document was prepared:

*MR POWER: And who prepared the document? --- The document was prepared by my wife.*

*Did you have any role in the preparation of the document? --- Limited role.*

*What was that? --- Some of the areas of special expertise, some of the titles that I currently held at Warringah Council – there was a number of areas there that I supplied some information to her during the preparation of the document.*

*How do you say you supplied it to her. How did that come about? --- Most of it was over the phone.*

*I see, so where was she, as you understood it? --- She was – she typed the document at my home – at our home.*

*And where were you? --- I was at work.*

38. Mr Smith said that he scanned the document before he sent it to Mr Beecroft but did not read it thoroughly: (T2942 6/12/04). He said the document was described as “*condensed*”

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because it did not describe in detail some of his past experiences or some of the professional expertise that he had. He attributed the absence of reference to his position as Director of Services at Warringah Council as a result of the document being done in haste. He said at (T2943 6/12/04):

*“That is an error because it was done in such haste, and at no stage did I consider that I was submitting details which would be so comprehensive that they would have to address all matters for the consideration of a specific applicant for a position.”*

39. He also described as an error, the description of his position as General Manager of Warringah from January 1998 to the present time, as well as the description of a position as General Manager Acting at Coffs Harbour from January 1994 to January 1998.
40. On examination by Counsel Assisting it was put to him that what Mr Smith described as errors were in fact embellishments.
41. Mr Smith was asked by his counsel about the words *“Post-Graduate Qualification, Bachelor of Business (Management) University of Technology, Sydney”*:

*MR POWER: Did you choose those words? --- No, I did not.*

*Well, do you know where the person who typed this got those words from? --- No, I do not.*

*You’ve told the Inquiry already that the person who typed this document was your wife? --- That is correct.*

*Did you ask her or have you since asked her where she got those words from? --- Yes, I have.*

*And? --- She has no knowledge of all of where she typed the – the information that’s on the document from.*

42. It is patently clear that the description of the qualification comes from one or both of the two previous CVs relied upon by Mr Smith for positions at Warringah. Mr Smith’s professed ignorance of the source of the information does nothing to enhance his credibility as a witness.
43. Evidence was taken from Mrs Robyn Smith by video link from Sydney. She was in company with Mr Smith when she gave her evidence. Mr Robilliard (who was a referee for

Mr Smith in respect of his applications for the positions he applied for at Warringah) was granted leave to appear on her behalf. Mrs Smith said on oath that she assisted her husband in the preparation of the Joondalup CV. She could not remember what she typed the document from, but said it was probably another written document which she thought was an earlier CV of Mr Smith. She was not sure whether it was paper or one recorded on a floppy disk. She typed the document at home and identified the Joondalup CV as the one she had prepared: (T4917-4918 4/2/05). She was asked:

*COUNSEL ASSISTING: Do you recall whether you were given any information from your husband orally regarding the contents of the CV you were typing? --- I don't recall him giving me any information.*

*PRESIDING MEMBER: Is it more likely than not that he did not give you information or that he did give you information in your recollection? --- I'd say its more likely not, that he did not give me information.*

*COUNSEL ASSISTING: What did you do with the document when you had finished typing it? --- I believe I gave it back to him.*

*Alright. Were you required to make any corrections or changes to the document? --- I didn't – no.*

44. Mrs Smith did not recognise the Coffs Harbour CV nor either of the letters to Judith Carpenter & Associates and Randall Maple which were attached to the Warringah CVs. Mrs Smith said that this was the first document she had ever prepared of its type for her husband.

*COUNSEL ASSISTING: And none of the documents that I have since taken you to are documents that you remember seeing at the time? --- They don't look familiar to me, no.*

*So I take it you must have had another document to work from? --- I must have. I don't know.*

*Now, were you aware at the time that you typed this CV in June 2001 from information that your husband had given you as to what qualifications he in fact held? --- I – no. I mean, I'm Denis' wife, not his keeper. I don't – I mean, Denis would really need to tell you what – what qualifications he's got. There's never been an occasion for me to need to. (T4921)*

*...  
I'm asking you whether he ever informed you as to what qualifications he held, in conversation? --- Not to the best of my knowledge, no.*

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*Were you ever aware of him undertaking any course of study at any time that you knew him? --- I'm not aware of any specific study that he took – he undertook.*

*Do you have any academic or technical qualifications? --- Yes, I do.*

*What are they? --- I have a two year degree in business management. I have an undergraduate or Bachelor of Arts degree in English Literature and French, and I have a post graduate degree – a B.Lit in literary studies and communication.*

*Yes. And the first degree that you have mentioned; where was that obtained from? --- America. And the second one.*

*And you've worked in universities, is that right, as well as studied? --- Yes, I have.*

*In what positions? --- When I was at Edith Cowan University I was in – worked for the director of Facilities and Services as an executive support officer. Prior to that I worked at the Coffs Harbour Education Campus as the executive officer to the Board of Governors, and also to the executive director. While I was in America I worked as an executive to the vice-president, Regional and University Services for the Moorehead State University in Kentucky.*

*PRESIDING MEMBER: Mrs Smith, do you have an understanding of what the words “post graduate qualification, Bachelor of Business (Management)” would mean? --- Well, I would read it as being post graduate qualification, that – which you would have to have because you've done prior study. (T4921-4922)*

*...  
Did you exercise any independent judgment as to what was to be put in the document? --- No. I did not.*

*Well, where – how did you go about the process of constructing the document? --- Just simply typed it.*

*Was it exactly the same as another document that you typed? --- Probably I typed from another document and I just typed it and I didn't check it. (T4923)*

45. Mrs Smith said that she typed the document late at night. Mrs Smith denied the suggestion that the words “*post graduate qualification, Bachelor of Business (Management)*” denoted a degree:

*COUNSEL ASSISTING: What do you understand the words to mean? --- As I said before, I see it as a post graduate qualification, that he's done work in business management. (T4930)*

*...  
Were you aware that your husband had any of the qualifications that are set out in this CV that you typed? --- Well why would I think that he wouldn't?*

*I'm asking you whether you are aware that he did have any of them? --- I can't tell you if I look at each of these qualifications that, yes, I know he's got them, or yes, I knew he didn't have them. But I would have no reason not to say that what he's put down there is correct. His reputation and his – his years in local government speak for himself. Why would he put down what he doesn't have?*

*Well, if he did have, say, a Bachelor of Business Management, you would expect that you would have become aware of that, wouldn't you? --- I would have expected that if he had a Bachelor of Business Management he would have listed it as a Bachelor of Business Management and not as a Post Graduate qualification.*

*Because it was of course described in similar terms to the one that you completed? --- Well, mine was in America. It was different. Totally different. (T4930-4931)*

46. Mrs Smith's evidence might be criticised on a number of points but it is sufficient to observe that she is an educated person who has held positions of responsibility and who understands the significance of university qualifications and CVs. Accepting that she did prepare the document for her husband, it must be concluded that she did so on the basis of a previous CV which Mr Smith had given her. The qualifications are described in virtually the same terms as those listed in the Warringah CVs and accordingly it is not possible to conclude that any mistake occurred in the typing of the words "*post graduate qualification, Bachelor of Business Management*". Nor is it the case, as Mr Smith told Cr Prospero, that a mistake was made by MRA.
47. Whilst there is little cause to give any credence at all to Mr Smith's professed ignorance of what he has said was the mistaken inclusion of a degree in his CV, his e-mail of 9 January 2004 to Mr Kimber in response to a request for guidance in the preparation of Mr Kimber's CV puts the matter beyond doubt:

*"Paul  
Attached please find a copy of condensed CV for you to use as a starting point. You will note that my CV is fairly sharp, concise and can be easily read. I believe that this format works well for me and has been well received in the past. Robyn also uses the same format and structure for her CV and others that she has compiled. We will both read yours over the weekend. Our first comments from a cursory glance are that your draft rambles a little bit and could be reformatted with qualifications and other areas of special expertise being put up front to better sell yourself ..."* (0102DIS76)

48. Mr Smith's evidence that he holds a post-graduate Diploma in Environmental and Pollution Studies from the University of Technology Sydney and a Diploma in Town and Country

Planning from the Royal Melbourne Institute of Technology, which evidence he steadfastly maintained, was false. It is clear from Mr Smith's evidence in relation to his managerial skills certificate that he was not under any mistaken belief as to the meaning to be given to the word "*diploma*". Nor should he have been, having regard to his professional experience.

49. Australian tertiary institutions apply the term diploma to signify a particular award, which will only be conferred upon a student who has satisfied clearly defined academic criteria. For Mr Smith to claim that he has been awarded a diploma after attending a course that does not satisfy the criteria for the award of diploma is untrue. As an experienced senior officer in local government in a number of municipalities, the husband of a person with a number of academic awards, and the parent of children with such awards, he well knew the range and comparative values of tertiary qualifications (T3188-3189).
50. Mr Smith intended to deceive those to whom he represented that he had University diplomas and, indeed a formal qualification in business management. The description he used repeatedly in written documents of that latter qualification was "*Post-Graduate Qualification Bachelor of Business Management*". It is difficult to ascribe a literal meaning to the phrase. The use of the word "*post-graduate*" does not necessarily mean that the person has graduated with a degree (see Reksmiss, T2008; Delahaunty, T1263; Kenworthy; Seabrook, T7112). Several witnesses came up with different interpretations or regarded the phrase as ambiguous (Baker, T100; O'Brien, T6113; R Smith, T4930-1). Significantly, Mr Reynolds, in evidence thought it was a "*Bachelor of Business*" (T109); RAL, in typing up a Candidate Profile, interpreted it as meaning a "*Bachelor of Business (Management)*" (2709WR6); and in a candidate listing (1310DSC2) described it as "*a Bachelor of Business in Management*". The Ward Howell recruitment consultant's Candidate Report to Warringah Council (0803RFM1) also described it similarly. It is open to consider whether Mr Smith intended to suggest the possibility of that inference being drawn.
51. Putting that aside, however, when giving evidence on oath in the District Court he said he had "*a post-graduate qualification in business management*". When asked what degree or diploma that conferred he said "*That doesn't give you a degree.*" In the passage of evidence

cited above, he then said “*It is called a diploma of business in management.*” When showing Cr Prospero documents (none of which was on its face a Diploma) Mr Smith told Cr Prospero that they included Diplomas (T1910DSC54, p 33 and T6737). His deception is, as described by Judge Gibson: “*not a simple mistake but an inability to record accurately his entire claimed university career*”. It was first practised on Coffs Harbour City Council, then Warringah City Council which had specified relevant tertiary qualifications as an essential criterion of selection. No error capable of being made in the preparation of a CV can explain the description in each of the CVs presented for Mr Smith’s last three positions of university awards, which he knew he did not have.

52. The evidence compels the finding that Mr Smith lied on oath to Judge Gibson in the District Court of NSW on 12 November 2002 when he said he held a “*diploma of business in management*”, a “*diploma in land and engineering, surveying, drafting*” and a “*diploma in environmental studies*” (or “*science*”). That conclusion may be drawn from:
- a) the transcript of Mr Smith’s evidence;
  - b) the certificates produced by him to the Inquiry; and
  - c) the evidence of Ms Seabrook of the University of Technology Sydney and Ms Jellett of the Royal Melbourne Institute of Technology.
53. The fact is self-evident, and the point made in the cross-examination of Ms Jellett and Ms Seabrook, that no individual employed by institutions can be certain of complete and perfect record-keeping, but the likelihood that neither institution would have any record of any enrolment for an award course, examination, application for award, or conferral in respect of Mr Smith is too remote to be meaningful. The chance is just as remote that Mr Smith should have lost his only two university awards at a time and place and in a manner unexplained, yet retained every other educational certificate he has received, including those from high school.
54. Mr Smith has no university awards. He has completed two extension courses in Managerial Skills and Environmental and Pollution Studies respectively. He has a technical college certificate in Land and Engineering Survey Drafting and a NSW local government certificate of qualification as a Town and Country Planner.

55. It follows from these findings that Mr Smith also lied to this Inquiry as to his belief that he had a diploma in environmental and pollution studies and a diploma in town and country planning. I am reinforced in that view by my assessment of his demeanour in the witness box, after taking into account the difficult and tense circumstances in which he was placed in giving evidence.
56. In relation to Mr Smith's CVs there were other discrepancies pointed to by Mr Carlos with respect to his description of his positions at Coffs Harbour and with Gutteridge Haskin & Davey Pty Ltd. In relation to Coffs Harbour Mr Smith stated in the Joondalup CV that he held the position of General Manager (Acting) from January 1994 to January 1998. The evidence of Mr Ferguson, General Manager, Coffs Harbour, was that Mr Smith did act as general manager from time to time from 1996 when the general manager was absent. Council purportedly appointed him to the position but was subsequently advised by its legal advisers and the Department of Local Government that it was beyond its power to do so. The description is an embellishment of insufficient significance to occupy this Inquiry. Similarly, Mr Smith's description of himself as General Manager, NSW Division of Gutteridge Haskin & Davey was an embellishment of his actual position as Director of the Planning, Environment and Urban Design section of that company. Compared to the misrepresentation of his academic qualifications, these other points are of negligible significance. Another point raised by Cr Carlos was in respect of Mr Smith's remuneration package at Warringah. Mr Smith told Mr Reynolds that it was \$225,000.00. In fact it was less, but due to be increased to that amount by virtue of an annual adjustment some months later. In relative terms it is not of sufficient significance to be given any closer attention.

### **Proof of Qualifications**

57. A surprising aspect of the evidence given to the Inquiry in relation to the CEO selection process was the acceptance by the consultant, the City's HR manager and the selection committee of the candidates' educational qualifications at face value. A number of witnesses gave evidence that they expected that the consultant would, as a matter of course, check such matters.

58. As has been noted, the MRA proposal which was incorporated in the contract stated:

*“[W]e will endeavour to provide correct and accurately stated individual employment history and qualifications that we will record. Through this process we will rely on the information that is supplied to be accurate. No responsibility can be accepted for incorrect information supplied.”*

59. The contract itself included in the specific scope of the consultancy at Clause 6(a):

*“(iv) Demonstrating the best practice in the searching and selection techniques.*

*(vii) To undertake relevant checks including police clearance, financial ability, medical fitness, psychological testing and other relevant issues as required for a person to have checked for the position of the Chief Executive Officer of a large organisation.”*

Clause 6(b) extended the scope of the consultancy to include:

*“(iv) A well planned strategy and due diligence process instead of estimation or guess work or suggestive measures.*

*(viii) Full disclosure as required by the client and allowed under relevant legislation.*

*(xiv) Full audit trail.”*

60. Each of the candidate reports contained the following statement:

*“The contents of this report have been compiled from verbal information supplied during interview and in writing by the candidate. In preparing this report and in subsequent reference checks, we will endeavour to ensure the accuracy of this information and will verify it where possible ...”*

61. Mr Reynolds’ evidence indicates that in writing the reports he did nothing to “*ensure the accuracy of the information and ... verify it*”. Mr Reynolds was asked about the questions that were prepared for the final interviews at T144 28/9/04:

*“MR McINTYRE: Well, asking questions might not have been the way to satisfy oneself of the qualifications of this candidate, might they? --- They also had any opportunity they wanted to ask us to go back and do whatever we liked. They – if they wanted us .to go back and check it, or if they wanted something made a criteria (sic), they had the opportunity to do so. That would be normal in our normal practice.*

...

*If I was confronted with a CV of a person, I would assume that it was correct, if it looked adequate. I'd move on to the topics which were of more cutting edge interest to me? --- And so do we, to a large degree. We rely on that information in exactly the same way."*

62. At (T113 27/9/04) Mr Reynolds was asked by his counsel why qualifications were not checked:

*"Well, it's a very unusual thing to do in our industry. Our industry, generally speaking, does not do that. We certainly, as a company, had never done it and still do not do it. If a client wants those things checked they will ask for it ..."*

63. Mr Loader said that he had never required proof of qualifications in his entire career.
64. The proposal of Gerard Daniels, as has been observed, suggested that the selection process would involve confirmation of qualifications. In evidence Mr Lloyd Smith said that academic qualifications had not always been checked by his firm and that prior to the firm undergoing a quality assurance certification in 2001, it was an individual practice that some did and others did not. It became formalised as part of the QA procedures.
65. The evidence was surprising inasmuch as it revealed an inconsistency between the current practices of MRA and GDA with respect to checking qualifications. It may not be reasonable for a client of a recruitment consultant to expect that the veracity of documents evidencing academic qualifications be checked with the issuing institutions, but to require a candidate for a position which specifies the desirability of "*tertiary qualifications in an appropriate business discipline*" to provide documentary proof of such qualifications would appear, as a matter of observation, to be one of the most basic elements of due diligence. Local governments and their officers ought, therefore, in future ensure that relevant certification is attached to any CV, resume or consultant report for consideration.

### **Final Candidate Interviews: 11 August 2001**

66. On 3 August 2001, a letter was sent to all of the interviewees (0505WR31) informing them of the scheduling of interviews on 11 August 2001. It further informed them of the format of the interview, which would be for a duration of 1 hr and 15 minutes and would comprise a 20 minute presentation (10 minutes on the candidate's history and 10 minutes on what the

candidate believed he could contribute to the City) followed by questions from the selection panel.

67. Prior to the interview date, the questions to be asked of the candidates were compiled by Mr Loader and Mr Reynolds: 2809WR19. These questions were forwarded to all councillors for their comment. The questions were forwarded to all candidates prior to their interview. They were as follows:

- (1) *What appeals to you about the position of CEO at Joondalup?*
- (2) *What would be the first strategic activity you would undertake upon joining the organisation?*
- (3) *How would you go about building a rapport with current staff and the Council?*
- (4) *How do you see your role from a public relations and community image standpoint?*
- (5) *How would you describe your leadership style?*
- (6) *What do you see as being your prime responsibilities as CEO?*
- (7) *Could you talk to us about a major project that you have undertaken in recent times?*
- (8) *Please tell us about the most difficult decision that you have made in management and the outcome?*
- (9) *Can you provide an example of change management that you have dealt with? How did you get it approved and implemented?*
- (10) *All roles have frustrations and difficulties. Can you give an example where you failed to reach an objective and how you dealt with that?*
- (11) *Could you please tell us about how you have brought together different organisations to create projects that have benefited the local community?*
- (12) *How would you describe your character outside of the work environment?*
- (13) *What would you describe as being your most significant achievement in life?*
- (14) *How do you see yourself working with councillors and ratepayers during Council meetings and day to day?*

68. On 11 August 2001 the interviews of the candidates took place. Five candidates were interviewed as one had withdrawn. The interviews were conducted as part of a formal meeting of the selection committee: 2909ML32. The candidates were interviewed by Mayor Bombak and Crs Kadak, Kenworthy, Walker, O'Brien, Carlos and Hurst. Crs Mackintosh, Barnett, Baker and Hollywood attended and were permitted to participate in scoring the candidates. The top three candidates ranked according to score were Mr Stephen Hains, Mr Smith and Mr Graham Foster. Mr Reynolds was asked to enter into further discussions with those candidates.

69. Each candidate was interviewed by the committee in the same manner with each giving a personal presentation and then being asked the set questions to which they provided their

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responses. The elected members had copies of the full candidate report on each. The questions were asked by a selected number of committee members and each response was marked on a one-to-five scale. The score sheets also required councillors to rate presentation skills, communication style, demonstrated knowledge of requirements of the role, appropriate experience and sensitivity to issues and requirements of City of Joondalup. After each candidate's interview the score sheets were collected and tabulated by the human resources staff.

70. None of the set questions asked of the candidates addressed their formal educational qualifications. However, it is not clear to what extent the candidates made reference to their education in their presentations, or incidentally in response to formal and informal questions from the committee. It would be surprising if none of the candidates mentioned their academic achievements in their presentations, as some were quite impressive and the 20 minute presentation, of which 10 minutes was allocated to personal background, allowed such opportunity.
71. Cr Mackintosh, though not a member of the committee, made notes of the candidates' presentations and interviews, recorded a number of references in these notes to university qualifications: (2901CJM1). Her notes indicate that Mr Hains mentioned that he graduated in economics and had a degree in urban planning from Scotland. She noted that "Candidate F" made reference to "*Social degrees*" and that "*Candidate E*" had a Master of Business degree: (2303 MCOB 1E).
72. Cr Walker expressed a very clear recollection that Cr Carlos asked questions of some candidates as to their qualifications –

*Now, do you recall academic qualifications being raised in the interview of any candidate?---I do recall that at least a couple, maybe two or three, of the candidates were asked about their academic qualifications by Councillor - - then Councillor Carlos. (T2281 25/11/04)*

...

*I do remember that Councillor Carlos did ask at least a couple of them questions about their tertiary qualifications as well.*

*And do you recall what the terms of Councillor Carlos's questions were?---I think something along the lines of, "Can you tell us about your educational qualifications, please?"*

*And do you recall what - - I think you said you recalled - - believed that B was asked that question?---I do believe that B was asked that question.*

*Do you recall him giving a response?---Yeah, I do - off the top of my head right now I can't remember what it was - because at the time I was thinking, "Why are you asking this question because it's already in the document that we've got in front of us" and I opened the document to that page to see what he said and what I was reading was what he was saying - "I've done this at this university and I've done that at that university, and I've been here and I've been there" and it was what was said - - basically, what was said on the document so I didn't really question it again. I don't remember what was actually said, just that I had actually looked at it and said, "Oh, yeah, okay. Well, that's what it is. Why are you asking this question? We've already got this information."*

*And in Mr Smith's case?---Again, I opened the book up and I thought, "We're still doing it. We're asking questions that we already have the answers to" and then what was said - - I was looking at it. "Yep", "Yep", "Yep", "Yep", "Yep", okay, close the book. (T 2284-6 25/11/04)*

However, she conceded, when examined by Mr Birmingham QC, that:

*"I do believe that [Mr Smith] was asked about his qualifications, but I may have been mistaken."*

Ms Walker stated unequivocally in her police statement that:

*"Don Carlos asked each candidate about their qualifications."*

However, as the passage from her evidence to the Inquiry indicates her recollection at that time was not the same as is indicated in the statement to the police. The evidence of Mrs Mackintosh, on the other hand, was not so clear as to what she recalled, but exhibited a keenness to deny that the questions addressed tertiary qualifications:

*COUNSEL ASSISTING: The questions that were asked of the candidates, do you recall whether they addressed any matters in the - -specifically addressed any matters in the CVs or the confidential reports you received?---I specifically remember that none of the questions addressed any tertiary or academic qualifications. (T4412 28/01/05)*

*What does "good quals" mean?---Qualifications.*

*Is that educational qualifications?---It may be. It may be qualifications as an administrator or as a CEO in Warringah. Yes.*

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*PRESIDING MEMBER: It appears you've said, "Good mediator skills", dash, "good quals"?---Yes.*

*Does that help you in understanding what your - -?---Well, I've also put "negotiation skills" and "planning experience", so - -*

*All right.*

*COUNSEL ASSISTING: Now, does that indicate to you that he said something in his presentation about his qualifications?---As I stated no questions were asked of qualifications and I don't - - I'd be talking about academic qualifications, and none were spoken by the candidates.*

*So you don't - - would that observation be made on the basis of the confidential report in that case?---I would imagine that if a candidate has given a CV that they wouldn't - - they wouldn't mention in their interview.... (T4414-5 28/01/05)*

*Now, when you say "good quals" after the words "good mediator skills" you're saying you weren't referring to his educational achievements?---What I can tell you about Mr Smith despite my comments at the top of the page, in the middle of the top of the page regarding the stature of the gentleman, the moment Mr Smith started to speak he had my undivided attention. He was a very good speaker and he was very impressive, that I do recall, from a man of such slight stature.*

*Well, did he speak to his educational achievements?---No.*

*Okay. Do you recall what he said that caused you to write the words "good quals"?---I have no idea. I may have meant good credentials but it's just - - it's just the scribble on a page while I'm listening.*

*Well, in relation to candidate B over the page, you've noted "grad economics" and "degree urban planning Scotland". What are those notes references to?---It must be a reference to something they actually said in their presentation.*

*Did you - - can we accept that you thought those statements were noteworthy?---I'm - - I can't comment. It was too long ago.*

*I mean, they were worth noting?---All that occurs to me is the more notes I've made about somebody the less they must have held my interest.*

*Candidate B had very impressive educational qualifications, didn't he?---Which candidate?*

*The one whose - -?---The one we're speaking about.*

*- - sheet we're looking at?---Yes. I imagine so.*

*It can't have escaped your notice?---This - - at the point we're talking about I am sitting listening to the candidate's presentation. I'm not - - I'm not sitting here looking at his - - at the notes on him. I'm listening to what the candidate is saying.*

*Is it the case then that at least this candidate spoke about his educational achievements?---He may have done. (T4421 28/01/05)*

74. The quality of evidence of many former and suspended elected members was unsatisfactory in terms of reliability because of poor recollection and imprecision. In many cases this was surprising, having regard to the importance of the events to the individuals concerned and the relative recency of their occurrence. In many cases poor recollection and imprecision were accompanied by prevarication, occasionally leading to periods of torturous examination. Mrs Walker apparently had a more detailed recollection of questions being asked of candidates qualifications than some other witnesses, her testimony evidencing a precise recall of events. However, her recollection that Cr Carlos asked questions concerning Mr Smith's qualifications diverges from that of others who were present and varied over time. Whether or not questions were asked of Mr Smith in relation to his qualifications at the interview is irrelevant to the materiality of Mr Smith's representation to MRA that he held certain academic awards. However, the issue is of some significance in terms of what occurred subsequently because Cr O'Brien came to the view which he expressed unequivocally in evidence that Cr Carlos had lied to the Minister in a letter of 20 December 2002 and to the elected members in his e-mail of 19 May 2003 when he stated his recollection that he asked questions of all candidates in respect of their tertiary qualifications.
75. The issue of qualifications was raised in November 2002, 14 months after the interviews. The question as to what, if anything, was said about qualifications at the interview was not of any significance to the Council until Mr Smith's solicitors, Blake Dawson Waldron, wrote to Council on 15 May 2003: (1810DSC27). That letter stated:

*"Mr Smith was interviewed on a second occasion in the Council chambers by the selection committee (including Cr Carlos) and asked to address a number of questions by the Council's selection committee which he answered. The emphasis of discussions was placed on our client's experience both in private enterprise and government. There were no questions asked relating to our client's qualifications."*

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76. Mayor Carlos, as he then was, sent a detailed memo to councillors on 19 May 2003 (1810DSC31) in which he stated:

*“Prior to the interviews, it was decided we would ask the same questions of each candidate and I was responsible for the questions relating to tertiary qualifications. Each candidate confirmed the tertiary [qualification] stated on the CV to be correct and my recollection of the day was that Smith clearly stated he had a Bachelor of Business (Management).”*

77. This statement was clearly incorrect, as the set questions did not address qualifications. In his letter to the Minister of 20 December 2002 (0905DSC130) he said, *“I specifically asked each applicant about his professional qualifications during the interview process”*. In Mr Carlos’ statement to police on 24 June 2003 (1310DSC3) he said:

- 13. The selection committee received a total of 14 questions that were going to be put to the applicants.*
- 14. The selection committee discussed the 14 questions to decide if the questions were appropriate and if any further questions were required to be asked of the applicants.*
- 15. The committee decided on the 14 questions. It was also decided the same questions were to be asked of each applicant.*
- 16. The questions that were going to be put before the applicants related to the applicant’s previous work related experience, their management abilities and what the applicant believed their responsibilities as chief executive officer entailed.*
- 17. There were no questions in the 14 questions related to the applicant’s education qualifications.*
- 18. Each applicant was interviewed and I asked each applicant about their educational qualifications.*
- 19. I asked this question because I wanted to ensure the successful applicant would be suitably qualified with the appropriate experience and educational qualifications.*
- 20. I cannot specifically remember what questions I asked of Mr Smith about his educational qualification.*
- 21. Neither can I remember specifically what Mr Smith’s response was to my questions about his educational qualifications.”*

78. Mr Carlos was asked in evidence whether he asked any questions. He said he could not recall whether he was given a formatted question or not. At (T779 13/10/04):

*COUNSEL ASSISTING: In respect of any of the candidates did you ask any questions that weren't formatted or make any comments? --- I was concerned about education qualifications. I did ask some candidates about their education – if they spoke about it during their presentation or during their answers. I am told, and this is in previous evidence, by two other councillors who were there that I did ask Mr Smith about his education qualifications. I can't – I cannot – as I have said to the Parliamentary Inquiry, I myself cannot recall whether I specifically asked Mr Smith about his education qualifications. I did ask some candidates about that but who I can't recall. I've tried to, but I am sorry.*

79. Mr Carlos recalled that Cr Walker gave evidence before the Standing Committee on Public Administration and Finance of the Legislative Council to the effect that she recalled Mr Carlos asking a question of Mr Smith about qualifications and that Cr Hollywood did likewise, but he had said to both of them that he could not recall who he had asked questions of: (T781 13/10/04).

80. Mr Carlos said at (T788 13/10/04) that he had never said that he asked Mr Smith any questions. He said that when he was interviewed by the Detectives he had difficulty confirming or denying that he had specifically asked Mr Smith a question, but recalled that he did ask at least one or two candidates about educational qualifications. He was then taken to his police statement and it was put to him by Counsel Assisting that his evidence conflicted with that statement. He said at (T790 13/10/04):

*COUNSEL ASSISTING: Which account is correct? --- Oh I – the – what I said today was correct. I've tried to think back to the whole of the thing. I mean, we're talking about a couple of years and then I thought, "did I ask -?" after giving that statement I then couldn't remember whether I did ask everyone or I didn't ask everyone. And I believed I asked questions but I can't remember whether Smith was involved. I then had to tell Cr Walker – I told Cr Walker that I intended to change it when we went to the Parliamentary Inquiry, and I believe I said – I changed it when we went to the Parliamentary Inquiry. You may have the evidence there. I haven't checked on that.*

...  
*COUNSEL ASSISTING: Was your account to the police mistaken in relation to whether you asked questions of Mr Smith? --- At the time, when I was asked the question by the police, I believed I did ask Mr Smith. But then my recollection at a later time – I tried to think, did I specifically ask Mr Smith, and I then couldn't recall. So I believe that I had the right to change what I was saying, because I knew I – I was*

*interested in education qualifications, but I can't recall whether it was Smith or not. But I did ask the question of some of the applicants.*

...

*Do you now recall whether you asked anyone questions about their qualifications? --- My – my belief I did ask questions of some candidates, yes.*

*Do you recall which candidates they were? --- No, I don't. – Do you recall what questions you asked? ... Oh, it would have been for them to confirm what they'd – if – it was – my recollection was trying to get people to confirm their education qualifications and the studies they'd completed.*

81. Mrs Walker's police statement was signed on 19 June 2003: (2311SRR4). In it she said:

- "17. During the interview of Mr Smith, Cr Don Carlos asked Mr Smith if he had any tertiary qualifications.*
- 18. Mr Smith said "I have a Bachelor of Business Management from the University of Technology in Sydney and I also have Post-graduate Diploma in Environmental and Pollution Studies also from the University of Technology".*
- 19. He also told us he had some kind of Town and Country Planning certificate or qualification and some kind of Land Surveying qualification.*
- 20. I can't remember exactly but he said one of those qualifications was gained at RMIT. I believed RMIT is the abbreviation for the Royal Melbourne Institute of Technology as I studied at the same institute.*
- 21. I was checking Mr Smith's qualifications on his curriculum vitae as he was confirming them to the councillors.*
- 22. I can't remember if we were required to score the candidates on their qualifications.*
- 23. From memory I believe there was a place on the interview sheet for scoring the candidates but I can't say for sure.*
- 24. There was no other question asked of Mr Smith about his educational qualifications.*
- 25. Don Carlos asked each candidate about their educational qualifications.*
- 26. Mr Smith was asked a number of other questions about his management techniques, his experience, his ideas on Joondalup City and the reasons why he wanted the job.*
- 27. I wasn't allowed to ask any questions of the candidates. I was only there as an observer and to give the candidates a score.*

28. *Don Carlos, Michael O'Brien, John Bombak, the Mayor, and Judith Hurst were allowed to ask the questions."*

82. Mr Loader made a statement on 23 June 2003 (2311SRR9). Relevantly he said:

*"40. There were 14 interview questions, which the prospects would be scored from one to five, five being the most favourable.*

*41. Crs Don Carlos, Paul Kadak, Chris Baker, Judith Hurst were allowed to ask the questions. The questions ranged from why the prospect wanted the position to their different experiences, their leadership qualities, their management style and what vision they possessed for the future of the City of Joondalup.*

*42. ...*

*43. There were no questions on the question sheet regarding the prospects' educational qualifications.*

*44. We were under time constraints so prior to interview process beginning all the councillors and the Mayor were informed that no questions would be put to the prospects that were not on the question sheet.*

*45. Gerry Kenworthy was the only councillor not present when this was discussed.*

*46. This subject was discussed at the time it was decided which councillors were going to be empowered with asking the questions of the prospects.*

*47. Any questions asked outside the question sheet given to the councillors were only questions that could expand on the answers given by the prospects to the question that was put to them from the answer sheet.*

*48. The Mayor was the only one to ask a question outside the answer sheet and that question was not to Mr Smith. The question the Mayor asked one of the prospects was about what the prospect's opinion was on the relationship between the office of the Mayor and the office of the chief executive officer."*

83. Mr Loader gave evidence on point at (T361 29/9/04):

*COUNSEL ASSISTING: I think you said earlier, Mr Loader, that some of the candidates spoke about their academic background; do you recall which of the candidates did so? --- I think --*

*There were only five candidates interviewed in the end, is that right? --- Yes, I think the third did.*

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*PRESIDING MEMBER: So you're talking about the one just after morning tea? --- Yes. I think Steve Hains did as well. And Denis Smith did.*

*COUNSEL ASSISTING: Did he? --- Yeah, just briefly. It was about – certainly for Denis, it was about a planning and the – more in terms of experience than qualifications. The others, I'm not sure.*

84. The inconsistency between Mr Loader and Ms Walker as to who asked the questions can be resolved to some extent by reference to Cr Carlos' notes of the interview of Mr Foster (1310DSC6) which showed his contemporaneous annotations suggesting that the interviewers on that occasion were Cr Kadak, Cr Hurst, Cr Baker, and himself. In this respect, therefore, Cr Walker's police statement appears to be mistaken. There is also a difference in the accounts with respect to the extent of questions, Mrs Walker stating that there were questions asked outside of the set questionnaire, including Cr Carlos' question about qualifications and others, and Mr Loader expressing the recollection that the only question asked that was not on the questionnaire was a question by the Mayor of a candidate other than Mr Smith about the relationship between the offices of Mayor and CEO.

85. Ms Hurst's statement was given on 24 June 2003: (2311SRR10). She said:

*“11. Recruiters Australia in liaising with Mark Loader, the human resource manager for the City of Joondalup prepared 14 questions to be asked of the applicants.*

*12. All the applicants to be asked the same questions.*

*13. Warren Reynolds from Recruiters Australia told the committee they could not ask the applicants any questions other than the 14 questions unless the [questions] they were asked were question[s] that expanded on the answer given by the applicant to one of those 14 questions.*

*14. None of the question[s] related to the applicant's educational qualifications.*

*15. I have no recollection on (sic) any questions being put to the applicants about their educational qualifications.”*

86. Mrs Mackintosh gave a statement on 25 June 2003 (2801CJM8) in which she said:

*“10. Prior to interviewing the applicants the selection committee received 14 questions that were to be asked of the applicants.*

*11. None of the 14 questions related to the applicants' educational qualifications.*

12. *I cannot recall any questions being asked of the applicants about their educational qualifications.”*

87. As has been noted, in evidence Mrs Mackintosh was definite on the point. After being asked about her note “good quals” at (T4414 28/1/05) the following exchange occurred:

*COUNSEL ASSISTING: Now, does that indicate to you that he said something in his presentation about his qualifications? --- As I stated no questions were asked of qualifications and I don't – I'd be talking about academic qualifications, and none was spoken [sic] by the candidates.*

88. Mr Kenworthy also provided a statement on 25 June 2003: (0303GAK2). He said:

*“8. Prior to interviewing the applicants a set of questions was provided by the recruiting company to the selection committee, which were to be asked of the applicants during their interviews.*

*9. There were no questions relating to the applicants educational qualifications amongst those questions.*

*10. Each applicant was going to be asked the same questions.*

*11. During the interviewing of the applicants no applicant was asked any questions about the educational qualifications.”*

89. In his statement dated 27 June 2003 (2311SRR11) Mr Hollywood said:

*“11. Prior to interviewing the applicants the selection committee received a number of questions that were to be asked of the applicants.*

*12. Each councillor had the opportunity to ask the applicants one of those questions.*

*13. Each applicant was provided with the questions prior to interview.*

*14. From memory I don't believe any of the questions were about the applicants qualifications.*

*15. I do not recall any of the applicants being asked any questions about their educational qualifications.”*

90. He added that he assumed Recruiters Australia would have vetted each applicant's qualification before they were interviewed. Mr Hollywood said in evidence at T2387

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26/11/04 that the only councillor he could recall asking questions other than those that were listed was Cr O'Brien who asked the candidates whether they preferred the pyramid system or the flat system, but apart from that he could not recall.

91. Ms Barnett stated in her statement of 27 June 2003 (2311SRR12):

- “11. The questions were standardised so that each applicant would be asked the same question.*
- 12. From memory there were no questions that related to the applicants qualifications.*
- 13. The applicants were not asked any questions about their educational qualifications during their interviews.*
- 14. The question[s] related to the applicants skills and abilities.”*

92. Ms Barnett stated that she was not concerned about the educational qualifications of the applicants. Ms Barnett had difficulty recalling the interview process at all. She could not recall Mr Smith mentioning that he had qualifications as a mediator or that there were presentations provided by the candidates before the interview. She did recall scoring most highly a person she described as rather tall but whose name she could not remember.

93. Mr Bombak also gave a statement on 27 June 2003: (2311SRR13). He said:

- “14. It was recommended that the same questions be asked of each applicant.*
- 15. During the interviewing of the applicants no applicant was asked about their education qualifications by the elected members.”*

94. Mr Reynolds' statement of 1 July 2003 (2311SRR5) states:

- “42. After consultation with the councillors a set of 14 questions were decided upon that were to be asked of each candidate.*
- 43. There were no questions relating to the educational qualifications of the candidates.*
- 44. I was present during all the final interviews; I don't recall any questions being directed to the candidates asking about their educational qualifications.”*

95. At (T223 28/9/04) Mr Reynolds was asked whether any questions apart from the set questions were asked and said, *“I think there was a little bit of discussion at times but – and a little bit of extrapolation of the question but not to a large degree, I don’t think”*.

96. Mr O’Brien said in his statement of the same date (2311SRR14):

*“10. The same questions were to be asked of each candidate.*

*11. There were no questions relating to the formal qualifications of the candidates.*

*12. I recall the interview with Mr Denis Smith who was one of the candidates.*

*13. No questions were put to Mr Smith about his formal educational qualifications.*

*14. No candidate was asked anything about their formal qualifications during the interviews.”*

97. Mr O’Brien said he was not concerned about the educational qualifications of the candidates, more about the candidates’ career summary. Mr O’Brien said that “Candidate D”, during the course of his presentation, mentioned that he had attended a university which was known to Mr O’Brien but that none of the other candidates spoke of their educational achievements: (T6057 23/2/05). He was asked whether any other questions were asked from those set out in the questionnaire. He said that Cr Baker asked Mr Smith what sporting activities he had been involved in and that he had asked Mr Smith whether he preferred a pyramid type structure of administration. He could only recall one reference to a candidate’s qualifications.

98. When Cr Mackintosh’s notes were put to Mr O’Brien he agreed that “Candidate B” probably did mention his qualifications. He was asked about Cr Mackintosh’s notes in relation to “Candidate E”:

*COUNSEL ASSISTING: And again you see there’s some notes on the – on the page on the right hand side towards the top which appear to indicate personal details and it says “degree: MB WA uni”? --- I don’t recall that – mention of that but in a presentation unless you’re making notes of –*

*Yeah. I’m just wondering whether you recall any information being delivered, other than what you indicated before, by candidates in the course of their presentations about what educational achievements they – they had? --- No. I don’t recall any others and there were – the main area was in the questions. The presentations that were*

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*being made were made first and the main area that we were concentrating on I guess would have become the questions rather than the – I suppose the initial presentation.*

99. Mr O'Brien was then asked about Cr Mackintosh's notes in relation to Mr Smith:

*It says – starts off, I think, "Warringah" and then its crossed out and "Barringah", but whatever caused that the next point is "good mediator skills – good quals". Can you recall Mr Smith talking about his mediation skills or any qualifications that he had? --- From memory he mentioned something in the presentation about mediation. I don't recall him identifying any particular degree or anything like that or anything. Might he have just referred to his – to the information that he had given the consultants? --- Yeah. Yeah. I noticed that Cr Mackintosh has put a couple of asterisks alongside "planning experience" but – yeah.*

*When you read – you told us before that when you read the summaries that Mr Reynolds prepared when you were doing that initial ranking - ? --- Yeah? – that you didn't pay any attention to the educational qualifications? --- No. I –*

*That's right, isn't it? --- I guess we're all products of our environment to a certain extent and my environmental background hasn't been in the academic field. I left school at 14 years of age.*

*Yeah. So if there are reference – what I'm putting to you is that if there are references made to educational achievements in the inter – in the presentation or the interview process that you would not have been anymore concerned about those than you were - ? --- Whether it had – whether it had been made or hadn't. I –*

*That wasn't what you were? --- No. – particularly looking at? Is that right? --- that's right. (T6066 23/2/05)*

100. Mr Baker, in his statement of 2 July 2003 (2311SRR15) said:

- "18. The same questions were to be asked of each applicant.*
- 19. From my recollection the applicants may have been provided with the questions prior to the interviews (proper) commencing.*
- 20. There were no questions in those 14 questions that related to the educational qualifications of the applicants.*
- 21. No applicant was asked any questions about their educational qualifications, any allegation to the contrary is manifestly false and misleading.*

22. *The questions that were asked of the applicants were of a general nature about their experiences and personal interests etc.*

...

28. *I did not consider Mr Smith's or any of the applicants' formal tertiary educational qualifications would be of much relevance at all."*

101. Cr Baker's statement is notable for his assertion that he believed the police investigation was "*a purely party politically motivated investigation*", and that there had been ministerial interference and directives given to public sector employees to instigate the investigation amounting to official corruption. He went on to state that he thought that the investigation signified malice towards Mr Smith. Mr Baker's recollection in evidence was that he was present during the interviews and recalled asking a question about Mr Smith's interest in rugby. He said the questions were largely set questions but he did not recall any directive that councillors were not permitted to ask other questions. Yet he said he could confirm that no questions were asked of any candidate, including Mr Smith, about tertiary qualifications.
102. As can be observed, a number of witnesses were inclined to emphasise their interest in career experience rather than educational qualifications. At the time of the interview process the shortlist of candidates had been selected on the basis of their educational and work background and all were considered by Mr Reynolds to fit the selection criteria. They were all "*suitably qualified*". It is understandable, therefore, that a number of councillors by that stage were not concerned with the details of educational qualifications, but Cr Carlos and Cr Walker were, and the evidence is clear that Cr Mackintosh noted details of qualifications of some candidates in her notes of the interviews.
103. It is open to the Inquiry to find that none of the witnesses' accounts is entirely satisfactory in terms of the detail they provide of the actual questions asked, and that it is not possible to conclude to any reasonable standard whether information about qualifications was provided by candidates in the course of their presentation or in responding to questions asked during their presentation or during their formal interviews.
104. Certainly, there was no set question on qualifications and this fact and the lack of interest of most councillors in qualifications at that stage tends to explain why they would have little, if any, recollection of whatever the candidates may have said about qualifications.
105. However, the recollection of Mrs Walker of questions being asked about qualifications, corroborated as it is by Mrs Mackintosh's notes for Mr Smith of "*good quals*", which may

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be open to various interpretations (some of which she proffered in evidence), but is consistent with notes made of other candidates qualifications suggest the possibility that Mr Smith may have disclosed his qualifications, probably in the course of his presentation, rather than in response to a question in the interview stage. It may be that this possible state of affairs led to Mr Carlos' belief that he had asked questions on the topic.

106. Mr Carlos had a poor recollection of the meeting and did not take enough care in ascertaining the accuracy and truth of the statements he made in his letter to the Minister in December 2002 and in his e-mail to elected members in May 2003. There is no direct evidence that Mr Carlos did not honestly believe those statements at the time that he made them. His recollection and belief as to what, if anything, he asked Mr Smith, has varied over time based upon information he has had from others who were present, particularly Ms Walker and Mr Hollywood, and what appears to have been a genuine attempt to reconstruct to the best of his knowledge and belief what occurred. His ultimate evidence and submission to this Inquiry continue to assert a belief that he raised the matter of qualifications during the interview of Mr Smith. I am not satisfied to the requisite standard that when Mr Carlos made those statements in December 2002 and May 2003 he was deliberately saying something which he then knew to be false. I, therefore, do not conclude that he lied.
107. However, I am satisfied, that, in the instances of the statements made in December 2002 and May 2003, he was not sufficiently concerned and had not made sufficient enquiries of others present, to ensure that the statements he made to persuade others were accurate and true. Regrettably, this contributed to a significant loss of confidence in him on the part of Cr O'Brien and other elected members who had a different view, based on their own recollections of what had occurred, and believed (and continue to believe) that Mr Carlos had lied about those matters.
108. At the conclusion of the interviews the scores given by each councillor present were tabulated and recorded on an evaluation matrix for comparison. The three most highly scored candidates, in order, were Mr Hains, Mr Smith and Mr Foster.
109. Mr Reynolds was instructed to contact the three candidates in order to gauge their interest in the position: T242 28/7/04. Mr Loader also said that the reason for further discussion with the candidates was "*in terms of trying to work out whether they really wanted the job, the kind of package that they were looking at*": T378 29/9/04. The minutes of the meeting

record that the Committee would meet again on Monday 13 August 2001 to analyse the score and determine the preferred candidate.

## Candidate of Choice

110. At the meeting of the committee on 13 August 2001 Mr Reynolds presented a verbal report that he had contacted the three highest rating candidates and all had confirmed their interest in the position. The minutes record that the committee discussed these three candidates and agreed to submit a report for the Council meeting on the next day: (2909ML33). Subsequently, Mr Reynolds presented a report on his conversations with the top three applicants to the Council meeting of 14 August 2001. Mr Reynolds recommended Mr Smith as the candidate of choice, on the basis that he indicated a greater level of interest than the other two: (2709WR8). The report sets out Mr Reynolds' recollections and impressions of the candidates gained from his telephone discussions with them. In relation to Mr Hains, Mr Reynolds said:

*“Stephen was somewhat reserved about his level of interest in the position and stated that he would be reasonably positive and would consider an offer if it was made to him. He said that he would need to consult his wife and that he would like to spend some time with the mayor to establish a stronger rapport as well as assess the offer prior to making a total commitment...”*

He indicated that Mr Hains was looking for a package of around \$222,000.00. Of Mr Smith he said:

*“Denis stated that he was very enthusiastic about the possibility of joining the City of Joondalup and that he had no hesitation as being put forward as a serious candidate. He is positive about working for the City of Joondalup and feels that he could make a significant contribution to the region...”*

Mr Reynolds said that Mr Smith had a remuneration package of \$225,000.00 and was happy to accept a similar package. Of Mr Foster, Mr Reynolds said:

*“In discussions with Graham he also showed significant enthusiasm and wanted to meet with the Mayor should he be considered the candidate who would be made an offer for the role. He felt he would have to have a one on one meeting with the Mayor before making his final decision and total commitment to the role...”*

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He informed Council that Mr Foster was looking for a package of \$220,000.00 - \$225,000.00.

111. Mr Reynolds recommended as follows:

*“I have been asked to give you a recommendation based on my discussions with these 3 candidates and I believe that given the degree of enthusiasm for the role, his commitment to moving to Western Australia and his background combined with the discussions held last Saturday I have no hesitation in recommending that Denis Smith be the candidate of choice. The other candidates: Stephen Hains who has been somewhat reserved about his commitment towards the Council, and with Graham Foster being somewhat reserved combined with scoring less points, puts these candidates as Denis Smith first, Graham Foster second and Stephen Hains third. This is solely based on my discussions with them in the last 24 hours and the results achieved in the assessment matrix last Saturday. I believe that all three candidates could adequately achieve results on behalf of the Council in this role and that all 3 would make excellent Chief Executives. Denis Smith has a degree of enthusiasm and commitment to coming to Western Australia, which I believe, puts him ahead of the other 2 candidates.”*

112. The Council received Mr Reynolds’ recommendation as part of a report to Council at its meeting of 14 August 2001. Council resolved formally to authorise him to undertake further discussions with the candidates in the order of preference set out in his report with a view to finalising an appointment with a remuneration package of \$220,000.00 - \$230,000.00.

113. Mr Reynolds was examined extensively about his decision to recommend Mr Smith as the candidate of choice. At (T249 28/9/04):

*COUNSEL ASSISTING: So what happened at that point? Where did – what was decided by the selection committee on the Saturday afternoon after the interviews had - ? --- That we would go away and find out their level of interest.*

*Wasn’t their level of interest apparent at that point, from the interviews? --- No, I think they needed time to consider that over a couple of days and see what their level of interest is, or if they had expressed it to me afterwards, we certainly need to go and talk to them. They certainly didn’t – you know, there was no time or opportunity really for them to express that.*

*Did you converse with Mayor Bombak at that time? --- I think I did, yes.*

*Did he indicate who he thought was the preferred candidate? --- Yes, I think he did.*

*Did he say that was Mr Smith? --- I believe he did, yes.*

*Did Mr Loader tell you he thought Mr Smith was the preferred candidate? --- Yes, I think he did.*

*Did your decision to prefer Mr Smith reflect the information you got from Mayor Bombak and Mr Loader, that he was their choice? --- It has to.*

*So it ceased to be an objective assessment at the point where you recommended Mr Smith on the basis of Mayor Bombak's preference, and Mr Loader's preference, didn't it? --- Certainly as the person he was going to be reporting directly to on a day to day basis and working with to meet their aims.*

*PRESIDING MEMBER: Well, until the next election? --- Well, or until the next election. I can't judge that or make an assessment of whose going to be the Mayor at that point.*

*COUNSEL ASSISTING: Its not stated in your report on the final three candidates, is the fact that you were influenced by Mayor Bombak's desire to have Mr Smith? --- Probably not, but I was – I don't – don't believe there's any reason not to be influenced by him, given he was the person leading the exercise. It didn't involve any exercise of expertise on your part to come to that decision, did it? --- Not really, other than – I mean – they felt that he was a great candidate for the role. He certainly scored well on the matrices so – (T251-252 28/09/04)*

114. Counsel Assisting suggested that Mr Hains was, on an objective assessment, the preferred candidate and that the degree of expressed enthusiasm of the candidates was not at an appropriate basis upon which to distinguish them:

*COUNSEL ASSISTING: You think you may have given the – distinguished the candidates on the basis of reservation of the enthusiasm of two of them, simply to disguise the true reason for preferring Mr Smith? --- I don't believe so. Because whether everybody - ? --- Mr Hains is actually a quite conservative, reserved sort of guy in some respects.*

*He wasn't as effusive as Mr Smith was? --- Sorry?*

*Not as effusive as Mr Smith? --- Correct.*

*That from what you've already said, by Saturday afternoon, after your conversation with Mr – with Mayor Bombak, you understood that Mr Smith was the person for the job? --- I understand – I understood that that was the candidate they wanted to pursue above the others. And so the question –*

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*PRESIDING MEMBER: The difference between those two concepts? --- Well, its – you know, I don't think I was left in any doubt by the Council that they preferred Mr Smith's presentation, style, and that Mr Bombak had also preferred that. And it was up to me to try and establish whether the candidate still had the same degree of enthusiasm, and put that back to them for them to consider. I mean, at this point, now you're talking about something that becomes very, very subjective indeed."*

115. Further on at (T255 28/9/04) Mr Reynolds said:

*"People make subjective judgments in recruitment, and they hire people that they like, that are going to fit the team, who will deliver a result in concert with the rest of the team. And that team, in many respects, was John Bombak and the chief executive on the day. So in the end, you know, someone you like, someone you prefer, someone who is going to deliver the result that you want to be delivered. I'd say there've been very few exercises that I've ever been involved in where that wasn't, in the end, the key criteria (sic) for hiring the person."* (T255-266 28/9/04)

116. Mr Hains gave evidence that he held a Diploma of Local Government Administration, a Bachelor of Arts (Honours) majoring in Economics and Geography and a Masters Degree in Urban and Regional Planning. Mr Hains described his level of interest in the position as "very keen". His wife accompanied him to Perth for the interview. He said he was very definitely interested in taking up the position if he were offered it. He was very confident following the interview process that he would be offered the job. Asked about how he expressed himself to Mr Reynolds on the Monday following the interview he said the only reticence that he expressed was in relation to the salary. He had been indicated a figure of \$210,000.00 and was hoping for something in the order of \$220,000.00. He did not agree with a suggestion by Ms Archer, counsel for Mr Reynolds, that during his conversation with him on the Monday, he was trying to communicate his level of interest in the position. He said:

*"I didn't regard Mr Reynolds as being an important cog in the wheel in that sense. What I was trying to communicate to Mr Reynolds I think was – that I was expecting to be offered more than the amount of money that he was suggesting the position was going to offer."*

He agreed however that it was a "good analogy" to describe him as a "tyre kicker". (T7035-7036 11/3/05) He described the interview itself as follows:

*"[It was] a very formal affair in that people stuck very rigidly to the script that had been given by the consultant in terms of the standard questions to be asked and, of course, I was prepared with my answers for those and I rather felt that the interview*

*went very well. I was very pleased with the process of the interview and I think I could tell from my – from the body language of the councillors that they seemed satisfied with my responses, and then it came to the end of the interview when I was asking general questions of them there was a reasonable exchange, but it was a very formal interview and I am not sure that in that sense it probably would have been as effective from their point of view as it could have been. The only significant point that I would make is that, as I have noted previously in my statement – is that I felt that the Mayor – his body language indicated that he was not particularly interested in the process. He wasn't making eye contact and was fairly – I found him to be fairly brusque in his – in his treatment of the questions and I rather had the impression at the time that the Mayor may have already made up his mind, that as I left the interview I was very – very positive and I think I – you know – conveyed that to my wife, who was waiting outside for me.” (T7027 11/3/05)*

117. Mr Hains was the most highly scored candidate. He obviously, therefore, made a good impression on the councillors present at the interview. The candidate report of MRA showed that he had a 30 year career, commencing as a graduate trainee at the Department of Trade and Industry in Canberra, followed by work as an economist for a corporation in Adelaide, and then 25 years in local government, including six years with the City of Unley as City Planner, Deputy Town Clerk and Town Clerk, six years as Chairman of the South Australian Planning Commission, two years as the Director of the Planning Division of the Department of Environment and Planning in Adelaide and ten years as City Manager of the City of Salisbury. Mr Hains was an impressive witness whose responses and demeanour in the course of evidence tended to validate the Council's scored assessment of him as the best candidate.
118. It is evident to the Inquiry that Mr Smith, although clearly an impressive candidate, was preferred as the candidate of choice for the wrong reasons. The stated basis upon which Mr Reynolds recommended Mr Smith over Mr Hains was his perception of his level of interest. Mr Reynolds in his report on the top three candidates (2709WR8) had described Mr Hains as “*somewhat reserved*” but “*reasonably positive*”. He described Mr Smith as being “*very enthusiastic*” and having “*no hesitation in being put forward as a serious candidate*”. Whereas Mr Hains was seeking improvement in his current remuneration, Mr Smith was happy to accept the same package as he was on. Mr Smith was only half way through his Warringah contract. Alacrity might be due to many reasons, and circumspection does not necessarily betoken ambivalence. Professed interest is an unreliable guide. Given that the City was out to find the best candidate it may have been expected that such a candidate would need to be persuaded. Accordingly, reservation was hardly a valid cause for disqualification.

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119. Mr Reynolds' evidence that he was concerned to recommend a person who would meet Mayor Bombak's expectations seems, in all the circumstances, to hold the key to the final recommendation. Mr Reynolds and MRA had no experience of local government in Western Australia at senior officer level, and no knowledge of the legislation (although evidence was received that MRA did purchase a Local Government Act in the course of the selection process).
120. It was in the interests of the City to select the successful candidate on merit. Mayor Bombak's preference was not entitled to be given greater weight than that of the selection committee. Mr Reynolds' statement that he did not believe there was any reason not to be influenced by Mayor Bombak, reflects his lack of knowledge and experience of local government. The respective statutory roles require a Mayor and a CEO to liaise with each other, but that does not mean that the requirements and preferences of a particular Mayor should operate to influence a consultant who is required to make a recommendation to Council. The interests of transparency and accountability are not served by recommendations which take into account un-stated reasons.
121. The Council was ill equipped for the task of selecting a new CEO. The lack of experience of all persons involved in the exercise probably resulted in a lost opportunity to recruit the best candidate.
122. After the decision to select Mr Smith, Mr Reynolds carried out reference checks by speaking to referees nominated by him. He spoke to Mr Neil Howie, a senior partner of Wiltshire Webb, solicitors, on 17 August 2001. According to Mr Reynolds' notes Mr Howie had known Mr Smith for six years: (2709WR9). The notes indicate favourable remarks from Mr Howie who mentioned Mr Smith's ability to "*handle difficult people problems*" and that he had "*achieved a great deal through good delegation*". Mr Reynolds also noted: "*Great ability to deal with politics in Council*". Mr Howie was a legal advisor to Warringah Council. Mr Reynolds noted: "*Commercial legal knowledge excellent, but knows how to get the right advice*". According to Mr Reynolds' notes, Mr Howie thought that Mr Smith was the best CEO he had seen in 30 years.
123. Mr Reynolds also spoke with Mr Don Dwyer, "*former national director*" of Gutteridge Haskins and Davey on 16 August 2001. Mr Reynolds made notes of the conversation: (2709WR11). Mr Dwyer had worked with Mr Smith for five to six years. He described Mr Smith as "*nothing short of brilliant, dedicated to the job, easy to work with*" and as a

“*remarkable worker*”. In terms of problem solving and decision-making ability Mr Reynolds’ notes read: “*p/s very good. No difficulty. Can seek advice when needed. Politically astute*”. The other remarks were fulsome in praise of Mr Smith’s qualities and abilities.

124. Mr Reynolds also spoke to Mr Sam Danieli, former Mayor of Warringah, on 16 August 2001. His notes (2709WR10) indicate that Mr Danieli appointed Mr Smith to the position of general manager of Warringah and reported to Mr Danieli whilst he was the Mayor. According to Mr Reynolds’ notes, Mr Danieli said that Mr Smith worked well with Council and staff and with the Mayor. He was good at pinpointing issues, successful on environmental issues and had good implementation skills. Mr Smith was well liked and respected by his peers, subordinates and superiors. He said he worked well with Council, was a good communicator, and a good leader. He always did his homework and was well prepared for meetings. He “*gets things done*”.

### **Preparation of Employment Contract**

125. Section 5.36(3) provides that a person is not to be employed in the position of CEO unless the Council “*is satisfied with the provisions of the proposed employment contract*”.
126. Prior to 28 August 2001 when Council formally resolved to appoint Mr Smith, Mr Loader and Mr Reynolds were involved in the preparation of a draft contract. Mr Loader provided a precedent for a senior officer’s contract because he did not have the then CEO’s contract in electronic form: (T402 1/10/04). Mr Loader said in evidence:

*“Personally I was not involved in negotiating the terms of the contract. That was essentially between the recruitment consultant, Warren Reynolds, and I would send him a copy, he would send them back. I would actually reproduce what the changes were to some senior people in the organisation, and there was about four or five people within the City of Joondalup that from time to time looked at the contract, made various changes. Also at that time there was a sub-committee formed of, in my memory serves me correctly, Cr O’Brien, Deputy Mayor, Judith Hurst, Mayor Bombak and Cr Kimber, who were charged with the responsibility of working through the document rather than give it to the other 11 councillors because it was felt at that time that there would be too many people involved at that stage.”*

127. It is evident that the group described by Mr Loader was not a formally appointed committee of Council.

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128. Mr Scott Ellis of Freehills was instructed to advise on a draft contract which had been the subject of some negotiation between Mr Reynolds and Mr Smith by the time Mr Ellis was instructed on 24 August 2001. Mr Ellis perused the contract and suggested amendments, the reasons for which were set out in endnotes to the draft: (0112DSE1). Mr Ellis in an e-mail of 27 August 2001 to Ms Colreavy of MRA and Mr Loader (0110ML41) advised that the principal changes he suggested were:

*The insertion of an obligation to exercise reasonable care ...*

*Tidying up with the review processes. The two processes must interrelate but did not do so in the original draft.*

*Insertion of a right enabling the City to terminate on notice.*

*The issue of Mr Smith's temporary use of the Fairlane can conveniently be dealt with in a short letter between the parties.*

*The attached document also contains a series of comments dealing with issues raised by the draft agreement ....*

129. There was no formal letter of advice in relation to the contract. There was no advice provided in relation to the requirements of Section 5.36 although it is fair to say that no instructions were given for such advice. It is evident that the City afforded Mr Ellis very little time. Instructions were given on Friday, 24 August 2001 with a view to settling a contract in time for the Council meeting on Tuesday 28. Mr Ellis' first draft appears to have been printed at 11:13am on 27 August. Another draft was printed at 1:05pm the same day.

130. The final document was not prepared by Freehills but appears to have incorporated all of the amendments suggested by Mr Ellis except for his proposed clause 9.5 which read: "*This agreement may be terminated by the City giving three months written notice*". Mr Ellis' endnote in relation to that clause read: "*There does not appear to be any reason why the City ought not be able to terminate on notice*". Mr Ellis' endnotes also set out a number of other matters that do not appear to have been addressed before the finalisation of the contract. These included questions about the relationship between the "*key objectives*" and the "*key performance indicators*" in annexure 2, the vagueness of the key performance areas and the fact that a number of key performance indicators were not expressed as outcomes. Mr Ellis wrote:

*"It is appropriate that the KPI's be more objective, if Mr Smith's entitlement to receive an increase in salary will be determined by reference to them. The key objectives are much more concrete and suitable for this purpose. The agreement would work better if*

*Mr Smith's performance was measured by reference to these objectives. Part of the annual review could be to set new objectives for the following year."*

131. Mr Ellis' advice also questioned what "review" meant in the context of a performance review and what would actually be done. Mr Loader gave evidence that the termination on notice provision was not included in the final contract because he was of the opinion that it was unlawful. Mr Smith returned an executed draft contract to MRA by fax on 28 August 2001: (2809WR20A). This was premature, however, as the Council had not, by that stage, made a decision to enter the contract and the document signed by Mr Smith was not the final form.
132. At 4:17pm on 28 August 2001 Mr Damian Cronin of Freehills e-mailed Mr Loader and Mr Reynolds referring to previous discussions with Mr Ellis and attaching a revised draft of the contract which included provision for repayment of relocation expenses in certain events: (0112DSE4). Mr Cronin's advice adverted to Section 5.94 and Section 5.95 dealing with the right of the public to inspect the contract. In relation to a draft report which had been submitted to him by Mr Loader, Mr Cronin advised that he had no issue with the contents of the report, but recommended not naming the candidate in the report as "*at present he has not accepted the appointment on agreed terms and it may prejudice your position with respect to other candidates should he fail to accept the position*". There was no mention of Section 5.36.
133. Freehills was not instructed to represent the City in any contractual negotiations or to prepare and engross the final contract. Mr Loader gave instructions on behalf of the City. They appear to have been given informally with no clear record of being kept of the instructions given or the advice received verbally or in writing. None of the advice was communicated to Council by way of oral or written report.
134. The unsatisfactory nature of the informal exchange of instructions and advice was highlighted in the evidence of Mr Loader and Mr Ellis as to whether a term which enabled the City to terminate the contract without cause on three months (and in another draft 12 months) notice could be valid given that the contract was for a fixed term of five years. Mr Ellis footnoted this proposed amendment by saying that there appeared to be no reason why the City should not have power to terminate the contract on notice. Mr Loader was concerned that such term would not be lawful in a fixed term contract. He said it was the only amendment proposed by Mr Ellis which he did not accept. He had a telephone

conversation with Mr Ellis on this point of which Mr Ellis has no recollection and was unable to dispute.

135. On the accounts received in evidence it appears that Freehills' total costs relating to advice given in respect of the contract in the period 24 – 29 August 2001 was \$3,505.00 (excluding GST).

### **Decision to Appoint Mr Smith**

136. The resolution to appoint Mr Smith was made by Council on 28 August 2001. The officer's report did not purport to attach the proposed contract: (2809WR21). Nor did it indicate what, if any, advice had been given in respect of it. There was some evidence to suggest that the proposed contract was available to elected members at the meeting, but no evidence that any elected member read it, or that it was discussed. The minutes do not mention such a document. The motion was opposed by Crs Carlos, Nixon and Barnett for reasons which were unrelated to the merits of Mr Smith's selection. Essentially, the dissenting councillors did not, by that stage, support the replacement of Mr Delahaunty, particularly at an extra annual cost of \$35,000.00 to the City. The resolution was in the following terms:

*That:*

- (1) The Council appoints Candidate A to the position of Chief Executive Officer of the City of Joondalup on a five year performance based contract on a total annual remuneration package of \$225,000.00.*
- (2) The Mayor, Deputy Mayor and Mr John Turkington, Director, Resource Management, be authorised to finalise the contract documentation.*
- (3) The Council approves the payment of up to \$20,000.00 towards the cost of relocation expenses subject to a written agreement requiring:-*
  - (a) 100% of the Council's contribution to be repaid if Candidate A does not complete 12 months of service;*
  - (b) 50% of the Council's contribution to be repaid if Candidate A does not complete 24 months of service.*
- (4) The Council agrees to provide a furnished apartment in Joondalup for a period of eight weeks at the City's expense and a further eight weeks on the basis of the City contributing 50% and Candidate A 50% of the rental costs.*

(5) *The expenditure in items (3) and (4) be charged to budget item CEO – salaries.*

137. Ms Hurst gave evidence that she had little to do with the contract documentation after Mr Smith's selection and could not remember doing anything with respect to the final contract: (T691 12/10/04). Mr Turkington's recollection was that he had no input into the drafting of the contract until 27 or 28 August 2001. He recalled Mr Loader was pushing for him to look at the contract urgently as the matter was going to Council the next day: (T11736 26/5/05, T8517 8/4/05). He understood that the resolution evinced Council's intention that he, the Mayor and Cr Hurst would examine the contract to ensure that they were satisfied with it and when they had reached a consensus take it back to Council: (T11740 26/5/05). This process did not occur and when he next saw the contract it was when he was given it on 5 or 6 September 2001 by which time it was signed by Mr Smith, his witness and Mayor Bombak. At that time he caused the seal of the City to be affixed and dated it according to the date of the document itself, being 29 August 2001.
138. In cross-examination Mr McLeod, on behalf of Mr Loader, made the point that according to Mr Turkington's evidence, he was nominated by Council to consider the draft contract on behalf of Council and to report any concerns back to Council and that in not doing so, he had been derelict in the performance of his duties and that ultimately there was very little change between the contract that Mr Turkington saw on 28 August and the executed contract. He also suggested that in giving evidence that he signed the document and back-dated it to 29 August, Mr Turkington was admitting that he falsified an official document, a point with which Mr Turkington agreed: (T11748 26/5/05), and that is cause to regard Mr Turkington as being unreliable as to the truth of his evidence on that matter and to prefer the evidence of Mr Loader and Mr Bombak.
139. The suggestion seems to be that Mr Turkington would be unlikely to do anything so improper as to falsify the date on a contract and therefore he is not to be believed on his evidence as to the date of signing. Mr Turkington did not seem to recognise the level of impropriety which Mr McLeod did in placing the same date at the end of the document as appeared on the front page. It is not a basis upon which I would reach any conclusion as to the reliability of his evidence.
140. Mr Turkington accepted that he had not been involved in the review of the contract as expected by Council, however, he stated that when he received the contract it had been signed by all of the other parties and in effect constituted an agreement. In that respect he

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had no choice other than to complete the administrative formalities. He further commented that he made the decision to date the affixation of the seal with the date on the front of the contract, being 29 August 2001.

141. The City's seal register which records the details of when each document was sealed shows that the entry was made retrospectively, in that it appears to be included in the bottom margin (below the last line) of the relevant page (this is the only page in the register where this occurs) and does not contain all of the necessary information which should be entered: (2704HLH4).
142. Mr Turkington's evidence conflicts with the evidence of Mr Bombak and Mr Loader's in that Mr Bombak stated that the purpose of the resolution was for Mr Turkington and Cr Hurst to execute the contract, which had been approved by Council at the meeting on 28 August: (T9297 22/4/05, T9299 22/4/05).
143. Mr Bombak stated that Mr Turkington had come to his office on at least three occasions over the week prior to 28 August regarding the contract and that Mr Turkington and Mr Loader came to his office sometime on 29 August when both he and Mr Turkington signed the contract and placed the seal on it: (T9300 22/4/05, T9303 22/4/05). Mr Turkington denies that these meetings occurred.
144. The matter of the signing of the contract was touched upon in the City's submission to the Upper House Inquiry: (1412NFAD24, p2464). The submission, which was prepared by Mr Neil Douglas of Minter Ellison and Mr Loader, provides some details of the contractual process. According to the submission, a number of draft contracts were provided to Mr Turkington and his involvement in the drafting of the contract was significant. Examination of the draft contracts said to have been perused by Mr Turkington indicates that they were copies of the draft which had been amended by Freehills and forwarded to the City and MRA by Mr Ellis on 27 August 2001. Interestingly, the submission does not detail the process by which the contract was signed by Mayor Bombak and Mr Turkington, other than to state that the document appeared to have been signed on 29 August 2001.
145. A document produced by Mr O'Brien (1801CJB8) suggests that on 29 August 2001 Mr Loader sent an e-mail to Mayor and Councillors at 10.03am under the heading "*CEO Contract*" attaching an unexecuted form of the contract. This document has some

formatting errors and does not include the annexes to the contract. This e-mail was not amongst the documents disclosed by the City or any other summonsed party.

146. The evidence of Mr Turkington was that the contract was signed by him on 5 or 6 September 2001 and that in his view it would not have been possible for the City to get the contract ready for signing the day after the resolution. He pointed to the fact that the draft contract purportedly sent to councillors by e-mail on 29 August 2001 was different in a number of respects from the one that was executed: see para 138 below, (T11705 26/5/05).
147. The evidence of Mr Loader as to the sealing date generally corroborates the evidence of Mr Bombak, but is less clear with respect to the process of execution.
148. Mr Loader gave various versions of what occurred –
- *“Now what form do you recall that you had it in? – Oh, okay. It wasn’t - it wasn’t bound if that’s what you mean.” ...*  
*“You had two copies of the document that you took to the Mayor with the seal register---I thought so.” ...*  
*“I can’t recall taking the seal.” (T9460, 27/4/2005)*
  - *“Was it you or John Turkington that took the contract around to the Mayor, or did he already have it when you were there?---No. John Turkington had it... Was it bound at that time?---I think it was bound.*  
*Can you be certain of that?---Yep. (T11650,; T11651 25/5/2005)*
  - *“You didn’t actually witness either of them putting a signature on the document?--- No I left. (T9641, 27/04/2005)*
  - *“I certainly saw the signing – Yes.” (T11650, 25/5/2005)*
  - *“Well I thought that it was signed the next day.*  
*Were you present when it was signed and the seal affixed?---No. But I can remember taking-- I’m sure I took the book across to the Mayor’s office.....the seal register ...And I thought that was the next day”(T9638, 27.4.05)*
  - *“I’m certain I took the register over that night and left it with the Mayor” (T11651-11652, 25/5/05)*

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The following exchange also occurred between Mr Turkington and Mr Bombak –

*“Were all us there all the time?---Yes. Turkington, Loader and myself.”* (T9729, 2/5/05)

149. The conclusions to be drawn for Mr Loader’s evidence are that it was his recollection that he and Mr Turkington went to the office of Mr Bombak at some time on 29 August where the contract was signed by both parties. However, he was unsure who took the contract for signing, whether the seal register was there at that time or whether the seal was placed on the contract at the time while he was there: see also, (T1079 18/10/04).
150. Nothing would appear to turn on reaching a conclusion as to the date on which the contract was signed. I do not conclude that any witness was deliberately not telling the truth on this topic. Even though Mr Loader and Mr Bombak concur with each other on the date that does not assist in reaching a conclusion. Mr Loader’s evidence is so inconsistent on other related details and Mr Bombak’s evidence in general I find to be particularly unreliable as to his recollection of details, so that I would tend in favour of accepting Mr Turkington’s evidence as to what occurred. Mr Turkington has identified that there are 15 identifiable differences of detail between the version of the contract which was e-mailed to elected members on 29 August 2001 (1801CJB8, pp827.002 to 827.013) and the version which was executed. This tends to suggest that the contract signed may not have been in the form in which it was executed by 29 August 2001
151. On 29 August 2001 Mark Loader also faxed a letter to Mr Denis Smith confirming the resolution of Council on 28 August 2001 appointing him to the position of CEO: 0110ML47. The letter stated, *“I shall courier to you later today a signed and bound copy of the contract”*. It annexed the formal Council resolution appointing Mr Smith to the position.
152. Mr Loader said he was unable to forward the contract that day, but sent it the next day. It was his recollection that the documents forwarded to Mr Smith had been signed by Mayor Bombak and Mr Turkington.
153. On 3 September 2001 Mr Smith forwarded a letter to the City informing it of his acceptance: (0110ML49). The letter stated that the contract would be sent by express post.
154. This document was produced by the City with a photocopy of the contract signed by Mr Smith, a witness C Ramey, John Bombak and John Turkington, sealed, and dated 29 August

2001. According to Mr Loader the contract signed by Mr Smith was received by the City on 5 September 2001: (T11653 25/5/05).

155. This document does not in itself resolve the discrepancies between the recollections of the parties involved in the signing of the contract. The only document which could do this would be the second original contract sent to Mr Smith for his records which was not produced by Mr Smith in answering his summons. (It is not suggested that this document was intentionally withheld.)
156. Although the evidence before the Inquiry is contradictory as to the process and date of the sealing of the contract by Mayor Bombak and Mr Turkington, on the balance of probabilities Mr Turkington did not sign it until 6 September 2001 when it was received by the City after having been signed by Mr Smith. On that date Mr Turkington became Acting CEO and therefore had authority to execute documents on behalf of the City: (T12075-12078) (Mr Delahaunty).
157. On 6 September 2001 a copy of the CEO contract, signed by all parties and bearing the Common Seal of the City, was placed within a sealed envelope, marked confidential, and secured for safekeeping by Mr Turkington, then Acting CEO of the City: (2402ML59). Mr Turkington signed and annotated the envelope with the legend “*Not to be opened without the express permission of Acting CEO – John Turkington*”.
158. On 14 September 2001 Mr Loader accessed the CEO contract, sealed within an envelope by Mr Turkington, to photocopy it for circulation to elected members: (2402ML59). Mr Loader forwarded a memo to all Councillors re the CEO’s contract which informed councillors as follows:
- “Following the recent acceptance by Denis Smith of the City’s offer of employment the Mayor has given approval for the distribution of the CEO’s contract to all Councillors. Please find attached the signed contract. I would be grateful if you maintain confidentiality as it is a sensitive issue at the moment.”* (0110ML50)
159. A copy of the signed contract was forwarded with this memo.
160. The evidence clearly demonstrates that the terms of the contract, other than those referred to in the resolution, were not the subject of consideration, debate, or resolution by Council. It may be concluded that the decision to enter into the contract of employment was made

without the Council observing the requirements of Section 5.36 as to the terms of the contract. The carriage of the contract should have been given to the City's solicitors. A comprehensive report incorporating legal advice should have been made available to Council together with the proposed contract and the terms of the contract should have been the subject of a resolution expressing the Council's satisfaction with them. These shortcomings reflect on the Administration, which was in a period of transition. They suggest that a contract of such importance should be the responsibility of a senior officer with appropriate experience aided by comprehensive legal advice extending to all aspects of the negotiation, agreement and documentation of the contract.

### **“New CEO Target of Bribe Claims”**

161. The appointment of Mr Smith was publicised by way of a press release on 13 September 2001: 2204JB1. Mayor Bombak was quoted as saying, “*I instructed our consultants to search Australia-wide for the best possible candidate and I believe they have found him. I am very impressed with his credentials*”. Shortly afterwards, Mr Foster contacted Mr John Turkington, then Acting CEO, with whom he was acquainted, by telephone and informed him of a number of internet links to NSW Hansard references to Mr Smith and articles in *The Manly Daily*: (T8541 8/4/05, 12417-8 10T/6/05).
162. On 22 September 2001 an article appeared in *The West Australian* newspaper which stated that Mr Smith had been the subject of allegations of bribery, credit card misuse and financial mismanagement over a period of 20 years, and that during his tenure more complaints had been made about Warringah Council to the NSW Department of Local Government than any other local authority: (0110ML51). Mayor Bombak and Mr Smith were quoted as saying that the allegations were unfounded and that Mr Smith was the victim of a campaign to discredit him. The Inquiry received in evidence an affidavit of Ms Peta Rasdien, the author of the story, which excluded as her source of the information contained in the article Mr Foster, Mr Turkington, Mr Magyar, Cr Carlos, and the other members of the Council.
163. Ms Rasdien has a Bachelor of Arts in Politics and History from the University of Western Australia and has been a journalist for 10 years. She first investigated the Joondalup Council in relation to the decision not to renew the contract of Mr Delahaunty. She wrote an

article published in *The West Australian* on 17 March 2001: “*Parting boss bags Council*”: (08PAR1). She was interested to discover who would replace Mr Delahaunty. After Mr Smith’s appointment became known, she received some information from a confidential source comprising Hansard transcripts and articles from NSW publications including articles in *The Manly Times* that included serious allegations about Mr Smith. Her own research confirmed the contents of the documents given to her. In her affidavit she stated:

*“I continued to investigate the appointment of Mr Smith due to the interest this article generated by feedback and telephone calls and letters to the Editor from people within the Joondalup area as well as outside. I did this through discovering who was on the Council panel that appointed Mr Smith and whether they were aware of the allegations made in the past about him. This included me contacting Cr Don Carlos who admitted to being a member of the panel which appointed Mr Smith. He told me he was unaware when Mr Smith was appointed of the allegations that had been raised in NSW. This revelation prompted me to write a story that was published in the West Australian on October 2, 2001: “Council Chief’s record not known”.”*

164. Ms Rasdien stated that her interest in the issue continued and in January 2002 she became aware that Warringah Council was to be investigated by the NSW Department of Local Government. She made inquiries into this matter before writing a further story which was published on 24 January 2002: “*Sydney case dogs chief at Joondalup*”.
165. Ms Rasdien stated that she was never encouraged by any person to conduct a campaign against Mr Smith.
166. Ms Rasdien’s evidence is consistent with evidence received from other journalists to the effect that stories that were published and broadcast about Mr Smith were covered because they were regarded by the journalist as newsworthy and not as part of any campaign by any individual or group of individuals associated in any way with the City of Joondalup, or for any surreptitious purpose of persons associated with Joondalup. The fact that the article was significantly incomplete as to the current factual circumstances does not establish any contrary proposition, in the absence of any evidence which supports that..
167. Mr Smith said in evidence at (T3012 7/12/04) that there had never been any finding of impropriety made against him by any court or tribunal whilst he was engaged in local government. Mr Bombak was asked about the statements attributed to him in the newspaper article at (T9319 22/4/05). Mr Bombak recalled speaking to Mr Ross Simons, acting General Manager of Warringah and Mr Howard Robilliard, Mr Smith’s solicitor, as he

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stated to the meeting of Council on 9 October 2001. He also received letters from them. He concluded that the allegations were baseless. Mr Bombak was not able to recall how he became aware of the matters raised in the newspaper article as he could not recall reading it. He said he went to China on 20 September 2001. Mr Bombak did not know why he made any statement about the issue. He said it would have been up to staff to advise him: (T9328 22/4/05). He had no recollection of the process involved in addressing the newspaper article. Eventually, however, it was put to him:

*PRESIDING MEMBER: I suppose the real question that is in issue is whether you thought it was a matter related to the good public relations which the City had with its public to say something about these allegations that were made in the newspaper? --- Well, I would have thought that would have been a good idea to put in, yes. Yes. I think that's probably all we needed to know.*

He agreed that it was in the interests of the City and the Council that the matters raised in the article be addressed: (T9331 22/4/05).

168. Cr Carlos, on 23 September 2001, e-mailed councillors the following message (1310DSC7):

*“After reading the above article I have grave concerns about the wisdom of permitting Mr Denis Smith to take up the appointment of CEO for the City of Joondalup.*

*Questions must be asked and a complete investigation should be undertaken with a report presented to Council before he takes up the appointment.*

*Who was aware of these allegations and why was this information withheld from councillors?*

*Below are some extracts from NSW Parliament for your information and deliberations. I discovered these extracts by searching the web today. Why was Recruiters Australia paid \$22,000.00 if they did not find the same information and have it presented to Council.*

*Do we really want this person to be our next CEO?”*

169. Subsequently, Cr Carlos circulated further extracts from NSW Hansard: (2302MCOB4). These included statements made in the Legislative Assembly by Mr Barr, member for Manly, who advocated State government intervention in the affairs of Warringah. There were also statements made in the Legislative Council on 24 March 2001 by Ms Rhiannon who spoke of a serious issue relating to the general manager's contract of employment. She

said four Warringah councillors, one of whom was from the Greens party, had experienced serious ongoing problems with the conduct of Mr Smith. The statement spoke of the City's management being in turmoil and alleged that it was not an accountable administration. There were other statements.

170. Cr O'Brien carried out some internet research of his own which he circulated by e-mail on 2 October 2001: (1705MCOB15.20). He described Mr Smith as "squeaky-clean".

## Mr Smith's Response

171. Mr Smith, who by that time had not yet taken up his position, made a detailed written response to the newspaper article contending that he was the subject of a smear campaign, that no bribery claims had been made except under parliamentary privilege by Mr Michael Knight, that no evidence was found by the NSW Department of Local Government to support the allegations, and that he had resigned from Warringah Council with the thanks and good wishes of Council: (1310DSC9). He attached testimonials from a number of Warringah councillors, a letter from his solicitor, and a letter from the acting general manager of Warringah. A letter from Cr Peter Moxham stated that Mr Smith was very energetic and dynamic and he expressed unqualified support. He accused "a mere handful of so-called 'community activists' " of "muckraking" and said that parliamentarians who raised allegations were "their running dogs". There was also a very lengthy letter from Cr Darren Jones. Cr Julie Sutton also provided a reference, as well as Cr John Caputo. The letter from Mr Smith's solicitors dated 23 March 2001 was a letter of advice addressed to him as to whether Mr Smith had breached his contract by claiming certain expenses in relation to a conference he attended in the US the previous year. This letter stated:

*"We have sighted a number of credit card statements evidencing payment of conference expenses which have been authorised by the Mayor or another officer. We note that following reconciliation of the conference expenses that your TRP was again adjusted in November, 2000 such that \$3,300.00 was allocated to professional development, which sum was to cover the difference in airfare between business and economy class fares and expenses incurred at the conference unrelated to the conference or relating to Mrs Smith. Having perused these documents we are of the view that you have fully met your liability in respect of same. We advised that the Mayor is entitled under the terms of your contract to grant approval in relation to the conference and this has been done as his approval is endorsed upon the request. In respect of the expenses incurred we have established that the Mayor has authorised the expenditure or incurred it at the conference."* (0712DIS17)

Mr Smith's own statement ran to four pages. He addressed each of the allegations made in *The West Australian* and detailed his achievements at Warringah.

### **“Purple Circle Out to Smear CEO: Mayor”**

172. Mayor Bombak was reported in *The Wanneroo Times* 8 – 15 October 2001 as saying that Mr Smith was the subject of a smear campaign by a “purple circle” of highly-placed local government officers: (2302MCOB5). According to the article, he said, “*we are thinking outside the square by appointing someone who is adventurous and entrepreneurial and the boys’ club doesn’t like it at all*”. He was reported as saying that “*a small handful seem determined to try to destroy us from within our own council for their petty political gain*”. Mayor Bombak was examined about his comments to the newspaper at (T9337-9338 22/4/05). It was evident from his answers that his accusation that Mr Smith was the subject of a smear campaign by local government officers was without factual foundation and mere speculation. Cr Baker was quoted in the newspaper article as saying that there was “*an obviously planned and well orchestrated campaign*” against Mr Smith.
173. The Council subsequently resolved on 9 October 2001 to re-affirm its decision to appoint Mr Smith as CEO. The motion was opposed by Crs Barnett, Nixon and Carlos. Cr O’Brien was complimented for his research on the Hansard references. Mr O’Brien had discovered in the course of his research and taken up with Ms Rasdien, by way of an e-mail dated 7 October 2001 (1512NFAD76, p 9244), that Michael Knight had been Mr Smith’s boss at Campbelltown Council in New South Wales and that a NSW Department of Local Government Senior Inspector, who conducted an inquiry into the matter and found that “*there appears to be no foundations to the allegations made in Parliament by Mr Knight*”. So the report of Ms Rasdien was incomplete to a significant extent as to the current circumstances and left a misleading impression. “*A half truth, thought literally true, may in fact be false because of what it leaves unsaid*” as to the current circumstances (N Seddon & M Ellinghaus (204), *Cheshire & Fifoot’s Law of Contract* (8<sup>th</sup> ed), p 477; *Howden v “Truth” AND “Sportsman” Ltd* (1937) 58 CLR 416).
174. The response of Mr Smith, the Mayor and councillors is significant because it evidences an awareness of the need to respond to issues which may, if unaddressed, reflect on the good government of the City and cause a loss of public confidence. Mr Smith was able to answer the various issues raised in the article and did so in a fulsome manner. He was also able to enlist the support of the five majority members of the Warringah Council. When Council

made its decision to reaffirm the contract of employment it had a reasonable basis upon which to do so. It was proper to investigate the matters raised, and for Mr Smith to give account, even though they may have appeared doubtful, and to affirm the contract. But it would have been preferable for such matters to have been raised and dealt with in the selection process.

175. The Council considered what had been published and recognised that it was a matter of significance to the City that such matters had been published. Appropriately, the Council members applied their critical faculties to what had been published, investigated the background to the matters raised and took into account what Mr Smith had to say about the matter, before affirming the contract. While it would have been preferable for such matters to have been raised and dealt with in the selection process, the steps taken by the Mayor, Mr Smith and the Council were intended to, and appropriate to, preserve public confidence and may be contrasted to their responses to the qualifications controversy when it arose in November 2002.
176. The controversy at this time, however, draws attention to the fact that no independent background information was obtained on Mr Smith by the recruitment consultant or Council (by way of advice from officers, by direction to officers from Council or as Mr O'Brien did in this instance). This is surprising having regard to the availability of information in the public domain through the Internet. A simple Google search of "*Denis Smith*" will throw up many references, and specific searches may be done through agencies that archive media reports as Mr Lloyd Smith explained by reference to the Fairfax service.
177. It is surprising that in an exercise intended to find the best possible CEO, enquiries were not made as to Mr Smith's general reputation. Mr Reynolds argued that his company was not contractually obligated to make such enquiries and that certain enquiries, if made, might breach the *Privacy Act 1988* (Commonwealth). However, the type of enquiries required to ascertain a person's general repute would not involve the disclosure of information protected by the Privacy Act. There is no evidence of any recognised standard of best practice relevant to the recruitment industry at the that time, but it might reasonably be expected by a Council engaging a recruitment firm which is part of a national network that more information be obtained about a candidate than merely self-reported details of education and work experience. Mr Reynolds advised members of the selection committee not to make their own enquiries in the interests of protecting their confidentiality of candidates. The Council was, therefore, totally reliant on the information provided by Mr Reynolds in his

report on the candidates, which reports contained no more than the candidates themselves disclosed.

### Special Electors' Meetings

178. The evidence of a number of witnesses made reference to special electors' meetings held in the City between February 2002 and March 2003. There were in fact six such meetings.
179. Under the LGA the City is required to hold a general meeting of electors every year. These meetings provide a forum to discuss and resolve issues of concern and each resolution made by such a meeting is to be considered by Council. The Act also provides that a number of electors may call a special meeting. This requires the support of 100 electors or 5% of a number of electors, whichever is the lesser, or one-third of the number of Council members.
180. Witnesses such as Mr Carlos and Ms Hart expressed concern at the number of electors meetings and the reasons for them. It also appeared that the meetings were a cause for some tension within the Council and between the Council, the Administration, and the community.
181. On 7 February 2002 1,103 persons as well as Mayor Bombak and six councillors attended a meeting to discuss the precinct action plan which had been put out for public consultation by the City for the suburb of Greenwood. Ms Hart was instrumental in calling this meeting and the minutes show that she presented a petition on behalf of the re-formed South Ward Ratepayers Group of 2,500 residents. The meeting unanimously carried a motion that: "*... precinct planning... be halted in its entirety until such time as the new consultation process policy which is advertised for public comment for a period of no less than 60 days has been implemented*".
182. On 11 February 2002 a similar meeting was held in Kingsley attended by 1,438 persons as well as the Mayor and five councillors. Precinct planning was debated at length and a number of motions similar to the one passed at the Greenwood meeting were carried. At that meeting Cr Baker told the electors that the precinct action plan had been abandoned. In relation to precinct planning, Mr Smith stated in the report he prepared for his annual performance review in November 2002 (0102DIS69):

*“The lack of comprehensive community consultation caused misinterpretation by some sections of the community and it was clear that some ideas proposed were beyond acceptance of the community at this stage.”*

183. On 18 March 2002 a special electors’ meeting was called at Mullaloo attended by in excess of 500 persons together with Mayor Bombak and seven councillors. Motions were carried which opposed development of the Tom Simpson Park and other recreational spaces and the Mullaloo Tavern. The minutes record that Mr Smith told the electors at the meeting that Council had abandoned precinct planning.
184. On 25 March 2002 there was a special electors’ meeting held which was attended by 115 persons as well as Mayor Bombak and five councillors in relation to the relocation of a senior citizens’ centre.
185. On 20 September 2002 there was a special electors’ meeting held with the stated purpose of discussing the adverse impacts of the Council’s approval for development of the Mullaloo Tavern site and the failure of Council to abide by the City’s District Planning Scheme No. 2 in granting approval for the development. There were 132 persons present as well as the Mayor and nine councillors. The main subject of discussion according to the minutes was a Writ that was issued by the developers against the City.
186. On 6 March 2003 there was a meeting held to discuss matters relating to the Wanneroo Basketball Association’s occupation of the Joondalup Basketball Stadium and this was attended by 462 members as well as Mayor Bombak and nine councillors.
187. The issues about which these special electors’ meetings were concerned were, and perhaps still are in some cases, of considerable importance to the electors. They do not require any particular comment or resolution for the purposes of this Inquiry. It is significant, however, that a number of witnesses who were called to give evidence of their interest in Council affairs expressed their concern with these issues and others. These witnesses, including Mr Mitch Sideris, Mr Ken Zagrevski, Mr Vince Cusack, Mr Steve Magyar, Mr David Davies, Ms Monique Moon and Mr Wayne Primrose demonstrated a significant interest in and concern for the issues facing their communities and were in each case involved in community groups which were obviously formed to protect and advance the interests of ratepayers and residents. Most of them regularly attended Council meetings and minutes of question time indicate that they and other electors asked a variety of questions regarding the administration of the City.

188. The evidence of all of the abovementioned witnesses and e-mails which passed among various of them and Mayor Carlos indicate that they carried out some research into the background of Mr Smith and came to be concerned in due course with the issues arising from the employment of Mr Smith as CEO. They and many others asked questions about Mr Smith's appointment particularly as to whether he had misrepresented his qualifications. Careful perusal of the questions recorded in the minutes of meetings from the time when Mr Carlos was elected Mayor, at which time they ceased to be ruled out of order, indicates that they reflected a legitimate concern.
189. According to Section 1.3(2) the LGA is intended to result in greater community participation in the decisions and affairs of local governments and greater accountability of local governments to their communities. In practical terms the Act seeks to achieve this object by providing for electors' meetings and public question time at Council meetings.

### **Organisational Review**

190. Following his appointment and in accordance with the key objectives specified in his contract, Mr Smith undertook an organisational review which was the subject of a report to Council on 26 February 2002: (0612DIS3). Mr Smith engaged Mr Reynolds of MRA to provide advice in relation to organisational structures. A facilitator was also engaged to run workshops with staff and the result of the review was a recommendation that the number of directorates within the City be reduced from four to three and the number of business units from 16 to 12.
191. Some evidence was heard as to the effect of these changes on the City's staffing requirements and its need for outside services. In his report Mr Smith indicated operational savings of about \$550,000.00 in the 2002/2003 year as a result of restructuring. The savings were said to be generated primarily through a rationalisation of the number of directors and business unit managers. He said it was anticipated that the savings would increase to approximately \$700,000.00 per annum. This aspect of his report was relied on by a number of councillors as proof of Mr Smith's value to the City, but it was evident that no analysis had been done of the actual costs and savings of the restructure in order to ascertain whether the predictions contained in Mr Smith's report were realised. Whilst the organisational review appears to have been competently performed, there is no reason to think that it would have been otherwise under a different CEO.

## Subpoena: Jones v. Sutton

192. By letter from MacMahon’s National Lawyers dated 15 April 2002 the City was served with a subpoena to produce documents in Action No 4496 of 2000 in the District Court of New South Wales at Sydney between Darren Jones (plaintiff) and Ruth Sutton (defendant). Mr Jones and Ms Sutton were both elected members of the Council of Warringah in New South Wales where Mr Smith was employed as General Manager prior to his appointment at Joondalup. The action was in the nature of a claim for damages for defamation for allegedly slanderous remarks made by the defendant. The reasons for decision which were handed down following a trial by Her Honour Judge Judith Gibson were tendered in evidence: (2704HLH5).

193. The subpoena required the City to produce the following documents:

*“Any and all originals or copies of the following documents relating to Denis Ian Smith (“Smith”) present general manager of the City of Joondalup Council:*

- *Applications for employment, curriculum vitae, resume, references and or any other document relating in any way to an application for employment (by Smith).*
- *Personnel records, performance appraisals, records of complaint and other documents relating in any way to the employment of Smith.”*

194. Mr Smith referred the subpoena to Mr Kevin Robinson with a direction to obtain legal advice in relation to the City’s obligations. Mr Robinson gave instructions to Kott Gunning.

195. Kott Gunning provided a letter of advice of the same date (1403KBR13) which stated:

*“The personal nature of the information being sought and the fact that some of the details provided to the City were on the understanding that they would be kept strictly confidential is not sufficient as to prevent them from being called up by the subpoena. Research into the legal position in New South Wales has not identified any immunity from production of such documents.”*

196. Mr Robinson said at (T7148 14/3/05) that Mr Smith spoke to him about the subpoena and *“indicated a reluctance to provide any other information than we had to”*. Mr Robinson subsequently liaised with Mr Loader to comply with the summons and to his knowledge Mr Loader arranged for the relevant documents to be collated and given to Mr Smith who had also been subpoenaed to attend court, Kott Gunning having advised that greater security would be provided if Mr Smith attended as the proper officer.

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197. Mr Robinson did not deal personally with the documents disclosed. Mr Robinson sent a fax to Mr David Yates, senior associate of Allens Arthur Robinson in Sydney stating:

*“I have been advised by Mr Smith that your firm will be applying to the Court to set aside the subpoena. Your urgent advice would be appreciated as to the outcome of your application, so the City can determine what further action it needs to take”.*

198. Mr Robinson did not discover the outcome of the application referred to. Mr Robinson said at (T7391 16/3/05) that he was not concerned to know what the significance of the subpoenaed documents was. He did not attach much importance to the matter and did not recall his discussion with Mr Smith about the case when he returned from Sydney: (T7393 16/3/05).

199. Mr Loader gave evidence at (T6283 25/2/05) about the documents which he copied from the file of Mr Smith to comply with the subpoena. He said it did not include the condensed CV of Mr Smith as he did not have it. He did not think it included the confidential candidate report of Mr Reynolds or any documents that Mr Reynolds prepared summarising the qualifications of candidates.

200. Mr Smith said at (T3088 7/12/05) that he had no involvement in the return of the subpoena except in respect of the legal advice. He did not handle the documents, which were copied for production. He did not know what documents were on his personal file. He had not provided any documents to the City and thought that there would only be the contract of employment and letters of acceptance. He said that the significance attached to the documents by the parties subpoenaing them did not occur to him. He said the documents were placed in a sealed envelope but were not produced because the Court did not require them.

201. Notwithstanding that he believed that the City did not possess any more than those documents, he said that he saw fit to distance himself from the City’s handling of the subpoena because: *“I felt that it was more appropriate for other officers to handle the subpoena because it dealt with CEO – related matters and I did not have a CEO file in my office so it required other officers accessing Council information”*: (T3094 7/12/04).

202. The City’s compliance with the subpoena served on it to produce documents to the District Court of NSW in the action of Jones v. Sutton is not a matter of great significance in terms of the function of this Inquiry, but was addressed as a relevant historical event leading to the

exposure of Mr Smith's qualifications. On Mr Loader's evidence the documents given to Mr Smith to take to Sydney did not include the MRA candidate report which the City retained and which clearly fell within the category of documents stipulated in the subpoena. It is likely, therefore, that the City did not properly comply with the requirements of the subpoena.

## **Conclusions**

- A. Mr Smith's evidence to this Inquiry that he holds a post-graduate Diploma in Environmental and Pollution Studies from the University of Technology Sydney and a Diploma in Town and Country Planning from the Royal Melbourne Institute of Technology was knowingly false.**
- B. Mr Smith intentionally deceived the Coffs Harbour City Council and Warringah City Council by representing to them that he had University diplomas and a Bachelor degree in business management.**
- C. Mr Smith lied on oath to Judge Gibson in the District Court of NSW on 12 November 2002 when he said he held a "Diploma of Business in Management", a "Diploma in Land and Engineering, Surveying, Drafting" and a "Diploma in Environmental Studies" (or "Science").**
- D. Local governments and their officers ought in future ensure that relevant certification is attached to any CV, resume or consultant report for consideration when engaging employees.**
- E. It is not possible to conclude to any reasonable standard whether information about qualifications was provided by candidates in the course of their presentations, or in responding to questions asked during their presentations, or during their formal interview. It is possible that Mr Smith did disclose his qualifications, probably in the course of his presentation, rather than in response to a question in the interview stage, and that may have contributed to Mr Carlos' belief that he had asked questions of Mr Smith on that topic.**

- F. Mr Carlos did not take enough care to ascertain the accuracy and truth of the statements he made in his letter to the Minister in December 2002 and in his e-mail to elected members in May 2003, that he had asked questions of Mr Smith as to his qualifications. I am not satisfied to the requisite standard that when Mr Carlos made those statements he was deliberately saying something which he then knew to be false. I, therefore, do not conclude that he lied. However, I am satisfied that he was not sufficiently concerned and had not made sufficient enquiries of others present, in those instances, to ensure that the statements he made to persuade others were accurate and true.
- G. Mr Smith was preferred as the candidate of choice for the wrong reasons: either perceived comparative level of interest or Mayor Bombak's expectations.
- H. The Council was ill-equipped for the task of selecting a new CEO. The lack of experience of all persons involved in the exercise resulted in a lost opportunity to recruit the best candidate.
- I. The terms of the contract of employment of Mr Smith, other than those referred to in the resolution, were not the subject of consideration, debate, or resolution by Council. The decision to enter into the contract of employment was made without the Council observing the requirements of Section 5.36 as to the terms of the contract.
- J. The article entitled "New CEO target of bribe claims" published in *The West Australian* was published because the journalist believed it to be newsworthy and not as part of any campaign by any individual or group of individuals associated in any way with the City of Joondalup. There is insufficient evidence to conclude that anybody associated with Joondalup, or the journalist, deliberately caused it to be published knowing it was significantly incomplete as to the current factual circumstances or for any ulterior motive.

- K. Mayor Bombak’s accusation that Mr Smith was the subject of a smear campaign by local government officers was without factual foundation and mere speculation.**
- L. The Council’s decision to reaffirm the contract of employment after the publication of the “New CEO target of bribe claims” article was made on a reasonable basis following an investigation of the matters raised, and was an appropriate step taken by the Council; intended to preserve public confidence. It would have been preferable for such matters to have been raised and dealt with in the selection process.**



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## Part 3

### The Importance of Probity

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#### Annual Performance Review

1. Section 5.38 of the LGA provides:

*Annual review of certain employees' performances*

*The performance of each employee who is employed for a term of more than one year, including the CEO and each senior employee, is to be reviewed at least once in relation to every year of the employment.*

Section 5.8 provides:

*Establishment of committees*

*A local government may establish \* committees of three or more persons to assist the council and to exercise the powers and discharge the duties of the local government that can be delegated to committees.*

*\* Absolute majority required.*

Clause 4.2 and 4.3 of the CEO's contract of employment provide:

**4.2 Performance Reviews**

*The CEO's performance under this agreement will be reviewed annually during the term by a committee comprising the Mayor and two other councillors, one of whom shall be nominated by the CEO and agreed upon by the Mayor and the CEO. The identity of the two councillors may vary from year to year.*

**4.3 Procedure**

*A performance review conducted under this clause 4 be in accordance with the following procedure:*

- (a) *No later than 1<sup>st</sup> November each year, the Mayor shall give the CEO a notice initiating the review process'*

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(b) *Not later than 7 days later the Mayor and the CEO shall agree on the third member of the Committee...*

2. On 1 November 2002 Mr Smith wrote to Mayor Bombak confirming that the performance review would be conducted by the Mayor, Deputy Mayor, Cr Hurst and Cr Rowlands as the CEO's nominee. On 14 November 2002 Mayor Bombak sent an e-mail to councillors advising that the performance review would take place in accordance with the contract and inviting any councillor who wished him to raise any matters regarding the CEO's performance to contact him on a confidential basis. Cr Walker replied to Mayor Bombak's e-mail announcing the performance review, drawing his attention to Section 5.8, and stating:

*“Regardless of the conditions set out in the contract of the CEO, I do believe the Local Government Act overrides these conditions, and the decision of who should be on the Committee to perform the performance review and appraisal of the CEO should have come before the Council and the members of the Committee should have been appointed by the Council by an absolute majority.*

*I understand this is called open, accountable and transparent local government.*

*It is our collective responsibility to conduct ourselves in accordance with the statutory requirements as explained in the Local Government Act 1995 or we will find ourselves in default of those statutory requirements and therefore not performing our duties under the law.”*

3. This e-mail appears to have prompted the Administration to obtain further advice from Mr Ellis as to whether the committee to be established under the contract for the annual performance review was a committee of Council. Mr Ellis provided a one and a half page letter of advice dated 19 November 2002 (0112 DSE5) in which he expressed the opinion that the intention of the parties, as evidenced by the contract, was that the committee referred to in Clause 4.2 of the contract would not be a formal committee established in accordance with the Act. The cost of this advice was \$800.00, excluding GST. The advice did not address the question of how the Committee would be established. In an e-mail to Cr Walker sent at 5:27pm on 18 November 2002 Mayor Bombak said:

*“I have held discussions with the CEO and Manager Human Resources. The Manager Human Resources has sought legal advice from Freehills regarding the issues that you have raised. Our lawyers have advised that the performance review will proceed.”*

4. The Mayor went on to request Cr Walker to supply him with the source and substance of any conflicting advice which she had received. In response to three further messages from

Cr Walker sent at 8:42pm and 10:13pm on 18 November 2002, and at 3:53pm on 19 November 2002, Mayor Bombak replied with the following message:

*“As indicated earlier, legal advice has been obtained through the Manager Human Resources and myself, Cr Hurst and Cr Rowlands will be undertaking the review process next Monday.”*

5. In a further e-mail message sent at 5:02pm on 19 November 2002 Cr Walker requested a copy of the questions forwarded to Freehills and a copy of their reply. In response she received the following message from Mayor Bombak:

*“Freehills were the authors of the contract. They have been given a copy of the signed contract and have liaised direct with the Manager Human Resources and provided the legal advice previously given. Therefore, I can merely reiterate what I have said in my previous e-mails.”*

6. Cr Walker responded with a further message at 5:35pm on 19 November 2002 in which she said, in part:

*“I take your inability to supply a copy of written documentation to indicate that you have no written questions that were asked of Freehills in order that they form an opinion to present back to Council, and that you have no written legal opinion upon which to lean should this legal opinion be proved to be incorrect at some stage.”*

7. On 20 November 2002 at 12:30pm, having received no reply from Mayor Bombak, Cr Walker sent an e-mail to Ms Cheryl Gwilliam, Director-General of the DLGRD, raising her concerns and calling for an urgent independent inquiry on the basis that she thought the Council might be about to breach the Act.
8. In evidence to the Inquiry Mayor Bombak said that he was not the author of the replies sent in his name to Cr Walker. At T9413-9414 26/4/05:

*“COUNSEL ASSISTING: What did you understand Cr Walker’s concerns to be at this time? --- Well, first of all, these would have been written by a staff member, because they’re fairly technical, in my view. Yes. I wouldn’t have written these. Do you know who wrote them for you? --- No. No. Council staff did all my correspondence. It was just standard. It was par for the course. She – she had –*

*I take it that you would have approved what was sent out in your name? --- Oh, no. Sometimes it would just go out. I would possibly see the hard copies. Yeah. I would see hard copies. Hazel would always load them down.*

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*So who wrote these messages on your behalf? --- Well, presumably a staff member. Mr Smith? --- I don't know."*

9. Mr Bombak's evidence in this regard and his answers to subsequent questions were evasive and unsatisfactory. His willingness to allow responses to be made to an elected member without taking responsibility for the content of those messages indicates that Mayor Bombak had no regard for Cr Walker's concerns. Certainly, it brings into question his compliance with the Code of Conduct which provides that elected members "*be frank and honest in their official dealings with each other*". The responses made on Mayor Bombak's behalf effectively stonewalled Cr Walker's attempts to comply with the rule that elected members "*endeavour to resolve serious conflict through initial discussion facilitated by either the Mayor, or the CEO*".
10. The review took place at a meeting on 25 November 2002 at which Mr Smith presented a report. The record of the meeting stated:

*"During the course of his presentation, the members present asked questions from time to time and provided constructive feedback to the CEO. At no stage were there any adverse findings found by the elected members in terms of the CEO's performance. The feedback was positive, informative and complimentary. The members congratulated Mr Smith on his ability to confront issues and provide positive solutions, as well as being complimented (sic) on his communication skills and the way in which he briefed elected members of Council prior to attending meetings. Mr Smith also displayed a good understanding of the way the administration was being run, and encouraged multi-skilling of the staff throughout the organisation, eg. Rhonda Hardy's appointment to strategic planning. There were also no proposals by the Committee to vary the performance criteria as a consequence of this."*

11. The minutes of the meeting of Council on 18 February 2003 showed that Council resolved on a motion of Cr Mackintosh, seconded Cr Hurst, that the confidential report in relation to the CEO's annual performance review be noted. This was carried 12/2, Crs Carlos and Walker dissenting. For the purposes of the annual performance review Mr Smith prepared a report dated 18 November 2002 purporting to assess his own performance, measured against the performance indicators set out in his contract: 0102DIS69. In it he said:

*"I am of the opinion that I have taken all necessary steps to achieve the key objectives set out in Section 2 of my contract of employment. As a result of the restructure, significant savings have been made to the operational costs of the Council's*

*administration staff. The Council is financially sound, and our auditors have indicated the recent audit they carried out was the best since the Council was formed.”*

12. The Inquiry heard evidence from Mr Delahaunty that his annual performance review in 2000 was done with the assistance of an independent consultant. He said:

*“I had recommended to Mayor Bombak particularly that they might like to get an independent consultant to actually assist with the review and he agreed to that and we did hire a consultant by the name of Ann Lake, who was familiar with a number of CEO reviews in local government, and she did undertake detailed work with the Council in that I recall that there were something like 30 or 35 questions in a questionnaire that she sent out to all councillors and they all participated and, of course, that all culminated – or was pulled together over a period of time”: ( T1284 1/11/04).*

13. There was no proper basis for the Mayor or Councillors to participate in any activity related to the CEO and his contract without a decision of the Council approving it. Further, Mr Smith’s contract did not establish the make-up of the complete Committee. Mayor Bombak reported to Cr Walker by e-mail of 14 November 2002 (2511AAW4) that, *“Mutual agreement has been reached between the CEO and myself whereby the review Committee should comprise the Deputy Mayor and Cr Peter Rowlands”*. It is doubtful whether the Mayor had any authority even to reach such an agreement with the CEO on the appointment of one member of the committee because the terms of the contract, including clause 4.2, were not approved by any decision of the Council.
14. The “first member” of the committee is nominated in clause 4.2 to be the Mayor. Clause 4.3 describes the “third” member of the Committee as being agreed upon by the Mayor and the CEO. However, the contract did not make any provision for the appointment of the “second” member of the committee; the evidence and the contract are silent as to how the appointment of the “second member” of the committee was to be made. In any event it was not made in accordance with the statutory functions of the Council.
15. The Deputy Crown Solicitor, Mr John Lyon provided advice to Mr Duncan Watson of the DLGRD on this topic and has provided a submission to the Inquiry as to how he arrived at that advice. He gave advice (0902QNH1, p 6799) on the basis of selected phrases from clauses 4.2 and 4.3(b) of the contract, as follows:

*“One of the councillors is to be “nominated by the CEO and agreed upon by the Mayor.”[from clause 4.2] The “Mayor and the CEO shall agree on the third member.”[from clause 4.3(b)] It can be seen that the effect of clause 4 is that the CEO has a power of nomination of one of the members and in effect the Mayor has power of veto in that respect. Correspondingly, the CEO has a power to veto the choice of the third member.”*

16. With the greatest respect for the Deputy Crown Solicitor’s admirable and valiant attempt to discern an operable interpretation from the words of the contract, I cannot agree with him that they can be given that interpretation. Clause 4.2 is the clause by which the performance review committee is constituted. Clause 4.3 specifies a timetable for the conduct of the events leading to the completion of the review process. Paragraph (b) of clause 4.3 sets out the second step of the process, i.e., that not later than 8 November each year the step shall be taken of the Mayor and the CEO agreeing on the ‘third member’ of the Committee. Clause 4.3(b) merely specifies a timetable for the decision to be made. It does not vest in the Mayor and CEO power to agree on the selection of a committee member in addition to the power they have in clause 4.2 to agree on one Councillor nominated by the CEO to be a member of the committee.
  
17. A review of earlier drafts of the contract reveals how the deficiency in the contract has arisen. Various drafts (0112DSE1, at p 796.006, printed on 27 August 2001 and 110ML40, at p 766 and 837 and 0605DSE39, at p 757.007) reveal that earlier drafts proposed that the performance review be performed by “a select committee including the Mayor” and then “a select committee comprising the Mayor, the Deputy Mayor and one other Councillor to be nominated by the CEO and mutually agreed upon by the Mayor and the CEO.” It was this latter draft which introduced the reference to the ‘third member’ into paragraph (b) of clause 4.3. In that draft the position was clear. The first two positions were filled pursuant to the clause by the Mayor and Deputy Mayor and the ‘third’ position was by nomination of the CEO and agreement between the Mayor and CEO.
  
18. In the process of deleting the entitlement of the Deputy Mayor to be a member of the committee and providing that the Mayor and “two other Councillors” might comprise the committee, it was apparently overlooked that no procedure was introduced for the

nomination or the appointment of the Councillor replacing the Deputy Mayor as an ex officio member. The lawful formation of a performance review committee was, therefore, not possible under the contract as executed. The participants in the committee were acting without lawful authority, but cannot be too heavily censured for that, given the complexity of the issues of interpretation of the contract and taking into account that neither Mr Ellis nor the Deputy Crown Solicitor came to the same understanding of the contract as is outlined above.

19. Whilst the committee comprising Mayor Bombak, Cr Hurst and Cr Rowlands may have had good reason to report favourably on Mr Smith's performance, the review procedure appears to have lacked structure and any identifiable methodology. The meeting at which the performance review was carried out lasted 90 minutes. Although Mayor Bombak invited councillors to raise any relevant concerns with him, there was no process of consultation which ensured the participation of all elected members in the review process as occurred in relation to Mr Delahaunty's review which was facilitated by an independent consultant.
20. A satisfactory performance review was important for Mr Smith in that it qualified him for a market adjustment of his remuneration package. For the City it was both a contractual and statutory requirement. Although the LGA does not specify any formal requirements, it would be consistent with the intent of the LGA as set out in Section 1.3(2) (and would have been possible, while remaining within the procedures specified in Mr Smith's contract at clause 4.3) that an annual performance review of a CEO be carried out by Council as a whole or a committee duly established by the decision of an absolute majority of Council and desirable that the process be facilitated by an independent consultant in order to ensure its objectivity.

## **Investigation of Cr Walker**

21. At the meeting of Council on 26 November 2002 Council resolved as follows:

*Moved Cr Baker, seconded Cr Kimber, that:*

- (1) *The chief executive officer be requested to investigate as a matter of urgency whether the action taken by Cr Allison Walker in providing copies of confidential*

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*information clearly marked “confidential” and “not for publication” to a third party contravening Section 5.93 of the Local Government Act 1995, or 7.2 of the City’s Standing Orders Local Law and/or the City’s Code of Conduct; and*

- (2) *In the event that the actions taken by Cr Walker do constitute an offence under either Section 5.93 of the Local Government Act 1985, Clause 7.2 of the City’s Standing Orders Local Law and/or the City’s Code of Conduct, the chief executive officer be authorised to commence proceedings to prosecute Cr Walker for the breach.*

*(In favour: Mayor Bombak, Crs Baker, Hurst, Kadak, Kenworthy, Kimber, Mackintosh, Patterson and Rowlands. Against: Crs Barnett, Carlos, Hollywood, Nixon and O’Brien)*

22. The motion was preceded by two procedural motions moved by Cr Kimber, seconded Cr Mackintosh, that Standing Orders be suspended to allow the matter to be dealt with as one of urgent necessity and that the matter be discussed behind closed doors. The text of the procedural motions included the substantive motion. The Standing Orders merely require that when a decision is made to sit behind closed doors that the reason be recorded. One of the reasons for sitting behind closed doors is to avoid undue embarrassment to an elected member or employee who may be the subject of a motion. The Standing Orders do not require a motion that is not passed to be read out. The inclusion of the substantive motion within the terms of the procedural motion in this case went some way to defeat the purpose of allowing Council to sit behind closed doors. Whether done out of ignorance, or to embarrass Cr Walker, it was inappropriate. What occurred was contrary to the Code of Conduct. It constituted conduct which was “likely to cause any reasonable person unwarranted embarrassment”. It also failed the ethical standard of ‘beneficence’ in the Code of Conduct, which requires that “we do for others what we would like done for ourselves”.
23. Cr Walker gave evidence that she was required to leave the chamber during discussion of the motion and therefore unable to respond to allegation made against her. This is confirmed by the minutes: 2511AW5. There was no cause to exclude Cr Walker at this time and by depriving her of her right to be heard on the issue Council denied her natural justice or what is more broadly described as procedural fairness. That is also a breach of the Code of Conduct. The ethical standards of the Code of Conduct require that all persons be treated fairly. It is noteworthy that Cr Walker’s concerns related to the CEO, yet he was the person appointed by Council to carry out the investigation. The dissent of Crs Barnett, Carlos, Hollywood, Nixon and O’Brien is noted.

24. On 2 December 2002 Ms Gwilliam wrote to Cr Walker stating:

*“It is the Department’s view that your actions in bringing concerns to the Department as the regulatory body responsible for Local Government matters, should not be the subject of prosecution. Such an attempt at prosecution would be against the spirit and intent of the legislation, could hinder the free flow of information to the Department as the appropriate regulatory body and would be entirely inappropriate.”*

25. The CEO made a confidential report to Council on 17 December 2002 stating that advice from the City’s solicitors and the Department indicated that Cr Walker had not breached any statutory provision and no further action was required: 2611AAW7. Council merely resolved to note this report: 1110ALP2. No formal acknowledgement was made of Cr Walker’s vindication.

### **Cross-examination of Mr Smith in Jones v. Sutton**

26. In a trial in the District Court of New South Wales before Her Honour Judge Gibson of an action for defamation by Cr Darren Jones of Warringah Council against Cr Ruth Sutton, Mr Smith gave evidence for Cr Jones and in the course of cross-examination on 12 November 2002 was challenged about a number of matters relating to his credibility, including misrepresentation of his academic qualifications. The relevant part of the transcript (2206MISC9) reads as follows:

*McCLINTOCK:*

*Q. What are your tertiary qualifications?*

*A. My tertiary qualifications are in town planning, in business and in environmental science.*

*Q. What institutions do you have tertiary qualifications from and what are they?*

*A. My qualifications are from – in respect of planning from the Melbourne Royal Institute of Planning which is where one becomes qualified as an ordnance for town planner and I became certified as a town planner and my other qualifications relate to environmental science which I obtained through the Institute of Technology.*

*Q. What degrees or diplomas do you have and from what institutions and when did you obtain them?*

*A. I don’t have degrees. I am a registered town planner through the ordnance provisions through the Royal Melbourne Institute of Technology.*

*Q. Do you hold a post-graduate diploma from any institution in Australia?*

*A. I have a diploma in environmental science through the Institute of Technology.*

- Q. When did you obtain that?*
- A. I would not know the exact date. It would have been in the early 1980s.*
- Q. Do you have any other post-graduate qualifications from the Institute of Technology or the University of Technology?*
- A. At the Institute of Technology I carried out a post-graduate qualification in business management.*
- Q. What degree or diploma does that give you?*
- A. That doesn't give you a degree.*
- Q. What did you actually do in the course of that endeavour?*
- A. Of obtaining that qualification?*
- Q. I withdraw that. What is the post-graduate qualification that you hold from the University of Technology?*
- A. It is in business management.*
- Q. What is it called?*
- A. It is called a diploma of business in management.*
- Q. And when did you obtain that?*
- A. It would have been in the early 1990s.*
- Q. You say that you have—*
- A. And I also have a diploma in land and engineering, surveying, drafting through the Institute of Technology in 1972.*
- Q. I think you also said that you had a post-graduate diploma of some sort from the Institute of Technology?*
- A. That is correct, in environmental science.*
- Q. When did you obtain that diploma?*
- A. It would have been in 1980.*
- Q. What is the title of that qualification?*
- A. Post-graduate diploma in environmental studies.*
- Q. You have included in your curriculum vitae, in job applications, haven't you, Mr Smith, the assertion that you hold a post-graduate qualification in business management from the University of Technology obtained in 1990, haven't you?*
- A. That's correct.*
- Q. You have also asserted that you have a post-graduate diploma in environmental and pollution studies obtained from the Faculty of Science, New South Wales Institute of Technology?*
- A. That is correct.*
- Q. You, in fact, do not hold – I withdraw that. Would you have a look at this particular CV, and I suggest that you used it to obtain a job at Coffs Harbour City Council. That is a CV, isn't it, that you used to get a job at Coffs Harbour Council?*
- A. I don't know. I would be unable to answer that question.*
- Q. Have a look at the preceding two pages. You will see it is a letter dated 16 August 1993. I just want you to read the letter and the CV to yourself.*
- A. That is correct.*
- Q. You represented to Coffs Harbour Council that you had a post-graduate qualification in business management at the University of Technology obtained in 1990, didn't you?*
- A. That is correct.*

- Q. You represented you had a post-graduate diploma in environmental pollution studies at the Faculty of Science, Institute of Technology, didn't you?*
- A. That is correct.*
- Q. You, in fact, do not have and have never held either of those first two qualifications, have you, Mr Smith?*
- A. That is not correct.*

27. Mr Smith was confronted with a letter from the University of Technology Sydney dated 8 November 2002 and then asked:

- Q. What I want to ask you, Mr Smith, is whether you still assert, having read that letter, that you have tertiary qualifications specified as A and B in the CV which is now part of MF19. What I want to ask you is whether you still say you had qualifications A and B.*
- A. That is correct.*
- Q. You have been falsely holding yourself out as having two qualifications from the University of Technology that you don't have, haven't you?*
- A. Not correct.*
- ...
- Q. How do you explain, Mr Smith, that UTS apparently has no record of your qualifications?*

28. At that point objection was taken to the questioning and the admissibility of the letter from the University and ruled upon. Then, at page 115 of the transcript:

*McCLINTOCK:*

- Q. (Exhibit 11 shown) You have seen those documents before, Mr Smith. I don't wish to be in any way unfair to you. I want to give you an opportunity to proffer any explanation you have for the apparent fact, as set out in the UTS letter, that you are unknown to that institution. Do you have an explanation?*
- A. No, I do not.*

29. He was then challenged on his evidence that he called an investigation in relation to an allegation by Cr Sutton against Cr Jones, a matter about which findings were subsequently made.

## CEO's Response: 15 November 2002

30. On 15 November 2002 Mr Smith e-mailed the elected members (2302 MCOB 6), informing them that, “during the course of giving evidence a dispute took place regarding qualifications and where they had been obtained”, and that he had subsequently provided to the Mayor, in the presence of Mr Loader, a “detailed explanation of the matters raised in court”. *The West Australian*, he said, had pursued the issue and submitted questions to the Mayor to which he (Mr Smith) had provided answers through the City's media advisor, Mr Laurie Brennan. The questions and answers were stated as follows:

*“(1) Could you please send me a copy of Denis Smith's resume which he sent to Joondalup on applying for the job of CEO.*

*A. No.*

*(2) Re Mr Smith's evidence from Tuesday: will the Mayor ask Mr Smith to explain why he was “unknown” to the University of Technology despite claiming he held two qualifications from the University?*

*A. Mr Smith has already explained that the University was asked only certain questions. The Court has been provided with details explaining the matters raised in the hearing.*

*(3) In light of the evidence on Tuesday, does the Mayor have concerns about Mr Smith's credibility?*

*A. None.*

*(4) Did Mr Smith tell the City of Joondalup he held two qualifications from the University of Technology which were queried in the NSW District Court on Tuesday.*

*A. Yes.*

*(5) Will the Mayor take steps to cancel Mr Smith's contract in light of Tuesday's evidence?*

*A. Not applicable.*

*(6) Has the Mayor received any explanation to the allegations raised in the District Court?*

*A. Yes. I am fully satisfied with the explanation.”*

31. Mr Smith went on to state:

*“Mr Smith has also been advised that a further letter has been supplied by UTS to the solicitors in the Court proceedings. It has been confirmed by the solicitors in the proceedings that this matter is no longer considered an issue and has not been pursued by either party. The Deputy Director of Student Administration, UTS, has clarified the content of the first letter that was written as a result of preliminary enquiries made by solicitors representing one of the councillors in the Court case.*

*Correspondence has also been received by the Deputy Director of UTS, clarifying the situation and advice has been received from the solicitors involved in the proceedings confirming that this whole matter has been clarified and is no longer an issue.*

*I trust The West Australian newspaper will give the story true fairness, which will be a unique situation, having regard to previous experience with Bronwyn Peace from The West. If The West Australian or any other newspaper attempts to make an issue out of this letter, I will have no hesitation in commencing formal legal proceedings.*

*I have submitted the above to all councillors, in an endeavour to brief you prior to the possibility of an article being published in The West Australian. The same information revealed above has been forwarded to The Sunday Times.”*

32. At the date of the e-mail to *The West Australian* neither Mr Loader nor Mayor Bombak were aware of either the similarities or the differences between the evidence given to the District Court by Mr Smith as to his qualifications and the qualifications shown in the documents he showed them. Further, there is no evidence to suggest that they informed themselves or otherwise became aware of such matters up to the time of the Council meeting on 17 December 2002.
33. Mr Bombak at T9370 22/4/05 was unable to recall getting questions from *The West Australian*, or the e-mail of 15 November 2003. Nor could he recall Mr Smith’s explanation:

*COUNSEL ASSISTING: Did Mr Smith give you an explanation, as he said he did in this e-mail, a detailed explanation of the matters raised in Court? --- I can’t recall. Really I can’t recall. I know that he gave me a list of his qualifications.*

34. It was put to Mr Bombak by Mr Power that “the likelihood is, is it not, that you were provided with an explanation”; to which he agreed. Mr Smith was not examined on the topic. It is not possible to reach a conclusion unfavourable to Mr Smith on that basis. However, whether or not Mr Bombak was given an explanation, he was not cognisant of the details of the differences between the evidence given by Mr Smith to the District Court concerning his qualifications and the qualifications which were revealed by the documents he was shown.

35. At T9371 Mr Bombak said he could recall being shown Mr Smith's certificates after the newspaper article appeared. He was examined as follows:

*COUNSEL ASSISTING: What I am asking you about is what happened before the newspaper article? --- Right.*

*And I am specifically asking you whether Mr Smith gave you a detailed explanation of what occurred in Court, as he said he did in this e-mail to councillors? --- Well, I –*

*Because if he didn't, then that e-mail might be quite wrong? --- Well, I don't recall. If I could recall that e-mail and a discussion with him on that – and I don't recall.*

*Well, I suggest that this is a conversation that you would have cause to remember? --- Mr Staude, I don't remember.*

*Your CEO had been accused of lying in a Court of law in NSW? --- Yes. And there was an article –*

*He was coming to you with an explanation about that? --- There was an article in the newspaper.*

*There was no article then, Mr Bombak. It didn't occur until --? --- Well, that's what your –*

*– Five days later? --- Well, that's what your confusing with me, because I was under the impression that he come and showed me all his qualifications after the newspaper article. Now, I hear what you say. Here is a letter dated this, that went out to all councillors. I don't have any recollection. In fact, I don't even know whether the conversation occurred. I don't know, to be – I just don't know.*

36. Mr Bombak did not recall whether Mr Brennan was asked to formulate answers to the newspaper's questions. Questioned at T9376 Mr Bombak said he could not recall what allegations were raised in the District Court. He could recall a meeting at which he inspected Mr Smith's certificates which began in the CEO's office and continued in the Mayoral office. He agreed that on that occasion Mark Loader took an inventory of the CEO's certificates. He recalled signing a document.

### **“Civic Chief Lied: Lawyer”**

37. There appeared in *The West Australian* on 20 November 2002 an article headed “Civic chief lied : lawyer”: 1210JAH4. It was reported that Mr Smith had been accused of lying by senior counsel on the basis that UTS had no record of him being awarded diplomas in environmental science and business management which he said on oath he had obtained and

which he had included in his Coffs Harbour CV. Mayor Bombak was reported as having confirmed that the two qualifications were included in Smith's resume to the City. The report stated that it was revealed in court that non-award courses taken by Smith did not result in any formal qualifications. The article did not mention Mr Smith's admission that he did not hold any university degree.

38. Mayor Bombak was questioned about the statements attributed to him in the article at T9379. He said he did not speak to Bronwyn Peace or any other reporter: "*As far as reporters went there was a protocol in place. They all went to Laurie Brennan*". He said he normally took newspaper articles with a grain of salt. He thought that if someone had lied in Court they would be charged with perjury. Mr Bombak had no recollection of making the statements which were quoted in the newspaper article. At T9381:

*COUNSEL ASSISTING: Well, what's your present view about having been quoted as saying that: that you were fully satisfied with the explanation as to his evidence in the District Court? --- Well, as I said, there is doubts about the e-mail, about the authenticity there. The fact that I ever seen it, you know, I just can't quite – I've got no answer for it.*

*So I take it then that you dispute that you received an explanation? --- Well, I don't know, you know. I received an explanation when we went through the certificates. Not an explanation per se. He spelt out that these were the certificates. I don't recall an explanation.*

*PRESIDING MEMBER: Well, he doesn't even know what the allegations in the District Court were –*

*COUNSEL ASSISTING: No. That's right.*

*PRESIDING MEMBER: -- So he couldn't –*

*COUNSEL ASSISTING: He would need to have known what actually transpired in Court.*

*WITNESS: That's right.*

*COUNSEL ASSISTING: Okay. Now, did you – do you recall whether you received any information along the lines of this article before it was published, about -- ? --- No. I don't recall.*

*-- Whether Mr Smith had diplomas in environment science and business management?*

*--- No.*

39. Mr Smith's personal assistant, Ms Helen Hill, said that she typed the e-mail of 15 November 2002: T9565 27/4/05. She thought the meeting referred to in the e-mail was that at which Mr Smith produced a memo outlining his qualifications. She believed that meeting took

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place in the CEO's office. She also recalled typing another document, which Mr Smith dictated and she recorded in shorthand, which described his qualifications. At T9568-9569:

*PRESIDING MEMBER: And that was – nobody else was present so its -- ? --- No. I don't believe so.*

*And do you believe that happened before or after the meeting with Mr Loader and Mayor Bombak? --- That would have been before because I recall that the memo was initialled by Mayor Bombak. I am not – I don't recall whether Mark Loader initialled them but certainly Mayor Bombak initialled both pages to say that he had sighted what had been typed on the memo, so that memo would have had to have been prepared prior.*

*Initialled once or initialled alongside each thing sighted? --- Initialled once I believe, at the bottom of the page.*

*So you saw a document with Mayor Bombak's initial on it? --- I have seen one. Yes.*

*COUNSEL ASSISTING: Have you seen a document that has Mr Loader's initials or signature on it? --- I don't believe I have. I can't recall that I have.*

*And when you prepared or you typed this document that Mr Smith dictated did the words that you typed which described the qualifications that Mr Smith was looking at record to your knowledge or understanding what was stated on the face of the document? --- Well, to understanding –*

*Whether it was described as a certificate or award? --- Yes. To my understanding it would have been. If that's what he dictated I would have taken it that he was reading it from the certificate.*

*You had no means of checking against the documents themselves the words that had been dictated? --- No. No.*

*Did you ever see the documents? --- I was aware the documents were there. I didn't – I hadn't actually physically seen the documents.*

40. Ms Hill did not recall seeing at any time a document that had initials against each of the items which described the qualifications. She only recalled the initial of Mayor Bombak at the bottom of the memo. She then identified the document which she had been describing as the CEO's memorandum of 25 November 2002: (1110ALP1). Ms Hill did not recall typing any other document listing Mr Smith's qualifications. She had no reason to believe that she did not type the memorandum on the day it was dated: (T9575).

41. Mr Loader's evidence was that he did not receive the e-mail of 15 November 2002, but met with Mr Smith and Mayor Bombak about that time. He recalled only one meeting with Mr Smith at which he was shown Mr Smith's qualifications and a memorandum describing those qualifications according to the words on the certificate. He was not told what the purpose of the meeting was. No document fitting Mr Loader's description and signed or initialled by him and Mayor Bombak was disclosed during the course of the Inquiry.
42. On Ms Hill's evidence the only list of documents she prepared was the memorandum of 25 November which she was likely to have typed on that day. Mr Loader and Mayor Bombak were shown another document which accurately described Mr Smith's qualifications, such as they were, which neither of them retained and the whereabouts of which is unknown.
43. Mr Smith described only one meeting with Mayor Bombak and Mr Loader: T3141, 3142. He said he produced his documentation to Mayor Bombak in the presence of Mr Loader. He did not say that he gave any other "explanation", detailed or otherwise, of the issues that arose in his cross-examination in *Jones v. Sutton*. Mr Smith completed his evidence before Mr Bombak and Ms Hill were called and before Mr Loader addressed events which occurred after Mr Smith's evidence in NSW. Consequently, it was not put to Mr Smith, in relation to his e-mail of 15 November 2002, that he had not in fact given any detailed explanation to Mayor Bombak or Mr Loader or that the answers to the questions put by *The West Australian* were not the subject of any consultation with Mayor Bombak.
44. Mr Laurie Brennan, the City's media advisor, gave evidence that there was a delegation of authority by Council to the CEO to issue media releases and that there was a sub-delegation to Mr Mike Smith, Manager, Marketing Communications and Councillor Support. Mr Brennan identified the City's communications policy 2.3.2: 1002LJB2. It was Mr Brennan's role to prepare statements on behalf of the City at the direction of the CEO or the Mayor. The usual process that he would be briefed on an issue, prepare a statement and then submit it for approval to the relevant officer. In relation to Mr Smith's contractual issues, however, he said at T5323 10/2/05:

*MR McLEOD: Well, what occurred then in relation to his personal contractual issues? --- Well, with that subject he would – he would send me, usually by e-mail, a statement which he wanted put out to the media. He never asked me to change them or –*

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45. Then at T5352, Mr Brennan gave evidence of his advice to Mr Smith:

*COUNSEL ASSISTING: In your role at that same time as media advisor did you give any advice to Mr Smith as to how to handle the approaches of the media? --- I did.*

*And what was that advice? It may have been from time to time but if you can tell us in summary form? --- Yes. Well my initial advice was for him to disclose what qualifications he had and put out a complete media release saying exactly what the situation was.*

*And how early did you give that advice? --- Very early.*

*So in terms of the qualifications in the advice you gave in relation to those when do you say you gave that advice initially? --- I'm just trying to distinguish between the qualifications and the media articles. Definitely when he came back from Sydney, from the Sydney court case, and there was that story in *The West*, the second one to which you referred. I said to him, "you should put out a news release straight away to clarify the situation".*

*And what was the basis of that advice or that you considered warranted advice in those terms? --- Well, I could see that if this was to become a media issue it would not be good for the image of the City.*

Mr Brennan's evidence did not otherwise address Mr Smith's e-mail of 15 November 2002 and the response to *The West Australian's* questions at that time.

46. The evidence of Mr Smith, led by his counsel, did not refer to any explanation being given to Mayor Bombak and Mr Loader of the events that transpired in court on 12 November 2002 except for the meeting at which he purported to verify his qualifications. If any explanation of discrepancies had been given it would have been in Mr Smith's interests to give evidence of it. Such an explanation would probably have been remembered by Mr Loader and Mr Bombak.
47. The date of the meeting is not clear, but it is likely to have occurred prior to the publication of the article in *The West Australian* on 20 November 2002. It is clear from the evidence of Mayor Bombak and Mr Loader that they had no idea of the issues that had arisen in Mr Smith's cross-examination or the purpose for which their inspection of the documents was requested by Mr Smith. The 25 November memorandum refers to a meeting between Mr Smith and Mayor Bombak on 21 November to discuss Cr Carlos' request for production of the documents, but it may be inferred from the text of the letter that the documentation had

been shown to Mayor Bombak before that date. These issues were not identified in Mr Smith's e-mail of 15 November 2002 (which Mr Loader did not receive in any event) and which were not known publicly until the publication of *The West Australian* article. The statements attributed to Mayor Bombak in that article appear to come from Mr Smith's own replies to the questions asked by *The West*. It would seem also that at or about that time Mr Smith was counselled by Mr Brennan, the City's media advisor, to make a full disclosure of his qualifications which he elected not to do.

48. Mr Bombak's evidence about the statements which he is reported to have made in the article is unsatisfactory. There is no doubt that he would have been most concerned to discover that the CEO had been accused of lying in court and that the veracity of his qualifications had been challenged. It was his role, as Mayor, to give leadership and guidance to the community, to speak for the City, and to liaise with the CEO. He had a particular responsibility to deal with this problem in a proper manner.
49. It was inappropriate for Mr Smith to prepare the Mayor's answers to the newspaper questions as it was a matter in which he had an interest. If Mr Bombak did not approve the answers, or see them before they were sent to *The West Australian*, then, when he read the statements attributed to him in the article he should have withdrawn them, unless he was satisfied that there was a factual basis for them. When he had the opportunity of seeing Mr Smith's qualifications he should have ascertained the significance of that exercise and taken care to ensure that the meeting was minuted in some way.
50. On the evidence of Mr Bombak it may be inferred that his confidence in and affection for Mr Smith obscured his perception of the importance of the issue which had arisen in relation to his honesty, and precluded him from dealing with it in an impartial manner. Furthermore, when Mayor Bombak was provided with Mr Smith's memorandum of 25 November 2002, it should have been apparent that the qualifications described therein were different from those described in the document which he had signed. He was careless not to compare the documents shown to him with the candidate report prepared by MRA having regard to the fact that he was quoted in the newspaper article as confirming "Mr Smith had included the two qualifications under question in his resume to the City".
51. Mr Loader also had a responsibility as the HR manager and the person responsible for the selection process to ensure that the qualifications which he was asked to inspect corresponded with those which had been represented having regard to the answer given on behalf of the City to *The West Australian*. Whether or not the meeting at which Mr Smith

showed his qualifications occurred before or after the publication of that article, Mr Loader was in a position to compare what he was shown with the consultant's report and was bound to advise the Mayor of any discrepancy pursuant to his obligations under the Code of Conduct. Those discrepancies would have been obvious to Mr Loader having regard to his professional background and experience. It would also have been apparent to Mr Loader that the memorandum of 25 November 2002 did not correspond with the list of documents which he initialled when shown the CEO's actual certificates. Mr Loader was in a particularly difficult position being part of the CEO's business unit, but was bound to bring an independent judgment to bear on the propriety of Mr Smith's actions.

52. The matters raised in the article were not conclusive, but were of significant public interest. The reporting of judicial proceedings is encouraged in the interests of the administration of justice – justice must be seen to be done. Mr Bombak and a number of other witnesses indicated in their evidence that they were disinclined to put much faith in newspaper reports. This was not a valid reason for not taking seriously a report that Mr Smith had been accused of deliberately lying about his qualifications in court. It behoved the Mayor and Council at the time to inform themselves of the issues independently of information from Mr Smith by obtaining a transcript of the evidence in order to satisfy themselves as to the facts of the matter. It was in the interests of the City that its CEO have a reputation which was not tainted by any suggestion of dishonesty. The elected members were required to put that interest of the City ahead of any personal considerations.

### **Mr Smith's Memorandum of 25 November 2002**

53. On 25 November 2002 Mr Smith sent to the Mayor and councillors a memorandum listing the professional qualifications he possessed and which he said he had shown to the Mayor and Mr Loader: 1110ALP1. This document was the subject of a great deal of evidence. It is crucial to an understanding of the Council's response. It begins with a reference to a discussion between Mr Smith and the Mayor on 21 November 2002 regarding a request by Cr Carlos to Mr Smith to produce his qualifications. In relation to the request Mr Smith made the following points:

- Cr Carlos had no "jurisdiction to request [him] to provide any information particularly that which may be deemed to be of a privileged nature".
- As CEO he was only required to implement and action a lawful direction.

- He had recently produced to the Mayor and Mr Loader documentation “pertaining to my qualifications”.
  - The position of CEO was not advertised and therefore no formal application was submitted.
54. The significance of the last point appears to be that the City’s Advertised Vacancy Information Package states that the provision of false or misleading information in an application may be grounds for dismissal: 0702SMC8. The memorandum listed Mr Smith’s qualifications, and his explanation for not being able to produce his “business management” qualifications, as follows:
- (1) *Qualification in Land & Engineering Surveying, Sydney Institute of Technology 1965-68.*  
Qualification completed in December 1968  
*Qualification Sighted*
  - (2) *Qualification as a Certified Town & Country Planner, Local Government Examination Committee, NSW (in conjunction with the RMIT).*  
July 1971 – Examination Committee advised that I had completed all necessary examinations to the satisfaction of the Examination Committee. This was completed over a three year period through RMIT. I was then eligible to apply for certification as a Town & Country Planner.
  - (3) *Local Government Town & Country Planning Examination Committee granted an Interim Certificate of Qualification as a Town & Country Planner, permitting me to practise as a Certified Planner – 14 March 1972.*  
*Qualification Sighted*
  - (4) *Post-graduate qualification course, NSW Institute of Technology, in Environmental and Pollution Studies – Faculty of Science, 1973-74.*  
*Qualification Sighted*
  - (5) *Full Certificate of Qualification as a Town & Country Planner, issued 30 November 1976, through the Local Government Town & Country Planning Examination Board.*  
*Qualification Sighted*
  - (6) *Certification as an approved Mediator from the Australian Commercial Disputes Centre, March 1996.*  
*Qualification Sighted*
  - (7) *Post-graduate qualification course in Business Management, Centre of Management Studies, Executive Development Unit, NSW University of Technology, 1990-92.*  
*Details of attendance and other documentation submitted*

*A request has been made through the Deputy Director of Student Administration, UTS for details of completion of the qualification. The Deputy Director is pursuing the matter as the qualification exceeds a seven year period, and therefore needs to be obtained through archival records. I am prepared to sign a Statutory Declaration that I completed this qualification and was issued with the necessary documentation. I am also able to obtain evidence from senior management staff of Gutteridge Haskins & Davey, my former employer, who also attended the same course and received the same qualification.*

*In the time that I have had available, I have been unable to locate all my boxes as some are in storage. In the last week, I have spent hours searching through boxes in an attempt to satisfy the whims of some of my political masters.*

55. Having submitted his documentation, as stated, Mr Smith said that as far as he was concerned the matter was closed. He went on:

*“If any of the councillors wish to challenge it any further, they can do it through a legal mechanism. I am not going to be subjected to further intimidation, harassment or unreasonable demands being placed upon me by certain councillors who have continued a witch hunt from the time of my appointment. I am already being subjected to a ‘spanish inquisition’ on the procedures laid out in the contract of employment regarding my performance review.”*

56. It is significant that none of the qualifications listed in the memo was described in the words which Mr Smith used in Court. Under cross-examination in *Jones v Sutton* he said he had a “Diploma in Environmental Science”, a “Diploma of Business Management” and a “Diploma in Land and Engineering, Surveying, Drafting”. No such diplomas were described in those terms in the CV provided to RAL. Nor were any such diplomas described in the memorandum of 25 November 2002. No such diplomas have been produced and the institutions which are alleged to have issued them have no record of so doing.

57. A comparison between the descriptions of the qualifications in the memorandum and the actual documents produced by Mr Smith, allows the following observations to be made:

- The first document refers to a Certificate of Completion of the Land and Engineering Survey Drafting Certificate Course at Sydney Technical College. It was not awarded by the Sydney Institute of Technology, but by the Sydney Technical College.

- The second document described was not a qualification, but a letter indicating satisfactory completion of an examination and inviting an application for the issue of a certificate.
  - The third document is described accurately.
  - The fourth document is in fact a certificate of satisfaction of the requirements of an extension course in Environmental and Pollution Studies issued by the NSW Institute of Technology, indicating that the course was done in the spring semester of 1973.
  - The fifth document is as described in the memo.
  - The sixth document is an Accreditation Certificate in Building and Development Application Mediation.
  - The seventh document was a certificate that Mr Smith satisfied the requirements of a course in Managerial Skills provided by the University of Technology Sydney Continuing Professional Education Programme issued 15 March 1990.
58. No mention was made in the memorandum that Mr Smith had professed in his CV to have a “post graduate qualification, Bachelor of Business (Management)”. The memorandum did not explain why none of the certificates possessed by Mr Smith was stated to be a diploma. At T2991, Mr Smith, in answer to a question by his counsel, Mr Power, as to why he produced this memorandum said:
- “I produced this document in an endeavour to clearly and transparently explain to the Mayor and to other members of Council of the qualifications that I held and what I had in my possession at the time. I wanted to clearly respond to it and clear up any issues that may have eventuated as a result of the evidence that I have given.”*
59. The memo was not a clear and transparent explanation. Nor did it respond to or clear up the issues that arose from Mr Smith’s evidence. Rather, it purposefully obfuscated, concealed and dissembled his qualifications. His actions were self-interested and contrary to the interests of the City of Joondalup.
60. Mr Patterson gave evidence that around the time of the 25 November memorandum, he went to see Mr Smith and he was told by Mr Smith that he held the appropriate qualification, which Mr Patterson assumed to be a qualification in business: T578 11/10/04.
61. Ms Hurst said that after Mr Smith gave evidence in *Jones v Sutton* she was aware that he had no tertiary degree, as he claimed to have. She believed that as CEO he was doing a

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good job and if she was in charge then she would have formally chastised him and MRA for the information not being clear and checks not being made, and then got on with business. She said that she would not have lingered on the subject or dismissed Mr Smith. Ms Hurst nevertheless agreed that Mr Smith had exaggerated his CV, that it was not good for the City, and that it might have meant that Mr Smith was a person of inherent dishonesty. She was not happy that it had happened, but in her view it did not change how he ran the City, which she was happy with: T661-663 12/10/04. Ms Hurst said that if she were in charge she would have done things differently. She said she had no hope of putting up her own point of view and believed that the majority would not support her: T664 12/10/04. Ms Hurst said she would not dismiss Mr Smith even if he had lied in Court and lied on his CV: T666. However, she would not have renewed his employment. Ms Hurst suggested that if she were Mayor she would have wanted to see the qualifications and would have suggested a different path from the beginning: T 679 12/10/04.

62. Mrs Walker said that after she received the memorandum she had concerns about the description of the post-graduate qualification course in business management as it said that “details of attendance and other documentation submitted”, but it did not say that the qualification was sighted, which she thought was odd as it was the seemingly highest qualification: T2140-2141 24/11/04. She also said that she believed that Cr Carlos alone could not ask Mr Smith questions pertaining to his qualifications, but Council as a body could. In her view, Mayor Bombak should have said “Right, okay, Mr Smith. You’ve got all these qualifications. Let’s take them to the councillors. Let’s spread them out on the floor and everybody can go and have a look at them, and then we’ll close this matter here and now.” (2147 24/11/04)
63. Mr Nixon said that when this information came out he thought there would be a few problems for the City. He expected more local scrutiny and possibly a vote of no confidence in the Council at electors’ meetings, such as happened prior to Mr Delahaunty leaving. He thought this would happen because of the nature of the allegations, and because Mr Smith had the support of the Mayor, Mr Nixon thought there would be a few “stormy meetings”, but nothing on the level of what happened prior to Council’s suspension: T3760 16/12/04. Mr Nixon said that the article in *The West Australian* did concern him, and anticipated that there would be discussion in Council over the issue: T3761 16/12/04. Mr Nixon said that he read the memorandum and noted it. He considered the intention of the memorandum was to end the matter, but it was obvious it would not, as there was no mention of a tertiary degree in it: T3764 16/12/04.

64. Mr Baker said that the article in *The West Australian* was a privileged allegation that the CEO had lied about his qualifications: T4117 18/1/05. He gave evidence that when the issue as to Mr Smith's qualifications arose in November he phoned Mr Smith and advised him that if he wanted to "kill off this issue", then he should show everyone his qualifications. Mr Baker said that in response Mr Smith told him that he was not going to show his qualifications as he had received legal advice that he did not have to: T4118 18/1/05. Mr Baker said that he would have made this request in response to the newspaper article and not the memorandum: T4240 18/1/05. Mr Baker said that he made this request of Mr Smith as he was concerned as a councillor that the issue was having the effect of bringing the City into disrepute and negatively affecting the reputation of the City: T4241 18/1/05. He had no problem with placing his trust and confidence in Mr Loader and Mayor Bombak to view the certificates, because if anyone would be familiar with reviewing certificates it would be the Human Resources Manager and the Mayor, who was a Justice of the Peace.
65. Mr Baker said he had no reason to doubt them when they said that they had sighted Mr Smith's qualifications and that he possessed all the qualifications he claimed to have: T4245 18/1/05. Later in his evidence, Mr Baker said that he felt that the issue was "all part and parcel of the smear campaign" against Mr Smith and this was bolstered by discussions with Cr O'Brien who had conducted research into Warringah: T4324 - 4325 19/1/05. He said that he never compared the 25 November memorandum with the confidential report on Mr Smith given to councillors by Warren Reynolds and relied on other councillors' comparative analysis: T4329 – 4330 19/1/05. Mr Baker did not compare what was in the memorandum with any record or report of what was said in Court.
66. Mrs Mackintosh gave evidence that a newspaper article could reflect badly on the City, and Mr Smith had an opportunity to make statements in relation to articles. She thought that if Mr Smith had misrepresented himself in any way then it was a failing of the recruitment company not the City. She also took the view that Mr Smith was not hired on his qualifications and was doing a good job: T4455 28/1/05. Mrs Mackintosh said that she would not take the word of a reporter over the word of Mr Smith as she could not know whether the reporter was reporting accurately and truthfully. She also thought that if Mr Smith was a liar, a fraud or a cheat then that would have come out in Mr Smith's performance, but she said he was professional in every way and had everybody's respect: T4456 28/1/05. Mrs Mackintosh said, regarding the newspaper article, that she was concerned that there was a reporter in the eastern states who was trying to discredit the City of Joondalup and its chosen CEO, but did not think it was her place to respond, being only

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one member of the Council: T4460 28/1/05. She believed Mr Smith was the subject of a “witch hunt” because for the whole term of his appointment he had had to deal with allegations against him: T4462 28/1/05.

67. Mr Kimber said that in relation to Mr Smith’s evidence in *Jones v Sutton* and the subsequent newspaper article he approached Mayor Bombak to ask him to sort this matter out. Mayor Bombak told him he would look into it. He said that he was not satisfied with the whole issue at that stage and wanted the Mayor and the HR Manager to speak to Mr Smith and provide evidence to Council. Mr Kimber said that Mr Smith did this by way of a memorandum to councillors: T5421 14/2/05. He said that the Mayor was the appropriate person to deal with the issue. Mr Kimber said he was satisfied with the Mayor’s actions and once he had received the information in the memorandum he too was satisfied: T5427 14/2/05.
68. Mr O’Brien gave evidence that Mr Smith explained verbally to councillors that the dispute arising out of *Jones v Sutton* was really in relation to his credibility being attacked, which Mr O’Brien understood to be part of the adversarial system. Mr O’Brien said that he did not read the transcript of Mr Smith’s evidence: T6108 23/2/05. He did read the reasons for decision of Gibson J, but understood there had been a successful appeal and that Gibson J’s comments in relation to Mr Smith were just an *obiter dictum*: T6109 23/2/05. Mr O’Brien said that when he found out that Mr Smith had said on oath that he did not have a degree he took the view that Mr Smith had been performing well and that it did not really matter as tertiary qualifications were not a statutory requirement and there was no proof that fraud had occurred. Mr O’Brien took the view that the words “post graduate qualification” meant that Mr Smith was qualified to enter a discipline: T6114 23/2/05.
69. Mr O’Brien said that he did not rely on the article as he had not yet read the transcript or judgment. He did not rely on journalists as he believed they wrote “10% fact 90% fiction”: T6121 23/2/05. Mr O’Brien said that at this time he did not ask Mr Smith for an explanation, but that one was provided in the form of the memorandum. He did, however, ask him at a Council dinner whether he had a degree, to which Mr Smith replied no. Mr O’Brien said that Mr Smith’s response did not cause him any concern or warrant further inquiry as he was aware there was no requirement for tertiary qualifications under the LGA and it was never an issue at the interviews: T6129 23/2/05.

70. Mr O'Brien gave evidence that he was satisfied with Mr Smith's explanation in the form of the memorandum, even though it did not address the question of whether he had a degree and did not say that he held a diploma, and so did not address the questions that were raised in his evidence in NSW: T6132 – 6133 23/2/05. Mr O'Brien said that he was satisfied with the memorandum and did not have any other questions. He did not want to see the documents that Mr Loader and Mayor Bombak had seen as he was not going to question the integrity of those people - the fact that they had sighted the qualifications was enough for him. He also said that there was no evidence of any fraud: T6140 23/2/05. He did not analyse the differences between the information provided by Mr Reynolds and the description of the qualifications in the memorandum: T6141 23/2/05.
71. Ms Barnett gave evidence that she thought the newspaper article "Civic Chief Lied: Lawyer" was just part of a smear campaign against Mr Smith: T6449 28/2/05. She agreed however that such press was bad for the City and reflected badly on the Council. She did not know how to handle an issue such as this and was relying on the Mayor to solve the dilemma. She thought that the article was outrageous and had the flavour of a witch-hunt: T6453 28/2/05. Ms Barnett said that she was satisfied with the Mayor and Mr Smith's explanation that he had all the qualifications he said he had: T6456 28/2/05. She thought the memorandum resolved the issues raised in the article: T6458 28/2/05.
72. Mr Kenworthy gave evidence that he knew there was an issue surrounding Mr Smith's qualifications, but he was unsure of the details. He understood Mr Smith had satisfied Mayor Bombak that he had not lied: T6586 2/3/05. According to Mr Kenworthy Mayor Bombak spoke to the media and was quoted in *The West Australian* article before Council considered the issue. He agreed it was important to deal with the issue from a public relations perspective: T6589 2/3/05. Mr Kenworthy said that he would have been aware of the article and would have been concerned to find out whether it was true or not and it would have been of great concern to him if Mr Smith had deliberately lied in court. He believed that if Mr Smith had committed perjury then that would have had a material effect on his ability to do the job and, if nothing was done about it, it would have the effect of undermining public confidence in the City of Joondalup. Mr Kenworthy never read the transcript of Mr Smith's evidence: T6591 2/3/05. Mr Kenworthy agreed that some explanation was called for and that Mr Smith had given that explanation in the form of the 25 November memorandum: T6595 2/3/05.
73. Mr Robinson gave evidence that after he returned from Sydney Mr Smith did not tell him about his cross-examination or the issue that arose as to the veracity of his professed

qualifications: T7393 – 7394 16/3/05. Mr Higham gave evidence that Mr Smith spoke to him about his evidence and relayed a story to him of how he was sick during the giving of his evidence, but Mr Higham was unable to recall the details of what Mr Smith told him: T7921 30/3/05. Mr Higham said that he recalled Mr Smith explaining that he had the qualifications, but felt that he was a difficult person to challenge on such matters as he always had an answer to everything: T7923 30/3/05.

74. Notwithstanding the detail of the report in *The West Australian* about Mr Smith’s cross-examination, it is evident that none of the councillors or officers who gave evidence on this subject, fully understood:
- (a) what qualifications had been professed by Mr Smith to the recruitment consultant;
  - (b) what qualifications he professed to have when cross-examined in court;
  - (c) the seriousness of the challenge made to Mr Smith’s honesty in court; or
  - (d) that that challenge gave rise to a significant probity issue.

## Reasons for Decision in *Jones v. Sutton*

75. On 6 December 2002 Judge Gibson handed down her decision in *Jones v. Sutton* (2704 HLH 5) in which she stated:

*“A series of attacks were made on the credit of Mr Smith. Individually, these were minor matters, but in total they had some significance. The plaintiff submitted I should totally disregard exhibit 11 which records that the University of Technology of Sydney and the New South Wales Institute of Technology have no record of any student or graduate with the general manager’s name in any of the courses leading to the qualifications listed in the 1993 job application which document was tendered by the defendant. The explanation that he might have participated in some kind of continuing education course or other non-degree/non-diploma courses does not explain why he claimed in his curriculum vitae that he obtained specific diplomas, certificates and degrees in specific years. This is not a simple mistake but an inability to record accurately his entire claimed university career.”*

76. Judge Gibson also said:

*“However, Mr Smith’s university qualifications (or lack thereof) are a relatively minor issue in relation to credit when compared with other unsatisfactory aspects of his*

*evidence. In addition to his unsatisfactory evidence of what he claimed happened at the meeting with the plaintiff on Thursday 18 November 1999 misconduct in taking document into the witness box for the purpose of assisting himself in answering questions (in light of my doubts about the 18 November 1999 meeting) demonstrated an anxiety to ensure his evidence conforms with the evidence of the plaintiff rather than this witness being able to give evidence by reason of independent recollection of events. The correspondence written on his behalf by Cr Moxham and the plaintiff to the Joondalup Council is indicative of a degree of common interest between these three witnesses.*

*Finally there is the unsatisfactory way which the general manager conducted an investigation into a serious allegation in a one-sided manner and failed even to reveal the existence of the investigation to councillors to whom he owed a duty by reason of the circumstances of his appointment. That was not only the defendant but the other members of the Council, particularly where three of these councillors had been in the same room as the defendant when she made allegations, it was in the interests of councillors that they should be consulted about and invited to offer evidence to any such investigation. The general manager's failure to take any such steps cannot be excused for any belief that it was Cr Moxham's duty to take such steps; at the very least, the other councillors were entitled to be told of the result of the investigation. The general manager's failure to do so illustrates his true relationship with the plaintiff."*

77. The judgment was quoted in a *Sunday Times*' article "Court Queries CEO's Record" on 15 December 2002: 1204MCOB8. The article quoted Cr Carlos as calling for an inquiry into the recruitment process and claiming that the CV provided to the City's recruitment consultant stated that he held a Bachelor of Business (Management) which Mr Smith had conceded he did not have. The article quoted Mayor Bombak as saying that he would not comment on the court criticism of Mr Smith until he had seen the judgment, but that he had sighted Mr Smith's qualifications and was satisfied they were genuine. He also said that Mr Smith had "performed beyond the expectations of the Council".
78. Mr Smith subsequently e-mailed the staff of the City and the elected members on 16 December 2002, stating that he had provided to the Mayor and councillors a detailed memo setting out his qualifications and had produced documentation supporting his qualifications to the Mayor in the presence of Mr Loader: 0206DSC144. He said he held qualifications in land and engineering surveying, town and country planning, environmental and pollution studies, and business management, and that the Mayor had indicated that he was satisfied that he held those qualifications. Mr Smith also referred to his successful annual performance review. He described the controversy as "this current war of political propaganda" which he said should be put aside.

## Public Question Time

79. Section 5.24 of the LGA provides:

- “(1) Time is to be allocated for questions to be raised by members of the public and responded to at –*
- (a) every ordinary meeting of a council; and*
  - (b) such other meetings of councils or committees as may be prescribed.*
- (2) Procedures and the minimum time to be allocated for the asking of and responding to questions raised by members of the public at council or committee meetings are to be in accordance with regulations.”*

80. Regulation 6 of the *Local Government (Administration) Regulations 1996* provides that the minimum time allocated for the asking of and responding to questions is 15 minutes, and that once all questions have been asked and responded to, nothing in the regulations prevents the unused part of the minimum time period being used for other matters. Regulation 7 provides that procedures for question time are to be determined by the person presiding at the meeting or where a majority of members disagrees with that person, by the majority. It also provides by sub-regulation (3) that each member of the public who wishes to ask a question at a meeting is to be given an equal and fair opportunity to ask the question and receive a response. Significantly, sub-regulation (4) provides:

- “Nothing in sub-regulation (3) requires –*
- (a) a council to answer a question that does not relate to a matter affecting the local government;*
  - (b) a council at a special meeting to answer a question that does not relate to the purpose of the meeting; or*
  - (c) a committee to answer a question that does not relate to a function of the committee.*

81. Sub-regulation (5) provides that if a question is directed to a person who has an interest in the subject matter of the question, that person is to declare his or her interest and allow another person to respond.

82. Clause 3.4 of the City's Standing Orders provides:

*“At the beginning of each Council meeting and any committee meeting open to the public, there will be a 15 minute segment of public question time. Questions should be submitted prior to the meeting, in writing where possible. The Chairman will be responsible for the conduct of public question time. Questions should relate to the business of the Council and should not be in the form of a statement or a personal opinion.”*

83. The first part of the meeting of Council on 17 December 2002 was chaired by the Deputy Mayor Cr Hurst in the absence of Mayor Bombak. This part of the meeting included public question time. The minutes of the meeting reveal that at the beginning of question time the Deputy Mayor read a statement setting out the rules applicable to public question time and stating:

*“I will not, under any circumstances, accept questions relating to the Chief Executive Officer's contract of employment, performance review, or qualifications. Such matters are of a confidential nature between the City and the Chief Executive Officer and have been the subject of extensive media coverage and correspondence between the Chief Executive Officer and elected members.”*

84. The minutes do not show the details of any question that was not accepted or ruled out of order.
85. Mr Carlos and a number of other witnesses gave evidence that members of the public were not allowed to ask questions about the CEO's qualifications at the meeting and that in fact, the microphone from the public gallery was switched off during the course of questions. The Inquiry heard a tape recording of this part of the meeting which verified the evidence.
86. The CEO advised the Deputy Mayor in respect of question time. The fact of the matter was that the CEO's probity was a matter of Council business upon which questions could be asked. It was not appropriate to rule questions about the CEO's qualifications out of order on Mr Smith's advice that the matter was confidential. The matter was one of considerable public interest and importance. Provided that the questions conformed with the statutory requirements and were not a statement or personal opinion they should have been allowed. The CEO's advice was given without regard to his obvious conflict of interest. Section 5.23(1)(a) of the *LGA* provides that all council meetings are to be open to the public. Section

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5.23 allows for a discretion of the Council to close to members of the public part of a meeting which deals with, among other things –

- a) a matter affecting an employee; or employees (per the Act, but here, a), b) & c) are not direct & complete quotes of the Act.)
- b) the personal affairs of any person;
- c) a contract entered into.

87. That provision would allow the Council to decide to close a meeting to discuss a matter which might have been raised by a question which raised any of those issues. It is not a provision which authorises the prevention of questions being asked in public question time; and it is not a basis, in itself, for ruling a question out of order.

88. Lang, in *Horsley's Meetings*<sup>1</sup> tells us that:

*'Just what constitutes a point of order is not easy of definition,*<sup>2</sup>.

*A point of order is an allowable interjection which directs the Chair's attention to an apparent or alleged breach of order...*

*A point of order usually relates more to procedure or the manner of a speech than to the substance of what is being said, although the latter is sometimes relevant. A point of order is raised validly when it draws attention to an irregularity or impropriety in the proceedings or some defect in the constitution of the meeting. Examples are: (1) the absence of a quorum, (2) some breach of standing orders or the accepted rules of debate, (3) introduction by the speaker of subject matter not relevant to the motion or amendment being discussed, or beyond the scope of the notice or authorisation of the meeting, and (4) offensive or abusive language, or uncalled-for insinuations regarding a persons motives or conduct.*

*A point of order is not something to be raised because a person wishes to contradict, disagree with or object to what is being said or implied, or to contend that it is untrue or misrepresents the facts.*

89. Asking a question concerning the CEO's qualifications per se could not be out of order in any of the senses suggested by Lang. It is not out of order to ask a question which may touch on any of the topics referred to in Section 5.23, by reason only of the fact that it does so. If the question contained an uncalled for insinuation regarding a person's conduct it might be

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<sup>1</sup> *Ibid*, p 95; see also Magner, *ibid*, pp 42-3; Renton, N.E., *Guide for Meetings and Organisations*, 6<sup>th</sup> edition, The Law Book Company Limited 1994, Vol. 2, p111, para 7.1-7.3.

<sup>2</sup> *Arcus v Castle* [1954] NZLR 122.

ruled out of order. However, a question seeking information as to the CEO's qualifications would not fall into that category.

### **Motion of Confidence: 17 December 2002**

90. On 17 December 2002 Cr Nixon moved a motion of confidence in Denis Smith, which was carried 12-1: (1110ALP2). Cr Nixon gave notice of this motion and said in support of it, "Denis Smith has shown himself to be an asset to the City since his appointment, an appointment which occurred as a result of a lengthy and thorough recruitment process." Council resolved as follows:

*"Moved Cr Nixon, seconded Cr Baker, that the elected Council of the City of Joondalup hereby declare their strong support for and full confidence in Mr Denis Smith and his dedicated attitude, work ethic and values (sic) to the City of Joondalup."*

91. Only Cr Carlos voted against this motion. In opposing the motion he said:

*"As far as I'm concerned we should get to the bottom of this, not move a motion tonight which exonerates the man while we've still got this hanging over his head. If he's got these qualifications I will be the first person to say, "Congratulations. You beat them. But these reporters won't go away."*

*"I have tried to get a reasonable assessment of what would happen if the same gentleman was in the State public service or the federal public service and they found out that the qualifications he stated on his CV were incorrect. The first thing they would do, they would suspend him, and that's what I would like to do; is to suspend or for him to stand down on pay so that we can get someone to investigate."*

92. In response to this Mr Smith stated:

*"Firstly, it's excellent the tapes are on, and two, that Cr Carlos has made his comments in the public arena. Because I'll welcome the opportunity of taking the appropriate legal proceedings against Cr Carlos."*

*Its - - firstly, I have already submitted to all the councillors in the presence of the Mayor at first and the presence of the Manager of Human Resources all the qualifications I hold. They were witnessed by the Mayor and the Manager of Human*

*Resources, and Cr Carlos received also a copy of that memo. One can only assume he does have the ability to read, otherwise he should not be a councillor.*

*And consequently I gave that to every councillor in a confidential memo. I have never, ever seen the document Cr Carlos is referring to. There was never an application called for in respect of the position. The position was never, ever advertised. There was never, ever a request for written documentation to be made to either this Council or to the recruitment agencies.*

*However, Mr Mayor, I have given you, in the presence of Mark Loader, all qualifications. I hold formal qualifications in land and engineering surveying. I hold formal qualifications in town and country planning, formal qualifications in respect of environmental and pollution and in business management, and you have witnessed all the documents. If Cr Carlos is now calling me a liar and also that they are forgeries he can make certain Mr Mayor. I'll welcome the - - " (1110ALP3)*

93. Cr Baker declaimed Cr Carlos' proposal as a "witch-hunt" (1110ALP3) and "part of a campaign...[of] groups over there...who are communicating with groups over here" (1110ALP3) Cr Hurst pointed to Mr Smith meeting the key performance indicators in his contract. (1110ALP3) Cr Kenworthy said:

*"Whatever the qualifications of the CEO are, it's very obvious that he has been an outstanding performer at this City... A witch-hunt is going on, and everybody knows here, Cr Carlos that that is exactly what you are about tonight. And it doesn't stand anybody, including yourself, in good stead to even listen to this in the public gallery. It puts the Council down and it puts our CEO down, and there's nothing achieved out of that at all. And it's very obvious that he is an outstanding performer, and I would just like to say to the CEO, we all appreciate what you've done so far and we look forward to having you around for a long time to come." (1110ALP3)*

94. Mr Mike Smith, Manager, Marketing, Communication and Council Support, gave evidence that he would have seen Cr Nixon's motion when he was preparing the agenda for the meeting, and considered that it was an observation by an elected member which he wanted to be considered by Council. He did not consider the potential for the motion, if it was carried, to be significant in the CEO's future employment issues. He could not offer an explanation as to why an officer's report was not provided. As at December 2002, Mr Mike Smith said that he was not aware of any of the details relating to Mr Denis Smith's appointment: T8884 – 8885 14/4/05.
95. Counsel for Mr Mike Smith submits that the motion was not of a kind which would ordinarily call for an officer's report, particularly by him, for the following reasons:

- a) As a subordinate to the CEO, he was in an invidious position if he chose to either support or criticize the motion.
  - b) Such a motion would normally be regarded as a formal motion based upon opinion with no substantive element which could reasonably be the subject of an officer's report.
96. In any event, it is not reasonable to conclude that at that time Mr Mike Smith was sufficiently informed, or could reasonably be expected to be sufficiently informed of the circumstances surrounding that motion which have later been referred to in legal advice to the City as being of substantial significance in determining how the issue concerning Mr Denis Smith was ultimately resolved.
97. Mr Robinson, Manager, Audit and Executive Services, gave evidence that:
- “It is certainly normal practice that wherever there's a notice of motion of which notice has been given that we would normally provide a response to the elected Council. I don't know whether - - because it was Denis Smith, a particular issue relating to him in relation to an assessment by the elected Council whether there was no report provided or no officer's comments provided or whether it was provided through, say, a memorandum or something along those lines.”* (T7418 16/3/05)
98. Mr Robinson said that where a councillor requested a Notice of Motion to be drafted with which he did not agree, he would still draft it and then give reasons why he did not think it would be an appropriate motion: T7420 16/3/05. Mr Robinson said that if it were a motion without notice he would tell elected members that he was not in a position to give advice as he would require additional time to consider it and would recommend to Council that it not take that particular action at that time: T7421 16/3/05. Mr Robinson gave evidence that motions such as the one passed were normally an exercise in public relations. In his experience he had usually seen such motions expressed negatively as in a vote of no confidence: T7421 16/3/05. Mr Robinson said that there was no suggestion made that legal advice be obtained on this Notice of Motion, and it did not occur to him either: T7426 16/3/05.
99. Mr Nixon gave evidence that he drafted this motion to see what the level of support amongst the Council was, and then “take it from there”: T3760 16/12/04. Mr Nixon said that Council had been through a period of instability during Mr Delahaunty's departure. He had discussed

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the form of words of the motion with Mr Mike Smith, who offered a few suggestions, but said that he did not speak with Cr Baker about the motion: T3766 16/12/04.

100. Mr Mike Smith's evidence was that he did not have any recollection of a discussion of that kind: (T8884-5 14/4/05). The significance of such a discussion is not great, in any event, given the fact that Mr Mike Smith had little knowledge of the background or potential consequences of the motion, which dealt with a matter for which he had no reporting responsibility.
101. Mr Nixon said that he thought that Council should support the CEO, otherwise he would not have moved the motion. Mr Nixon also said that if he had all the information then, that he subsequently obtained, he probably would not have moved it. He said he moved it with the best of intentions of helping the Council to move on: T3768 16/12/04. Mr Nixon said that he did not expect such resounding support for Mr Smith at that stage, given the voting history of Council which did not usually speak with such a unified voice: T3769 16/12/04.
102. Mr Rowlands gave evidence that he was not very impressed when it was reported that Mr Smith had been challenged in relation to his qualifications in the course of his giving evidence in Sydney, but said that after advice, the Council decided not to take the issue any further. He was aware that Mr Smith did not have the qualifications that he claimed to have, as it was clear from the November memorandum that Mr Smith did not hold a degree. Mr Rowlands said he also looked at Mr Smith's performance up until that date, which had been very good, and did not question his honesty and integrity: T1541 – 1542 16/11/04. The explanation that Mr Smith had given was that it was an error, and so in light of his doing a good job, Mr Rowlands did not think that the matter should progress any further: T1547 16/11/04. Mr Rowlands said that he supported the motion of confidence in Mr Smith as he agreed with the wording and he was doing a great job: T1561 16/11/04.
103. Mrs Walker said that she supported this motion of confidence as she did not have any evidence to support the fact that Mr Smith was not performing his job in a satisfactory manner. She said that at this stage the fact that she did not know what Mr Smith's post-graduate qualification was did not affect her level of confidence in Mr Smith: T2148 24/11/04. Mrs Walker said that she supported Cr Carlos' comments in that meeting, that Mr Smith should be stood down and an investigation held into the veracity of his qualifications but only for the purpose of correcting the City's records. Whilst she agreed that there may

have been dishonesty on the part of Mr Smith and that he may have misled Council as to his qualifications, Mrs Walker saw the issue of the investigation and the vote of confidence as being two separate issues, and as far as she was concerned, she did not have any evidence that Mr Smith's work ethic and the way he was conducting his job were not satisfactory. As she saw them as two separate issues, she did not see the vote of confidence in Mr Smith as the Council saying they did not want to pursue any question about the veracity of his qualifications: T2149-2150 24/11/04.

104. Mr Baker gave evidence that he thought this vote of support for Mr Smith was necessary as Mr Smith at that stage, was under "*relentless attack, for various reasons, on many fronts, politically within the Council.*" He cited the bribery allegations reported in *The West Australian* as one of those attacks: T4347 19/1/05 and page 8154 – 8155 5/4/05. Mr Baker also said that Mr Smith was doing a good job, particularly with regards to the restructuring and outsourcing: T4352 - 4353 19/1/05. Mr Baker understood that the bribery allegations had remained a live issue from talking to councillors and people in the community. He said that most councillors believed that Mr Smith had addressed this issue but not all councillors were completely satisfied that the allegations were false. Mr Baker gave evidence that he had said to Mr Smith that he should produce his qualifications to kill off the issue, but Mr Smith told him that he had legal advice, which said that he did not have to produce his qualifications. He said that he thought the matter should be investigated but said there was no point in Council investigating the matter, as it did not have coercive powers to compel him to produce his qualifications. He interpreted Cr Carlos' call for an investigation as "part and parcel" of a continuing attack on, and criticism of, Mr Smith: T8161 – 8162 5/4/05.
105. Mr Baker said that at this stage, he thought that Cr Carlos had copies of Mr Smith's qualifications, which were the "secret documents" referred to in debate. He was concerned that Cr Carlos would not produce the documents he had. He believed that Cr Carlos had developed a relationship with several current and former councillors at the Warringah Council, specifically a party political team of Greens councillors, who were providing him with information regarding Mr Smith, through Mr Magyar, who was also in the Greens party: T8167 5/4/05. Mr Baker also said that as the motion did not refer to Mr Smith's qualifications, merely the performance of his duties, it was not the intention of the motion to address the issue of his qualifications. Mr Baker said he supported it because he thought Mr Smith was doing a good job: T8173 – 8174 5/4/05. He could not see how the Council could compel Mr Smith to produce his qualifications, as he did not think that Mr Smith would

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have to comply contractually with a direction from Council; which would make an investigation pointless: T8178 5/4/05.

106. Another reason was that the Mayor had seen Mr Smith's qualifications and was satisfied with them and he thought that Mr Smith was doing a good job, particularly with the restructuring of the City. He also said at no stage was any candidate asked questions about their qualifications: T8180 5/4/05. Mr Baker said that at that stage he was concerned that the campaign about Mr Smith was largely being conducted in the media and not in Council and there were groups "feeding" the media: T8189 5/4/05. He also said he had a negative view of Cr Carlos as he had voted against the budgets in 2001 and 2002 and whenever he spoke to the media or raised an issue in the City it was always to criticise the City or its staff. According to Mr Baker, Cr Carlos wanted to create the perception in the community that if he were in charge of the City he would do a better job: T8194 – 8195 5/4/05. Mr Baker agreed that his contribution to the debate was full of rhetoric, but said that the fundamentals of what he was saying were correct: T8224 5/4/05.
107. If, as Mr Baker said in evidence, he was aware on 17 December 2002 of Mr Smith's legal argument that the Council could not compel Mr Smith to produce his qualifications, it would have been desirable for Mr Baker to draw attention to that in order to stimulate a more useful debate on the issue, which possibly would have encouraged councillors to think deeply about the issues and perhaps have led to legal advice being obtained. Mr Baker, however, did not focus the debate on that issue, but rather resorted in debate to an attack on Cr Carlos' motives.
108. Mrs Mackintosh thought there was a need for this motion of confidence in Mr Smith due to Cr Carlos' ongoing attacks in relation to the ability of Mr Smith but she was unable to say precisely what these attacks were. Instead, she spoke in generalised terms about allegations being made against Mr Smith by Cr Carlos in the period 2001 to 2004: T4463 – 4465 28/1/05.
109. Mr Kimber gave evidence that he voted in favour of the motion of confidence in Mr Smith as it signified to all present in the chamber including councillors, staff and ratepayers that the Council wanted Mr Smith to continue as CEO because he was doing a good job: T5480 14/2/05. Mr Kimber said that he disagreed with Cr Carlos' approach because he would not share the documents that he had in his "black bag". Mr Kimber believed that these documents were not publicly available and that Cr Carlos was asking the Council, without

these documents to make a decision. He knew that Mr Smith had admitted in court that he had no degree. Mr Kimber said that he did not have all the information in front of him and therefore would not pass judgment: T5483 14/2/05. Mr Kimber said that he disagreed with Cr Carlos' approach for the CEO to stand down and be investigated as he believed that Mr Smith did not use his CV to gain employment with the City of Joondalup. Mr Kimber said that Mr Smith did not "apply" for the job and MRA provided the information: T5485 14/2/05. He said that he did not have any doubts about Mr Smith's honesty at this time and the finding of Gibson J in *Jones v Sutton* had no effect on him. He considered that there might have been a reason for Mr Smith admitting that he did not have a degree and he was not going to make assumptions about how and why that occurred: T5491 – 5493 14/2/05.

110. Ms Barnett gave evidence that she read Gibson J's decision. She had sent an e-mail on 9 December 2002 to councillors encouraging them to read it and assuring them that the reference to Mr Smith was short and had been blown out of proportion as it only concerned an issue about "*the Sydney Institute of Technology versus the New South Wales Institute of Technology*". Asked what she meant by that she said she had 'no idea': T6460 28/2/05, 2206MISC27. She thought there was a smear campaign against Mr Smith and that the issue had to be put aside so the Council could move along with Council business: T6459 – 6460 28/2/05. Ms Barnett did not compare the MRA report with what Mr Smith said in evidence as she had not retained it: T6461 28/2/05. Ms Barnett thought that it was the responsibility of the Mayor to deal with the issue and so relied on what he said about the qualifications he had sighted: T6462 28/2/05. Ms Barnett said that she did not come to understand what qualifications Cr Carlos was taking issue with on Mr Smith's CV and so she found Mayor Bombak more compelling as he was able to say that he had sighted the qualifications, whereas Cr Carlos had not proved that Mr Smith did not have any qualification that he claimed to have: T6468 28/2/05. Ms Barnett did not think that Mr Smith's evidence in *Jones v Sutton* was a big issue as she did not think that he had ever claimed that he possessed a degree: T6469 28/2/05. Ms Barnett said that she supported Mr Smith for doing a very good job and had confidence in him: T6473 – 6474 28/2/05.
111. Mr Kenworthy gave evidence that he voted in favour of the motion of confidence based on the 25 November memorandum. He thought he also had verbal information from the Mayor on the issue, and so was satisfied enough to make a positive decision: T6602 2/3/05. Mr Kenworthy thought Council believed that the Mayor and the CEO had dealt with the issue and wanted to keep the CEO, who was doing a good job. However, he acknowledged that Council was under pressure from the media. He thought one way to show support was a

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vote of confidence: T6604 2/3/05. Mr Kenworthy did not think Council should follow Cr Carlos' recommendation of an investigation at that stage as he considered that the issue had been adequately dealt with. In summary, Mr Kenworthy's three reasons for supporting the motion were that (T6607):

- 1) the issue in relation to the qualifications had been dealt with adequately;
- 2) it was not of sufficient importance to warrant taking any further because the CEO was doing a good job; and
- 3) because, whatever the CEO had or had not done, he was too good to risk losing. He understood the CEO to have some qualifications in planning and environmental science.

112. He was unsure of the explanation given by him in relation to the business qualification: T6608. As far as he was concerned councillors and he had all the information they needed to support a vote of confidence: T6610-6611. Asked about Judge Gibson's decision, Mr Kenworthy said he did not recall reading it: T6613. Asked whether he entertained the possibility that Mr Smith had been untruthful about his qualifications when he was interviewed, Mr Kenworthy said that knowing Mr Smith as he did, he perceived him to be "very straight up" and it didn't make sense to him that he would tell lies about things like that: T6615. Mr Kenworthy said he did not distrust Cr Carlos but was concerned by his approach. He said at T6618:

*"I was concerned that he wouldn't – he was going so hard at it. He was aware that it was causing public – you know, the media were getting hold of it and causing problems for the Council. Well, it wasn't doing the Council's reputation any good and yet he wouldn't, you know, put all the information forward. I mean, what were we to think? Why wouldn't he do that."*

113. Asked why he used the term "witch hunt" in the course of the debate on the motion he said it was because Cr Carlos had not disclosed all the information he had: T6620.

114. Mr O'Brien gave evidence that he was satisfied with the 25 November memorandum that Mr Smith circulated and relied on what had been done by Mr Loader and Mayor Bombak as recorded in the memorandum. He was of the view that the 17 December meeting should have put the matter to bed. He believed that the recruitment consultants had misinterpreted Mr Smith as the memorandum did not claim a degree. He also believed that Cr Carlos was running an agenda: T8596 12/4/05. Mr O'Brien said that he had asked Cr Carlos to prove to

him beyond reasonable doubt that Mr Smith had lied, which Cr Carlos could not come up with as Mr O'Brien said that Mr Smith had never said that he had a degree, either in writing or verbally: T8597 12/4/05. Mr O'Brien was of the view that Cr Carlos had to satisfy him beyond reasonable doubt before he would entertain the proposal of an investigation: T8598 12/4/05. He said he respected Cr Carlos' right to raise these matters but thought he should have established the facts first "*before embarking on what was a speculative activity.*" He thought that bringing forward the issue in the manner he did amounted to an attack on the CEO as the 25 November memorandum from the CEO was not in the public arena: T8600 12/4/05. It was also significant to Mr O'Brien that Cr Carlos did not produce the documents he had in support of his arguments: T8603 12/4/05. Mr O'Brien said that he voted for the motion of confidence as it was intended to satisfy the issues at the time, and was largely related to Mr Smith's good performance: T8606 12/4/05.

115. Mr Carlos was asked at T881 14/10/04 what information he had. He received information in brown paper envelopes anonymously which he did not circulate to his fellow councillors:

*"COUNSEL ASSISTING: Is there any reason for that? --- Yes. Because I couldn't substantiate the information.*

*You referred to newspaper articles in Manly? --- Oh, there were newspaper articles, but –*

*CVs delivered? --- Yeah. I couldn't substantiate them. For example, I got a copy of a letter from the University of Technology, Sydney, and from the RMIT in Melbourne and these were letters which were – half things were blocked out, but they were letters from these people and I felt a bit uncomfortable with this information. It wasn't until March the following year when I actually wrote to these organisations and confirmed it, and I felt the letters that had gone, and I received copies of letters that had gone to the University and copies of letters that had come back, that a lot of things were removed and so I felt uncomfortable with this until I had sufficient evidence to be able to produce this.*

116. Mr Carlos was examined extensively by Mr Birmingham QC on this aspect. He was asked why he refused to circulate the documents that he had to councillors at the meeting on 17 December:

*"Mr BIRMINGHAM: Why not? --- Because they were given to me in confidence.*

*But if they're newspaper articles 'what's confidential - ? --- Well, the – no, the newspaper articles – I had sent those, the reference matters, to all the councillors.*

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*But they asked you to put up the material. A speaker, perhaps Mr Baker – said: “We shouldn’t have any secret documents in this chamber”. --- Yes.*

*And you said: “they’re not secret documents”. The Mayor says: “well, pass them around”*

*You refused to put up any of the documentary material that you relied on in opposing the motion. Correct? --- But all the – all the documentation that I had was available to all the councillors.*

*Well, with respect, did they not ask you to table the documents that you say you had got? --- I had one copy of the documents. I was not going to give those unless I got those documents back.*

117. He was then challenged to explain why the documents could not have been easily copied:

*MR BIRMINGHAM: Wouldn’t it be possible to ask for a suspension of standing orders and adjournment of the meeting to get a copy? --- The Mayor never asked for that. No, but if you were so troubled by handing over your last copy, that would have been an easy resolution to the matter, would it not? --- The documents were readily available to the other councillors.*

118. Mr Carlos’ evidence of his reasons why he did not make available to councillors documents which supported his suspicion that the CEO had been dishonest in relation to his qualifications was inconsistent. It appears that the documents in his possession were newspaper articles which were publicly available, the transcript and reasons for decision in *Jones v. Sutton* which were public documents but not readily accessible to all other councillors, and correspondence such as letters from UTS and previous CVs of Mr Smith which had apparently been used as the basis for his cross-examination. Given the level of distrust and personal animosity that was evident in the Council chamber between Cr Carlos and certain other elected members including the Mayor, and which may have resulted in part from disapproval of his action in speaking against the 2000 budget, Cr Carlos had good reason to expect opposition to his call for an investigation.

119. The City’s Code of Conduct exhorts councillors and elected members to be frank and honest with each other. It was in Cr Carlos’ interests to see that the other elected members were as fully informed as he on the issue. He did not give any satisfactory reason to the Council, when asked, why he could not produce his documents. The reasons he gave in evidence tend to suggest that Cr Carlos was concerned that there may have been some adverse ramifications for him or his suspected source if he disclosed the documents. He was

concerned about the lack of verification of the source of the documents and that they contained ‘blacked-out’ portions. If that were in fact the case, then the Council should have been afforded that explanation. He might have offered to make them available to a legal adviser on a confidential basis for the purpose of legal advice being given on them or some process of verification being pursued. Alternatively, he might have sought some personal legal advice on how to deal with them. Unfortunately he did not take any of those courses and his refusal to disclose the documents only fuelled the existing lack of trust and opposition of other Councillors.

120. Whilst there are some members of Council who, it seems, would not have supported an investigation in any event, Cr Carlos’ failure to give a full and frank disclosure of his sources of information at that time was able to be turned to his opponents’ advantage in debate by exciting misgivings about his motives. It is also likely that such information would have assisted councillors occupying the middle ground to a more informed decision.
121. Mr Bombak gave evidence that after the budget in 2000, he felt that Mr Carlos would say one thing in one room and something else in another and he was of the view that he could not be trusted and had no credibility. With regards to the budget, he considered that Mr Carlos had betrayed Council: T9353 - 9354 22/4/05. Mr Bombak also said that he would listen to what Mr Carlos had to say but he was acting in his own interests and not the interests of the City of Joondalup as he believed Mr Carlos wanted to be elected Mayor: T9355 22/4/05.
122. Mr Bombak said that before the publication of the newspaper article “Civic Chief Lied: Lawyer” he did not know that Mr Smith had been challenged about the veracity of his academic qualifications: T9367 22/4/05. Mr Bombak could not recall if Mr Smith gave him a detailed explanation of matters raised in court, but recalled that he was given a list of Mr Smith’s qualifications: T9370 22/4/05. Mr Bombak said that the article “Court queries CEO’s record” did not give him any further cause for concern as he believed it was a relatively minor issue. He also never obtained a copy of the reasons for decision in *Jones v Sutton*. Mr Bombak said he voted for this motion as Mr Smith had done nothing untoward at the City of Joondalup and if he had lied in Court he would have been charged with perjury: T9390 22/4/05. Mr Bombak said that he felt that he did not need to get advice on the motion of confidence in Mr Smith. Mr Bombak regarded the newspaper reports, such as the report regarding Gibson J’s findings, as just “media spin”.

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123. He thought that Cr Carlos had some important documentation which was not in the public arena that could have assisted Council in making a determination, but which he refused to show: T9429 – 9430 22/4/05. Mr Bombak said that Cr Carlos never spoke to him about this issue one-on-one and never produced documents to him which would prove that there was an issue: T9447 22/4/05. He thought that Cr Carlos was being unreasonable having “secret documents”. There was no requirement for qualifications under the LGA. As far as he was concerned MRA had done its job. He also understood that Mr Smith never provided a CV to the City. He said that the way Cr Carlos conducted himself could be interpreted as an attack on Mr Smith: T9454 26/4/05.
124. Mr Bombak had previously served on the Joondalup and Wanneroo Councils. Clearly, he identified closely with Mr Smith’s appointment owing to his role in the decision not to renew Mr Delahaunty’s contract, his strong preference of Mr Smith in the selection process, and his public defence of Mr Smith in relation to the newspaper report in September 2001. It is also clear that Mr Bombak had confidence in Mr Smith, could work with him, and regarded him as doing a very good job. It was not at all surprising that when Mr Smith attempted to deal with the qualifications issue by showing his certificates, he called in Mayor Bombak and Mr Loader.
125. Mayor Bombak did not know what the issues were at that time and the statements attributed to him in the press, having been prepared by the Administration, did not reflect his actual knowledge. He does not appear to have distinguished between the list he was shown when he and Mr Loader inspected the documents and the documents as described in the 25 November memo. Cr Carlos was his *bete noire*. His relationship with him was marked by mistrust. This mistrust was exacerbated by Cr Carlos’ failure to provide documents which he was believed to possess. These circumstances explain, but do not excuse, Mr Bombak’s failure to adequately discharge his role as Mayor. His scepticism of newspaper reports generally did not justify him in failing to fully inform himself of the issue that was raised in Court and the serious findings of misconduct that had been made by Judge Gibson. Although he was advised by the CEO in relation to the issue, he should have recognised the need to obtain independent advice, having regard to the CEO’s conflict of interest.
126. Mr Patterson gave evidence that he thought it was appropriate in November/December 2002 that Mr Smith be required to produce his qualifications to Council, although he did not vocalise this: T590 11/10/04. He thought Council needed a clear-cut solution to the problem, rather than Cr Carlos’ investigation and suggested that at this stage he would have

“got the lawyers in and done an immediate termination payout.” He claimed he did not do this because he needed time to speak to other councillors and said that on raising the issue he did not receive much support: T592 11/10/04. Mr Patterson gave evidence that in his opinion other councillors did not want to investigate the matter by production of qualifications to the Council as personal and emotional issues came into play, and “consequently the ability to have a rational discussion about this issue went out the window”. He also said that there were some councillors who would not hear anything said against Mr Smith: T594-595 11/10/04.

*“COUNSEL ASSISTING: Now, was it evident to you before that meeting on the 17 December 2002 that there was a division in Council between people who supported the CEO and people who didn’t? --- Well, I think anyone who went there would have certainly agreed that there was a division between differing people on their views on Mr Smith.*

*Yet the Council voted 12/1, expressing strong support and full confidence in Mr Smith?  
--- Yes, but –*

*According to the minutes we have just referred to? --- But the rest of the – just be aware the rest of – of what the rest of the motion says, and that is they’re expressing full confidence in Mr Smith as to, where are we – “in his dedicated attitude, work ethic and values”. Now, they’re not expressing full approval of Mr Smith and his qualifications so, I mean, you need to just be aware of how that’s framed and what its trying to say.*

*Were you present for any of the debate? --- I’m sure I was.*

*For that - ? --- I can’t remember it off hand and, you know, obviously by my absence I was trying to make a point that I wasn’t in agreeance with either side.*

*But had you moved out of the chamber deliberately to avoid the debate that was going on? --- (No audible response).*

*Was that because you were upset by what was happening? --- No, I wasn’t upset but, I mean, I had another position that I thought would be suitable but it wasn’t the time and place to argue that position. I mean, events subsequently have proved it was the right position.*

*...  
PRESIDING MEMBER: So that your position was that it ought to be taken to the lawyers and he ought to have been dismissed. Is that - ? --- Well, not necessarily dismissed. There would have been a termination and whatever payout negotiated would have been paid. I mean, that’s –*

*No, that was the point I was wanting to make. So you hadn’t formed a view that this was gross misconduct which warranted instant dismissal? --- No. (T597 11/10/04)*

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127. Mr Hollywood said that he had met Cr Moxham, from Warringah Council at a twin city conference in Donnybrook sometime after Mr Smith took up his appointment. Cr Moxham gave Mr Smith high praise: T2397 26/11/04. Both Mr Loader and Mayor Bombak told Mr Hollywood they had viewed Mr Smith's qualifications and believed them to be genuine: T2398 26/11/04. Mr Hollywood said that he did not see the qualifications, but accepted that Mr Smith had them: T2399 26/11/04. He believed that the motion merely affirmed the fact that Mr Smith was doing a good job, which had nothing to do with his qualifications. As Mr Smith was doing the job well, he had no reason not to support the motion: T2412 26/11/04. Mr Hollywood did not vote. He gave evidence that he could not support the motion, but he could not disagree with it and so left. At this stage he said he had not made up his mind about whether Mr Smith should be dismissed or not and thought that there should be an investigation. Mr Hollywood said that he did not like denigrating people. He said he could not support Mr Smith and that he thought the safest thing to do was to leave the chamber: T2413-2414 26/11/04. Mr Hollywood said that he wanted some investigation done but was not ready to "vilify" the CEO until he had the information to do so. In the meantime he felt he had to accept that he possessed the relevant qualifications as the Mayor had told him so. Mr Hollywood did not agree that by voting against the vote of confidence that he would merely be saying it was inappropriate: T2417-2418 26/11/04.
128. Both Cr Patterson and Cr Hollywood left the chamber to avoid voting on the motion. Clause 4.8 of the City's Standing Orders requires councillors to vote one way or another. Leaving the chamber to avoid voting constitutes an abrogation of the statutory duty which they undertook when they accepted office. There is no evidence of Cr Patterson or Cr Hollywood leaving the chamber to avoid voting on any other occasion. Cr Patterson's reason for doing so is not clear. He said "*it wasn't the time and place to argue*" his position. That was not a good reason for avoiding his responsibility.
129. Cr Hollywood's reason for not voting is also unsatisfactory. The effect of not supporting the confidence motion would not have been to "vilify" the CEO but to reserve judgment on him. A vote against the motion would simply have preserved the status quo. Both councillors should have expressed their concerns to Council and, having misgivings about the meaning and effect of the motion, moved that the matter be deferred for advice on the implications of voting either way.

130. The situation facing Council was novel. Councillors were inexperienced. Their training is unlikely to have equipped them to deal with the situation that had arisen. As the CEO was not in a position to give independent advice, Council should have obtained other advice. The decision had considerable consequences for the City beyond those contemplated by Cr Nixon. It compromised the City's legal rights with respect to the termination of Mr Smith's employment and isolated Cr Carlos as the sole advocate for an investigation. It would also appear from the evidence that councillors failed to apply the test which applies to any decision, namely, whether it was in the interests of the City of Joondalup. There was, on the evidence, no benefit to the City from a motion of confidence in the CEO at that time.
131. The argument made by Cr Carlos at the meeting could in no way be characterised as an "attack". He expressed no judgment on the merits of the findings made by Judge Gibson, but merely identified these as a cause for public concern for the integrity of the office of CEO. As he said, "*If this is right, well, we've got to do something. If its wrong, well, we can put it to bed and get these reporters off our back*". He admonished the Council not to express a vote of confidence until the question was answered: are the qualifications valid, or not?
132. Ethically, in the interests of transparency and accountability, the Council, as a matter of good governance, was bound to satisfy itself on the issue of the CEO's honesty and integrity. The *ad hominum* arguments raised by Cr Baker and Cr Kenworthy, characterised by words such as "witch hunt" and "hypocrisy", against Cr Carlos were baseless and unjustified. Furthermore, to argue that the CEO had performed satisfactorily, or even beyond the expectations of some councillors, was to raise an irrelevant consideration. The question in relation to Mr Smith was not about his competence or performance. It was about honesty and integrity, and public confidence in the City of Joondalup.
133. As far as Mr Smith was concerned, he should have recognised his conflict of interest and formally delegated the role of advising and informing the Council to a specified officer so that the statutory role of the CEO in ensuring that Council is fully advised and informed was capable of being independently discharged. Legal advice should have been obtained. It is now apparent that there may have been some benefit in obtaining legal advice of the kind subsequently provided by Freehills. Such advice may have counselled against making a definitive decision until an investigation had been undertaken into the matters which Cr Carlos was raising to ascertain the appropriate response to them.

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134. It is not apparent from the evidence that Mr Robinson and Mr Mike Smith recognised this necessity. Legal advice would foreseeably have addressed the necessity of the motion “in the interests of good government” including the benefit to the City and the legal effect of the motion in the face of a public controversy involving probity issues which had not been conclusively resolved at that stage.
135. Cr Barnett was mistaken when she told councillors that the reference to Mr Smith in Judge Gibson’s decision was short and had been blown out of proportion. From her evidence it appears unlikely that she read fully or understood the findings. Judge Gibson’s findings not only called into question Mr Smith’s honesty about his qualifications, but also the probity of his conduct as General Manager of Warringah. As other councillors appeared not to have read Judge Gibson’s decision, Cr Barnett’s communication was likely to have been misleading.
136. Council had insufficient information to vote on this motion. There was no officer’s report. Council should have deferred this decision pending more information such as an officer’s report and, potentially, public relations advice as to the content and basis of the newspaper report and its effect on the City and legal advice as to the effect of Judge Gibson’s conclusions and Mr Smith’s account to Mayor Bombak concerning the proceedings and his qualifications, and, ultimately, about the consequences of passing such a motion. Those who were uncomfortable with voting either way on this motion and who left the Council Chamber should have advocated a deferral of this decision.
137. The reasons given by councillors for their failure to recognise that the City had a problem in terms of the CEO’s qualifications often reflected a lack of appreciation of, and respect for, the role of courts, universities and the media as institutions of Australian society. It is fitting that councillors should perform their statutory role with circumspection. Those sources of advice and information should be scrutinised. As critically thinking individuals, they would not blindly accept them without question, but would at least be alerted by them to the need for investigation. Councillors who were prepared to give no credence or as little as “ten percent” credence to the public media organs in this State, and to effectively ignore them, particularly when reporting on proceedings conducted in Courts in this country, acted unreasonably.

## Questions and Comments in the Legislative Council

138. On 4 December 2002 the Hon Giz Watson MLC (North Metropolitan) asked a question of the Legislative Council of the Minister for Local Government and Regional Development referring to the article in *The West Australian* on 20 November 2002 and enquiring what formal university qualifications Mr Smith had. The Minister, the Hon Tom Stephens, answered by saying that pursuant to the Act the Council was responsible for employing Mr Smith and he was therefore not aware of his formal qualifications or the information provided to the Council about them: 1512NFAD76.
139. On 20 December 2002 the Hon Ken Travers MLC (North Metropolitan) made a statement in the Council to the effect that he had requested that day a copy of the CEO's contract which he considered ought to be available to him under Section 5.94 of the Act: (1705MCOB15.4).

## FOI Application by Hon Ken Travers MLC

140. Mr Travers lodged an FOI application which the CEO referred to Mr Mike Smith by memorandum dated 5 February 2003 in which he stated that he would not permit the employment contract to be copied or viewed by any third party: (1404MGS8).
141. Freehills was instructed in February 2003 in relation to the FOI application and a request for documentation made by the Department of Local Government and Regional Development. A detailed letter of advice was provided by Mr Ellis on 7 February 2003 (0112 DSE9) in relation to whether the CEO's contract of employment was liable to be disclosed under the FOI. Mr Ellis' opinion was that the disclosure of the contract would involve disclosing personal information about the CEO and that it would be open for an officer to conclude that the disclosure would not be in the public interest, although reference was made to a decision by the Information Commissioner in *National Tertiary Education Industry Union (Murdoch Branch) v. Murdoch University and Ors* [2001] WAIRC mr1 as indicating a real risk that the Commissioner would order disclosure.
142. No mention was made in the advice of Section 5.94 of the LGA which entitles any person to inspect a contract under Section 5.39 (contracts for CEOs and senior employees) subject to the limitations prescribed by Section 5.95.

143. As to the DLGRD request, Mr Ellis' advice was that if the Department was not acting under Part 8 of the LGA then it had no legal right to any information not publicly available from the City, but that, bearing in mind the possibility of a formal inquiry under Part 8, the City should provide documents which are publicly available and "invite the investigating officer ... to inspect selected documentation as a goodwill gesture in an attempt to satisfy the DLGRD that there is no need to launch a formal investigation process". For this advice the City incurred costs of \$5,669.15 (excluding GST).

### **Cr Walker's Child-minding Expenses and the Letter From Chan Galic**

144. At its meeting on 17 December 2002 Council received a report from the Audit Committee held on the previous day. The minutes (1110ALP2) note that the Audit Committee meeting considered, *inter alia*, "elected members expenses – training and childcare". The officer's report indicated that, with the exception of that item, the committee reports were merely for noting. In relation to that item the committee had resolved to recommend a different course of action from that proposed by the Administration. When this item was raised Cr Baker, seconded Cr Mackintosh, moved that the minutes of the audit committee meeting be noted and that Council undertake an annual audit of expenses incurred by all elected members. The motion further sought that "*the Council direct the CEO to inquire into and conduct a thorough audit in respect of all childcare or child-minding expenses claimed by and paid to Cr Walker since her election to Council*", and that the Council direct the CEO to inquire into and report to the Audit Committee as to whether there was any evidence indicating that childcare expenses were inappropriately claimed, and whether Cr Walker may have obtained the services of her husband or her children to supervise her other children, or may not have engaged any childcare services at all.
145. Cr Carlos, seconded Cr Nixon, then moved an amendment that the latter parts of the motion dealing with Cr Walker be deleted. This amendment was carried 9/6. The minority consisted of Mayor Bombak, and Crs Baker, Kenworthy, Kimber, Mackintosh and Rowlands. The original motion was then passed (14/1) in terms that the minutes be noted and that an annual audit of expenses incurred by elected members be undertaken.

146. Evidence was given by Mr Baker, Mr Kimber and others about their reasons for supporting the investigation into Cr Walker which went to the grounds of their suspicion that she may have over-claimed on childcare expenses. There was no evidence that any subsequent audit revealed any inappropriate claims by Cr Walker.
147. The Council also dealt with a letter from Chan Galic, solicitors on behalf of a number of unnamed former councillors of the City of South Perth which complained that statements attributed to Cr Walker in an article published in *The West Australian* were defamatory: (2611AAW13.3). The words were contained in a single paragraph of an article published on 11 December 2002 regarding Cr Walker's objection to the performance review process:

*"It could lead to corruption. I am not saying that it did, but it could in future lead to corruption similar to what happened at the City of South Perth, and we do not want a repeat of the City of South Perth".*

148. The letter from Chan Galic requested that the Council seek an immediate unequivocal public apology from Cr Walker and publish a statement withdrawing any inference of corrupt conduct by the former councillors of the City of South Perth.
149. At the meeting on 17 December 2002 Council received a report indicating that the City was seeking urgent legal advice: (2611AAW13.1). Notwithstanding that this advice was not available at the time of the meeting, Cr Baker moved (seconded Cr Kimber) that:

*The City of Joondalup hereby resolves not to provide any financial contribution in respect of any legal fees incurred by Cr Allison Walker in defending any future Writ of Summons seeking damages for defamation, issued by any former member of the South Perth Council, including the Mayor, in relation to her defamatory comments in The West Australian newspaper on 11 December 2002.*

150. An amendment was then moved by Cr Kadak (seconded Cr Mackintosh) adding the following paragraph in terms of the officer's report recommendation:

*Chan Galic, barristers and solicitors, acting on behalf of former members of the City of South Perth be advised that the comments allegedly made by Cr Walker and published in The West Australian newspaper on Wednesday, 11 December 2002, have not been made in any official capacity and have not been sanctioned or authorised by the City.*

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151. The amendment motion was carried 12/2, Crs Carlos and Hollywood dissenting.
152. Subsequently on 27 December 2002 Kott Gunning, lawyers, provided written advice to the City stating that “although the words used are probably defamatory, it is not clear that they are defamatory of Chan Galic’s clients”: (1603KBR61).
153. The decisions of Council relating to Cr Walker are, in relative terms, of minor significance. Yet they evidence, at least on the part of some elected members at the time, a tendency to apply double standards. The question of Cr Walker’s child-care expenses was a matter relating to the expenditure of public funds and so needed to be appropriately accounted for. However, it could have been dealt with discreetly in accordance with the City’s existing statutory audit procedures to ascertain whether there was anything improper about it.
154. If and when any impropriety had been suggested or determined then may have been the appropriate occasion for Councillors to debate it, yet it was raised publicly. It was inconsistent with the Code of Conduct to raise it as a public issue for debate within Council merely on the basis of the quantity of the claim and to suggest the possibility of impropriety in the terms of the motion.
155. The decision regarding legal expenses need not have been made as Cr Walker had not made any claim for legal funding and, in any case, legal advice on the Chan Galic letter had not been received. The part of the motion which distanced the City from Cr Walker’s personal statements was desirable and appropriate. However, the part of the motion dealing with legal expenses was gratuitous and evidently calculated to embarrass Cr Walker. The motions moved by Cr Baker in each case were not those recommended in the officer’s reports. Conduct likely to cause unwarranted embarrassment is contrary to the Code of Conduct.

## Conclusions

- A. Mayor Bombak, Deputy Mayor Hurst and Cr Rowlands inappropriately formed a committee and carried out a performance review of the CEO purportedly under his contract of employment without any authority from the Council and without the committee being formed either in accordance with the statutory power of the Council to form committees, or in accordance with the contract, because the contract of employment did not authorise any person to appoint Deputy Mayor Hurst as a second of three members of the Committee.**
- B. Mayor Bombak acted unreasonably and inappropriately in his dealings with Cr Walker over her concerns about the validity of the annual performance review by not ensuring that responses on his behalf to Cr Walker's e-mails were authorised by him.**
- C. Mayor Bombak and Crs Baker, Hurst, Kadak, Kenworthy, Kimber, Mackintosh, Patterson and Rowlands acted in a manner contrary to the Code of Conduct by causing unwarranted embarrassment to Cr Walker and treating her unfairly in the manner in which they dealt with an investigation as to whether, by referring the matter of the appointment of the committee to review the CEO's contract to the DLGRD, she had breached Section 5.93 of the LGA, the City's Standing Orders or the Code of Conduct relating to confidential information.**
- D. Cr Carlos' failure to give a full and frank disclosure of his sources of information referred to at the meeting of 17 December 2002 was inconsistent with his obligations under the Code of Conduct and fuelled the existing lack of trust and opposition of other Councillors by exciting misgivings about his motives.**
- E. Councillors other than Cr Carlos, failed to take adequate steps to inform themselves of the issue raised in relation to Mr Smith's probity by his evidence in *Jones v Sutton*.**
- F. Mayor Bombak, in particular, failed to inform himself fully of the issue that was raised in Court and the serious findings of misconduct that had been made by Judge Gibson and should have recognised the need to obtain advice on the matter independent of that given by the CEO, having regard to the CEO's conflict of interest.**

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- G. Mayor Bombak's and Mr Loader's failure to identify the serious discrepancies in the CEO's qualifications at that early and opportune stage contributed significantly to the mistakes that were subsequently made by Council.**
- H. Cr Carlos acted unreasonably in failing to make a full and frank disclosure of the documentary evidence in his possession and the sources of his information about the CEO, thereby exciting misgivings about his motives and fuelling mistrust and opposition.**
- I. Councillors other than Cr Carlos, Cr Hollywood and Cr Patterson acted unreasonably in supporting a motion of confidence in Mr Smith on 17 December 2002 when they had made insufficient inquiry to satisfy themselves adequately as to the significance of the findings of Judge Gibson and the seriousness of the probity issue raised by those findings and Mr Smith's evidence.**
- J. Crs Hollywood and Patterson acted contrary to the City's Standing Orders, Clause 4.8 in leaving the Council chamber in order to avoid voting on the motion of confidence in Mr Smith on 17 December 2002.**
- K. It was contrary to the principle of transparency in government for Deputy Mayor Hurst to rule out of order public questions relating to the public interest issue of the veracity of the CEO's qualifications; and it was in breach of the Code of Conduct for the CEO to provide advice to the chair of the meeting in relation to that matter, in which he had an obvious personal interest.**
- L. Councillors who supported the motions that Cr Walker's child-care expenses be investigated and the pre-emptive motion that no legal funding be provided to Cr Walker to defend any defamation proceedings which might eventuate from her public statements concerning the City of South Perth acted in a manner likely to cause unwarranted embarrassment and thereby breached the Code of Conduct.**

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*It is error only, and not truth, that shrinks from inquiry.*

*Thomas Paine*

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### Carlos' Notice of Motion

1. On 9 February 2003 Cr Carlos lodged by e-mail to the CEO and Mr Mike Smith a Notice of Motion in terms that the CEO be stood down until Council had received and considered a report of an investigation into 14 allegations of impropriety: 1110ALP5. The reason for the motion was stated as follows:

*“A considerable amount of media coverage has appeared in the Joondalup Community paper, The West Australian, The Sunday Times, The Sydney Morning Herald and The Manly Daily regarding the above allegations and it is considered the matter will not go away until a full independent investigation is conducted. In addition, many of the matters have been raised in both the NSW and WA Parliaments without any satisfactory answers being provided. Therefore, it is my contention that we must fully investigate all of the allegations.”*

2. Mr Carlos gave evidence that between December 2002 and February 2003 he received in the mail brown paper envelopes, sent anonymously, containing information relating to Mr Smith including copies of his various CVs and newspaper articles mainly from *The Manly Daily*. This information led Mr Carlos to decide to raise the matter in Council: T 879 14/10/04. Mr Carlos said that he drafted this motion over the Christmas/New Year period and sent a copy of it to Cr Walker and an ex councillor, Mr Magyar, with whom he had discussed it: T 883 14/10/04.
3. Mr Carlos gave evidence that he nominated a Mr Eric Cousens to be the independent investigator because he was a member of the community, had stood for Council in Wanneroo, was a retired Assistant Police Commissioner and seemed interested in Council business, though not particularly the CEO issue. Mr Carlos knew of Mr Cousens and spoke

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to him when he was drafting this motion. Mr Carlos said that if Mr Cousens was rejected and another independent investigator was put in his place, he would have been happy with that: T885 14/10/04. He said the allegations in his motion were not made by him, but were sourced from ratepayers who had tried to ask questions at previous meetings, newspaper articles, Gibson J's findings in *Jones v Sutton* and Parliamentary comments: T 886-887 14/10/04.

4. On 10 February 2003 all councillors received a copy of the Notice of Motion and were told it was confidential and not for publication in accordance with Clause 7.2 of the City's Standing Orders. Mark McCrory of *The Wanneroo Times* was given a copy of the Notice of Motion by Mr Magyar: (0912DIS31). Mr Carlos gave evidence that when he put the motion to the Administration, he did not mark it as confidential as he was prepared to have it debated in open Council.
5. Mr Robinson gave evidence that he sought advice from Watts & Woodhouse, solicitors, in relation to the publication of the Notice of Motion, whether the comments in it were defamatory, and how it should be treated in terms of circulation to the elected members. He said that the substance of the advice was that the Notice of Motion should be circulated on a confidential basis and be marked "Not for Publication" in accordance with the Standing Orders. Mr Robinson said that after receiving that advice he conveyed it to Mr Mike Smith to give effect to it in terms of distribution. A memorandum was sent to elected members advising them of that advice: T7155 – 7156 14/3/05, 1403KBR17, T7438 – 7439 16/3/05.
6. According to Clause 7.2 of the City's Standing Orders a motion is not confidential until it is received by the City and marked confidential or not for publication. Mr Carlos did not breach the Standing Orders by discussing the motion with Mr Magyar or providing him with a copy.
7. After Mr Kimber received the Notice of Motion he wrote an e-mail to councillors urging them not to second Cr Carlos' motion as he believed it was an "unprofessional, unwarranted and personal attack on the CEO" and did not "warrant any discussion by any elected member": 2102PMK2.

### Advice of Freehills: 11 and 14 February 2003

8. Legal advice was sought from Mr Ellis of Freehills by Mr Robinson as to the City's ability to stand down the CEO and any potential claims Mr Smith could make against the City if Cr Carlos' motion was passed: 1403KBR18. Mr Ellis' advice by letter dated 11 February 2003 was that an investigation into matters concerning Mr Smith would be lawful, and any suspension would be required to be on full pay: 0112DSE12. Mr Ellis also advised that in the event of an investigation Mr Smith had to be treated fairly and given an opportunity to respond to any allegations made against him. He recommended that the investigation be done by an independent person, the fairness of the investigation being a matter which might be taken into account in the event of an unfair dismissal claim. He said that pre-emptive ventilation of allegations may make a dismissal unfair or exacerbate any award of damages and that it would be preferable for the subject matter of the investigation not to be publicly identified. He considered that the contractual provision for dispute resolution could be invoked by Mr Smith.
  
9. Mr Loader, acting independently of Mr Robinson, sought advice on 12 February 2003 from Mr Ellis in relation to contractual obligations and the City's liability in relation to the CEO being "harassed and badgered" by "councillors' consistent attacks": 0112DSE13. Mr Ellis provided written advice on 14 February 2003 which said in part:

*"It must be noted at the outset that councillors have a duty to raise and pursue issues about the proper administration of the City, including any inappropriate or dishonest conduct by its officers. We are not aware of any material which [indicates] that Cr Carlos is motivated by any factor other than the best interests of the City or that he does not genuinely believe that the allegations to which he refers requires investigation."*

10. Mr Ellis also advised:

*"Further, while an investigation into Mr Smith's affairs will no doubt be distressing to him, and will divert him from other activities, an employer is clearly entitled to investigate relevant allegations of misconduct by an employee. Investigating allegations against an employee is not, without more, a breach of the obligation of mutual good faith or the relationship of trust between employer and employee."*

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11. Mr Ellis recommended that counselling services be made available to Mr Smith should he require them, that any investigation be carried out as discreetly as possible, and that debate be conducted without reflecting adversely on Mr Smith.
12. It was extraordinary to discover from the evidence that neither of these letters of advice were provided to Council prior to, or at the time when the Carlos Notice of Motion was considered on 18 February 2003. The advices should, at the very least, have been referred to in the report to Council on Cr Carlos' motion. Mr Robinson and Mr Loader both worked within the CEO's unit. However, neither of them was responsible for reporting to Council in relation to Cr Carlos' motion. It was a matter which the CEO was responsible for. The CEO should have been aware, or been made aware of these advices. It is not clear from the evidence what the situation was in that regard. The CEO should have been in a position to take steps to ensure that the advices were included in a report to Council.
13. No cogent reasons were advanced as to why the advices were not made available to Council. There is no question that they would have assisted Council.
14. Mr Loader admitted that the timing of his instructions to Mr Ellis would indicate that he had an opportunity to view the legal advice of 11 February, but he could not recall if in fact he did so. He agreed that he would have been interested to know what the advice was as he was going to seek further advice on occupational health and welfare issues. He recalled discussing with Mr Robinson whether they were asking the same questions of the legal advisers and said that from then on they liaised closely: T6345 25/2/05. Mr Loader said that he sought advice in relation to occupational health and welfare on 12 February on the basis of his observations of Mr Smith and his demeanour. He did not discuss the need for legal advice with Mr Smith, but later showed his advice to Mayor Bombak: T6355 25/2/05.
15. Mr Robinson gave evidence that he wrote to Mr Ellis on 17 February to ask him where his response was to his letter of 10 February as he wanted to circulate it to elected members. Mr Ellis responded that his advice was not necessarily intended for distribution to elected members. Mr Robinson said he was not sure what he then did, but thought he would have suggested to Mr Loader and Mayor Bombak that Mr Ellis be asked to attend the meeting. He said he would have been uncomfortable giving advice on the standing down of the CEO. The letter of advice dated 11 February 2003 (from the transmission details imprinted on it) was faxed on 12 February at 8.35am to the machine in between Mr Smith's and Mr Robinson's offices: T7440 – 7441 16/3/05.

16. Mr Robinson was not aware that Mr Loader was also seeking advice on the Notice of Motion from Freehills, which was dated 14 February: T7442 16/3/05. Mr Robinson said that the record management system annotations on the letter of 11 February indicated that it had been actioned to him. When he inquired with technical staff he was informed that although it was actioned to him, it was never sent to him electronically and was not lodged on the system until some time after its receipt. There is a receipt stamp on the document that shows it was not stamped until 13 February and then lodged electronically on 14 February: T7445 – 7446 16/3/05. Mr Robinson said this indicated to him that someone had physically taken the document to the records office and stamped it. He had been told this would not have occurred on 13 February. Mr Robinson said that normally when he expected a fax he would retrieve it, and if he was not expecting one and someone else picked it up off the machine, they would deliver it to him and he would then give it to central records. The original seems to have been kept on file 53538, a legal advice file: T7449 16/3/05. Mr Robinson said that sometimes he would retain legal advice for the purposes of preparing a report to Council and at some subsequent time a copy of that legal advice would then go to records for storage so that may explain why a document was received by records sometime after it had been received by the City: T7450 16/3/05.
17. Mr Higham gave evidence that even though the Freehills letter of 14 February was actioned to him, he did not receive a copy of it. He said that he believed that it was not recorded in the record management system at the time it was received, but on 28 July 2003. It was actioned to him at that time, because in May he was delegated with responsibility of the CEO issue with Mr Robinson and Mr Loader.
18. Mr Robinson said that Mr Smith was not involved in the obtaining of legal advice. He agreed that it would have been inappropriate for the CEO to have been involved: T7443 16/3/05. Mr Ellis gave evidence of a note of a telephone attendance on Mr Robinson on 17 February 2002 which read: “advice overlooked about ability to stand down – he had overlooked it”. The telephone conversation recorded by Mr Ellis appears to have been precipitated by Mr Robinson’s letter sent by fax on 17 February 2003 in which he referred to his earlier request for advice and sought a response as soon as possible so that it could be circulated to elected members prior to a meeting on the following day. This letter tends to confirm that the earlier advice did not in fact come to Mr Robinson’s attention, but does not explain why he did not locate the advice after speaking by telephone with Mr Ellis on the day prior to the meeting having regard to the urgency that then attended the matter.

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19. Finally, in respect of this issue, mention should be made of the evidence of Ms Helen Hill, the CEO's personal assistant, whose work station was outside the CEO's office. The fax machine to which the Freehills' advice was faxed was located next to her printer. She said that as a matter of course if a fax came in she would take it to the person to whom it was addressed and make an additional copy for the records system. If the matter was confidential she would take the document to the senior records officer for scanning: T9590 27/4/05. When asked about the Freehills' letter of 11 February she could not recall whether she handled it. She said she was at work at 8:35am when the document was transmitted. She agreed that if it was addressed to Mr Robinson she would have taken it to him and because it was private and confidential would not have sent it through the normal records system. She thought it was not unreasonable to suggest that it might not be processed until the following day.
20. At the end of the day Mr Robinson's failure to receive the document is unexplained. Yet, in those circumstances, the Administration, having recognised the need for legal advice, should have informed the Council that legal advice was still being sought and that consideration of the Carlos motion should be deferred.
21. At the very least the advice that Cr Carlos had a duty to raise questions of inappropriate conduct and that, in the eyes of the legal advisor, there was nothing to indicate that he was not acting otherwise than in the best interests of the City, might have moderated the inflammatory response of Cr Baker and deflected the censure motion which was carried on the casting vote of Mayor Bombak. Indeed, Mr Ellis' advices, which obviously took serious account of the matters raised by Cr Carlos, may well have guided Council to a more considered and circumspect response.
22. The CEO had a responsibility to ensure that Council was properly advised in respect of the Carlos Notice of Motion. Legal advice was indicated and obtained. As at 18 February 2003 the CEO had not delegated any power or responsibility to any subordinate officer to deal with the matter notwithstanding his clear conflict of interest. He was derelict in not doing so.
23. In the result, the City received no real value for the \$5,355.50 paid in respect of the Freehills' advice and the Council's decisions in relation to the Carlos motion were seriously ill-informed.

## Press Coverage of Carlos' Notice of Motion

24. As has been noted, the issue of the CEO's qualifications had been the subject of an article in *The West Australian* on 20 November 2002 and a further article in *The Sunday Times* on 15 December 2002. The *Joondalup Community* of 28 January – 3 February 2003 (1204MCOB9) contained a front page article by Mark McCrory headed "CEO hits back: personal attacks 'hampered City's operations' ". Mr Smith was quoted as saying that personal attacks hampered the day-to-day activities of an organisation because staff were constantly trying to put out bushfires:

*"I was pleased at the end of the year when there was a very strong vote from the Council showing their true confidence in me as a chief executive and there was backing from all councillors bar one. The City has been given all the details of my qualifications. The confidence vote from the Council was conclusive. The matter is finished."*

25. Mr Smith wrote to Mark McCrory by e-mail on 12 February 2003 (0912DIS31) pointing out that the Carlos motion was being treated confidentially under the Standing Orders. He said that the matters raised in the Notice of Motion were totally false, that most of the statements related to comments made in Parliament under privilege and that the defamation case was sub judice. He said that the City wanted to obtain his copy of the motion in order to investigate the leak.

26. An article in the *Joondalup Community* on 13 February 2003 stated in part:

*"Cr Don Carlos wanted to move that Mr Smith be stood down from his position until the Council has received and considered a report from an independent investigator into questions about the Chief Executive's professional qualifications."*

*During public question time on Tuesday night's briefing session, former Joondalup councillor Steve Magyar asked Mr Smith whether he had received any notice of motions [sic] that were [sic] not in the briefing session agenda, and if so, would the motion be published in the agenda for the February 18 Council meeting?*

*Mr Smith replied that he had received a notice of motion from Cr Carlos but was getting legal advice on it and that it would be dealt with behind closed doors as a confidential item and would not be published.*

*A copy of the Notice of Motion was leaked to the Community. In it, Cr Carlos said the allegations against Mr Smith could not be laid to rest without a full, independent investigation.*

*Mr Smith was surprised and angered by the leakage of the document to the Community.*

*“The document could only be described as a scurrilous and vindictive attack upon the chief executive” he said.*

*“The document is riddled with mistruths and unsubstantiated allegations and has been the subject of comprehensive legal advice from our lawyers.*

*“All councillors were advised in categorical terms that the document was confidential in nature, should not be published, copied or reproduced in whole or in part without the express permission of the Council or chief executive.*

*“Such permission has not been given and the document is also not available for public inspection.”*

27. The matter was also reported briefly in an article by Bronwyn Peace in *The West Australian* on 18 February 2003.

### **Officer’s Report on Carlos’ Notice of Motion**

28. Mr Loader and Mr Robinson, with advice from Mr Ellis, helped Mr Smith to provide a report on the Notice of Motion. Mr Loader wrote a response to part (b) of the Notice of Motion, which he took directly from the memorandum provided by Mr Smith to councillors in November 2002: 2502ML62. Mr Loader also wrote a response to parts (i) and (m): 2502ML63. Mr Smith then provided some further comments and asked Mr Robinson to comment upon and finalise the document: 0912DIS32. Mr Robinson forwarded the document to Mr Ellis for his advice: 1403KBR19. Mr Ellis advised that it would be appropriate to separate Mr Smith’s comments from the City’s comments: 1403KBR20. Mr Smith gave evidence that he was only asked to comment on the points which began with the words “Mr Smith has advised...” and on points which stated “no comment” he was not asked to say anything. Mr Smith said he was not the author of the report, but was asked to address some matters: T3015 7/12/04.
29. Mr Smith had a conflict of interest and should not have participated in the writing of the report. He suggested in his evidence that he was “asked” to comment on certain areas, but there is no indication by whom he was asked or that anyone other than he was directing the content of the report or finally responsible for the report. Mr Smith should have delegated responsibility to another officer to deal with the issue of his employment at this stage.

However, even if he had delegated that responsibility, by virtue of that delegation and his position as CEO he could have intervened and directed the response to the Notice of Motion which was put to Council.

### **Council Meeting of 18 February 2003**

30. At the Council meeting on 18 February 2003 when Cr Carlos opened debate on the motion he referred to an e-mail he had received from a resident expressing concern about the CEO issue. He used the e-mail as an illustration of public sentiment and declined to table the document. Council then resolved that Cr Carlos no longer be heard in relation to the e-mail until he nominated the author. Council's response was petty and obstructive. The mover of the motion was Cr Baker. The author of the e-mail, which is in evidence (0206DSC133A), was a public servant who used a work address. Mr Carlos said he did not wish to embarrass him by naming him. The points made by Cr Baker, in the debate on the motion, about accountable government and natural justice were specious.
31. In the course of debate Cr Carlos denied that he circulated the Notice of Motion to *The West Australian* and *The Wanneroo Times*, but did say that he spoke to various interested parties, who he did not name, regarding the issue: 1410DSC16A1. Mr Magyar subsequently gave evidence that it was he who gave the Notice of Motion to the press: T7012 11/3/05.
32. In debate, Cr Kenworthy said that qualifications were not a requirement under the LGA and the bottom line for him was "Are we happy with [Mr Smith's] performance since he's been here?": 1410DSC16A1. Cr Hurst in debate said:

*"I have never, ever found Mr Smith to lie. I entrust - - trust his integrity totally. The Mayor and Mr Loader have certified that they've seen Mr Smith's qualifications. Do we doubt the Mayor and our HR manager? Mr Smith's doing a great job. I think Cr Carlos has got another agenda and I'm very sorry that Mr Smith has been the subject of such harassment."* (1410DSC16A2)
33. The main speaker against the motion was Cr Baker who accused Greens in Warringah of feeding information to the media about Mr Smith. He said the media campaign was a contrivance. He addressed the points of the motion in a cursory fashion, generally paying no regard to the basis upon which the issue was raised. For example, nowhere in his speech (from page 12-16 of the transcript) did Cr Baker address the findings made by Judge Gibson

as to Mr Smith's lack of honesty and probity as General Manager of Warringah or the proven discrepancies in his CV.

34. Cr O'Brien spoke against the motion, stating that there was a "purple circle" of administrative people in local government who had formed the Institute of Municipal Management and that the course taken by the City in going outside Western Australia to select a CEO "cut across the path that is normally taken and expected by that purple circle". He emphasised that there was no statutory requirement for qualifications and was also critical of Greens representatives on Warringah Council. At page 19 of the meeting transcript he said:

*"It's a political activity of a witch-hunt and I give credit to Cr Carlos for certainly taking up matters and listening to what people have implied and insinuated. But lets come up and have a look if there's any foundation in it. There's no evidence whatsoever that gives any of the councillors a position where they shouldn't be reinforcing the decision of Council that was carried in December, that gives full support for the performance of the CEO since he has been appointed in this post ..."*

35. In response Cr Carlos read from the findings of Judge Gibson about the CEO's qualifications. He did not mention the other findings about his conduct as general manager. He concluded:

*"So there is an allegation that we may have been misled on the document that we had. May I also say, every one of these allegations have either appeared in the press or in Parliament and I have just done some investigations and I think it needs further investigations. Or Mr Smith needs to come clean and tell us what he does have. Not the document that was produced and signed by himself last year. Thank you."*

36. Mr Patterson said that he did not support Cr Carlos' motion as there was too much in it and it raised issues that were not relevant to Mr Smith's qualifications, but he did not suggest an amendment to the motion: T601 11/10/04.
37. Mr Carlos said he did not understand why his fellow councillors did not support his motion, investigate, and put the matter to bed. Mr Carlos gave evidence that he did not believe that the press, ratepayers and politicians were going to let the matter go unresolved. He was concerned that there were at least six errors in Mr Smith's CV. More allegations were coming out in the newspapers and in Parliament and he did not want Council to go down the road of a Royal Commission: T893 14/10/04.

38. Mrs Walker supported the motion and thought it was reasonable to have the issue investigated as it was becoming more prevalent in the press and an investigation would allow Council to move on: T2151 24/11/04. Mr Hollywood said that he thought an investigation was appropriate and did not receive an officer's report or legal advice in relation to this motion: T2423 26/11/04. Mr Nixon was not present for the meeting, but said that he would not have voted in favour of Cr Carlos' motion as at that stage he did not think there was enough evidence to warrant an investigation: T3792 16/12/04. Mrs Mackintosh gave evidence that she voted against the motion because she believed that Cr Carlos was bringing the City of Joondalup into disrepute: T4468 28/1/05.
39. Mr Kimber agreed that there had been a considerable amount of media attention but thought it was instigated by Cr Carlos. He was concerned that this matter was receiving wide media attention, but voted against the motion because he did not have enough information to support the motion in its entirety. He said all the information he had was based on newspaper articles. In order to be able to support the motion, Mr Kimber said he would have wanted the evidence that Gibson J based her decision on. He did not believe the information he had was enough to warrant an investigation and Cr Carlos refused to provide any more information: T5512 – 5513 14/2/05. Mr Kimber also viewed sceptically the fact that Mr Eric Cousens was nominated.: T5578 – 5579 15/2/05. In debate, Cr Kimber said that Cr Carlos had gone on a "vindictive vendetta" after the 17 December 2002 vote of confidence in Mr Smith.
40. Mr Kenworthy gave evidence that he did not support Cr Carlos' motion as Mr Smith had spoken to the Mayor and councillors and they were satisfied that the issue was not of sufficient importance to stand him down given his performance: T6627 3/3/05. Mr Kenworthy felt there was no need for Cr Carlos' investigation as there had already been an internal investigation: T6629 3/3/05. Mr Kenworthy said that he did not have any problems with Mr Smith's honesty: T6631 3/3/05. A main factor in Mr Kenworthy's decision making was that Cr Carlos would not say who had put forward a number of the allegations and would not show other councillors what was in his file that proved that there was a problem with the CEO: T6639 – 6640 3/3/05. Mr Kenworthy said that Cr Carlos may well have had a genuine issue but he had a problem with the way he was going about it: T6639 – 6640 3/3/05. Mr Kenworthy said that he did not think that Council would have benefited from Mr Ellis' legal advice of 14 February 2003 regarding Cr Carlos' Notice of Motion: T6651 3/3/05.

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41. Mr Baker gave evidence that by this stage he had formed the view that there was a campaign against Mr Smith using a considerable amount of media coverage, particularly with regard to the new allegations. He was dismissive of the matters raised in the motion: T8255 5/4/05.
42. Mr O'Brien said that Cr Carlos could not reasonably raise the matters to Council's attention unless he substantiated his position with documents, which he consistently refused to do: T8618 - 8619 12/4/05. Mr O'Brien said that he did not think that Mr Smith required a degree to do the job. He said that if Cr Carlos had proved to him beyond reasonable doubt that Mr Smith had lied he would have been prepared to listen to him: T8651 12/4/05.
43. Mr Kadak believed that many of the allegations in Cr Carlos' notice of motion had been made and responded to earlier. Hence, he did not think there was anything in the motion that warranted any different action from what had previously been taken: T12094 1/6/05. When Mr Kadak was shown the Freehills advice he said that any legal advice regarding this notice of motion would have been helpful: T12104 1/6/05.
44. Mr Bombak gave evidence that he gave no thought to whether it was appropriate for Council to have legal advice when dealing with the motion. Nor was he concerned that there should be an officer's report. When the advice of Mr Ellis of 11 February 2003 was put to him, he said: "I would have thought that if the City or the Council did get advice like this it should have acted upon that advice". He was of the same view in relation to the advice of 14 February 2003. Mr Bombak agreed with the proposition that Cr Carlos was under a duty to raise and pursue the relevant issues, but he thought "one had to be very discreet about it". At T9468 26/4/05 he said that Cr Carlos' way of doing things was not orthodox; it was "bash heads and embarrass people". Asked what he thought would have been an orthodox way, Mr Bombak said that Cr Carlos could have called a "special general meeting". At T9469 26/4/05:

*MR MCINTYRE: Do you think it would – so are you suggesting that a special Council meeting would have been a preferable way to an ordinary Council meeting? --- Without a doubt.*

*Why is that? --- Because it deals with that item and that item only. One can go behind closed doors.*

*Well, you did go behind closed doors when you dealt with it in the ordinary Council meeting? --- Yes. But when you've got Council meetings you are dealing with a lot of – a lot of information, a lot of decisions there to be made on – after hours when councillors are working. Now, the best way to approach it would be to, "look, I've got*

*all this stuff, John. This is how we should tackle it.” You know, “we should seek advice”. He should have come to me with all that. I could have called a special Council meeting and that item would have been the only item of debate that evening or day or whatever.*

...

*But how would it have helped if he had come to see you about it beforehand? --- How?*

*Yeh? – Well we could have got an item up on the agenda but I think that anyone could have called a special Council meeting he could have done that in his own right.*

45. Mr Bombak could not identify any other ways in which he thought Cr Carlos should have approached the matter. It was put to Mr Bombak that he did not want an investigation into the CEO and did not want him stood down. He refuted those propositions. He also refuted the proposition that he had spoken to other elected members about the Carlos motion before the meeting. He was then asked:

*MR STAUDE: Do you deny that you spoke to other elected members about how this motion of Cr Carlos should be dealt with? --- I don't have a recollection of that.*

*But its possible? --- It would be possible that any elected member could have said anything to me prior to a Council meeting, during a Council meeting, during the week. If you're suggesting that the majority of Council has ganged up to have this defeated, I suggest no. Because I didn't operate a Council like that. I never put pressure on any elected member.*

46. His concern was that Cr Carlos did not have proof:

*MR STAUDE: I am asking you whether you thought it was a good idea that he should be stood aside and an investigation held into his qualifications and other matters? --- Mr Staude, there was no proof whatsoever that he had been dishonest. So you thought it wasn't a good idea? --- Just a minute. There was no proof that he had been dishonest with the Council. None whatsoever.*

47. The point of Cr Carlos' motion seems to have been lost on the majority of councillors. The purpose of the proposed investigation was to establish whether the allegations were true or false. If the allegations were false, that would be that. Unresolved, they would continue to attract attention and undermine public confidence in the local government. Council as a matter of good governance was required to “clear the air”. Cr Carlos recognised the need to investigate the allegations to determine the truth of the matter. That was a legitimate and necessary course of action in the circumstances.

48. Cr Carlos opened himself to criticism in the manner in which he dealt with this motion. He did not discuss the motion with any fellow councillors prior to lodging the Notice of Motion with the Administration, and did not disclose the documents on which he based his motion. He sought to have investigated many items which were not of great significance when compared to the qualifications issue, thereby unnecessarily complicating the matter. He also unnecessarily nominated a particular person to conduct the investigation. He would have been assisted by independent advice, including legal advice. Cr Carlos would also have been assisted by a Mayor who was impartial and capable of giving guidance and leadership on such a delicate matter. Mayor Bombak was unsympathetic and unresponsive to Cr Carlos' concerns and simply joined in the general condemnation of him.

### Censure of Cr Carlos

49. On 18 February 2003 the motion was defeated 12/2. Because it was treated confidentially the Council went behind closed doors to debate it. The motion was not put in the agenda, not read out and not minuted. There is no record of it in the Council's public records. Mr Mike Smith gave evidence that he was directed by Mr Smith not to minute the Carlos motion. Mr Mike Smith said in evidence at T8891 14/4/05 that the Local Government (Administration) Regulations require that every motion moved and the outcome be recorded in the minutes. He acknowledged that he would usually prepare the minutes for acceptance by Council at the following meeting. He said at T8892 14/4/05:

*“General practice is that I would peruse the minutes prior to them being distributed to councillors for acceptance at the next Council meeting. On this occasion I recall, as I wasn't present during the meeting, I sought advice from Denis Smith and he gave me the direction to record the minutes as they had been recorded.”*

*MR McLEOD: Did Mr Denis Smith give you any indication as to the reasoning that he followed in giving you that direction? --- I under – I can't – I understand that he referred to a section of the Act. I can't be specific but I think it was 5.95(3) of the Local Government Act which gives the CEO some ability to restrict public access to matters that are discussed behind closed doors. I mean, I at the time did not agree with the decision but ultimately it was the decision of the CEO to sign off that section of the minutes, and I couldn't sign off a set of minutes that, or a section of those minutes that I wasn't in attendance to. I think the section talks about the public's right to inspect, and there is some limitations on being able to inspect some sections of the Council minutes.”*

50. With reference to Section 5.22(1) Mr Mike Smith said it was the responsibility of the presiding member to ensure minutes were kept of a Council meeting.
51. Ms Helen Hill confirmed in her evidence at T9555 27/4/05 that she observed an encounter between Mr Smith and Mr Mike Smith on 19 February 2003:

*“There was a discussion between Mike Smith and Denis Smith outside Denis Smith’s office in relation to how those minutes should be recorded. I don’t recall the specific words that were spoken but I know that Mike Smith disagreed with the direction that Denis had given him and made that clear to Denis. However, Denis indicated that that was his direction and that’s how the minutes should be recorded.”*

52. When Council went to open doors it was moved by Cr Kimber, seconded Cr Mackintosh, that Standing Orders be suspended to deal, as a matter of urgent necessity, with a motion to censure Cr Carlos and express confidence in Mr Smith. The first two parts of the motion were dealt with as follows:

- (1) *Cr Carlos be and is hereby formally censured for his ongoing and repeated attacks on our CEO, current and former Council staff and the Mayor, and for his ongoing attempts to bring the City of Joondalup into disrepute.*

(There being an equal number of votes, the Mayor exercised his casting vote and declared the motion carried. In favour of the motion were Mayor Bombak and Crs Baker, Hurst, Kenworthy, Kimber, Mckintosh and Rowlands. Against were Crs Barnett, Carlos, Hollywood, Kadak, O’Brien, Patterson and Walker.)

- (2) *The councillors of the City of Joondalup hereby again re-affirm their full confidence in our City’s CEO and congratulate him on his many achievements including but not limited to:*
- (a) *that the City of Joondalup is one of the lowest taxing local government bodies in Western Australia;*
  - (b) *for the restructuring of the City’s administration resulting in substantial savings to our ratepayers; and*
  - (c) *his thoroughly professional administration of our City.*

(The motion was carried 13/1, Cr Carlos dissenting.)

53. Prior to the passage of the abovementioned motion, Cr Baker (seconded Cr Hurst) moved to add a third paragraph to the motion as follows:

- (3) *The Council authorises the CEO to seek and obtain legal advice from Blake Dawson Waldron, solicitors, or another recognised legal firm, in relation to the allegations made by Cr Don Carlos in his notice of motion submitted to Council on 11 February 2003, and other media articles concerning the CEO published in The West Australian newspaper and the Community News [sic] given the significant damage being caused to the image and reputation of the City and its senior officers. The Council places an upper limit of expenditure not exceeding \$5,000.00.*

The amendment motion was tied and the Mayor exercised his casting vote and declared the amendment carried. The motion as amended was passed. The minutes do not show the division on the third part of the motion.

54. Cr Baker spoke to the amendment. He described a misinformation campaign but never actually said what he expected the expenditure to achieve, what kind of legal advice the CEO was going to obtain, or whether it was on his own behalf or that of the City. Cr Carlos in response said:

*“A number of ratepayers have provided me with information, because they were concerned that we still hadn’t answered the questions, and even the questions that were raised tonight in the Council chambers, where people were told the question is out of order, and we’ve been saying they’re out of order. And all I think should happen is our CEO answer the question and this would probably go away. Not just leave it in abeyance and censure me. You may censure me, but I’m sorry, I still believe there is something wrong and we need it investigated. I do not - repeat, not - wish to bring the City of Joondalup into disrepute, but I feel that we are doing it ourselves by not fully investigating the matter and by rejecting the motion that I put up tonight. It was a simple motion; just to ensure that we work - - we’re squeaky clean because there are still unanswered questions out there.”*

55. Councillor O’Brien spoke against the amendment, objecting to spending ratepayer’s money to pursue a councillor on a matter which Council had dealt with. He made the point that each councillor had a responsibility to electors to bring such matters forward. The Mayor and Cr Baker, however, insisted that the amendment did not aim to pursue a councillor. Cr Baker said he believed that the Carlos Notice of Motion was defamatory.
56. Mr Patterson said that though he could not support Cr Carlos’ motion, he did not support him being censured as he could appreciate and respect that Cr Carlos was trying to get to the truth. He also said that there was no point in hoping that this issue was going to go away: T603 11/10/04. Mr Patterson supported the motion of confidence in Mr Smith, even though

he was of the view that his contract should be terminated. He believed that getting to the bottom of the qualifications issue was separate from whether or not Mr Smith was doing a good job. Mr Patterson felt he was doing a good job, so he was happy to express his support, even though he may not have been prepared to show support for his integrity: T603-604 11/10/04. Mr Patterson said he voted against the amendment to authorise to seek and obtain legal advice as he did not want to make the situation worse. He understood that part of the motion was to enable the CEO on his own behalf to obtain legal advice to launch an action, possibly for defamation, against Cr Carlos. He also said it was possible he voted against it because it was unclear whether the motion was enabling the CEO on his own behalf, or on behalf of the City to obtain legal advice: T609 11/10/04.

57. Mr Patterson said he was frustrated in relation to the CEO issue as he thought that it could not be resolved. His observation was that the depth of personal animosity between certain councillors was an obstacle. He said that Mayor Bombak and Crs Baker, Kimber and Mackintosh wanted to “ride out the storm”. Mr Patterson said that he thought that other elected members were probably trying to think of other ways to resolve the issue: T611 11/10/04. Everyone wanted a resolution to the issue but there seemed to be little debate on any alternatives: T612 11/10/04.
58. Ms Hurst gave evidence that she believed Cr Carlos’ position was undermining the City of Joondalup and the confidence of ratepayers. In her opinion Mr Smith was doing a good job: T699 12/10/04. Ms Hurst said that she supported the motion to fund Mr Smith’s legal advice as she was “sick of the issue”, wanted it to be sorted out, and thought legal advice would help. She supported the censure of Cr Carlos as he kept raising the issue and would not accept the majority decision of Council. She believed he was opposed to Mr Smith from the beginning and wanted to get rid of him. She also pointed to his criticism of Council staff: T714 12/10/04.
59. Ms Hurst said she voted for the motion of confidence in the CEO because Mr Smith by restructure had saved the City the cost of his contract and did it without the staff being antagonistic or upset about it: T717 12/10/04. She could not actually say whether in fact there was any saving to the City: T719 12/10/04. Ms Hurst seconded the amendment regarding legal advice, but she did not seek advice from any Council officer regarding the propriety of the motion: T720 12/10/04. She voted for the amendment as she wanted the issue sorted out but hoped that Mr Smith would not commence defamation proceedings

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against Cr Carlos or the City: T722 12/10/04. She did not accept the legitimacy of Cr Carlos' concern.

60. Mr Rowlands gave evidence that he believed Cr Carlos' "ongoing and repeated attacks on the CEO" were his continual pushes for an inquiry when Council had already said that it was not going to pursue the matter: T1563 16/11/04. He did not think Cr Carlos' concerns were valid: T1565 16/11/04. He believed that Cr Carlos' was bringing the City into disrepute by speaking to the media. In his view, if councillors did not comment to the media, the media would have left the issue alone: T1567 16/11/04. Mr Rowlands said he supported the part of the motion that gave Mr Smith access to funds for legal advice as he did not want Mr Smith to leave the City, and wanted him to get advice on defamation and the allegations being made against him: T1570-1572 16/11/04. Despite citing these reasons, Mr Rowlands insisted that the Council's decision authorised Mr Smith to get advice on behalf of the City: T1573-1574 16/11/04.
61. Mrs Walker said that she voted against the censure of Cr Carlos as she did not think it was appropriate. She thought he was trying to make the Council open and transparent. She understood the funds to be for the purpose of Mr Smith getting legal advice as the CEO on behalf of the City: T2151 24/11/04. With regards to the vote of confidence in Mr Smith, Mrs Walker said that the three achievements listed were correct and so had to agree with them. She had confidence in him for restructuring, low taxes and professional administration of the City: T2153-2154 24/11/04.
62. Mr Hollywood said that he did not vote to censure Cr Carlos as he believed he had every right to raise his motion and supported him in wanting an investigation. He believed that Cr Carlos was trying to do what was best for the Council: T2423 26/11/04. Mr Hollywood said that he probably voted to fund the CEO to obtain legal advice. Mr Hollywood also voted in favour of the confidence motion. Mr Hollywood said at this time, even though he did not view Cr Carlos' motion as an attack on the CEO, Mr Smith was under attack from a lot of different people and he had every right to protect himself and get legal advice: T2424 26/11/04. He thought the City should pay for Mr Smith to get advice, if it were legal to do so, but he did not regard any action of Cr Carlos as an attack on the CEO: T2424 26/11/04.
63. Mr Nixon was not present for the meeting on 18 February 2003, but said that he would not have censured Cr Carlos, and probably would have voted in favour of the motion to express confidence in and support for the CEO: T3792 16/12/04.

64. Cr Mackintosh supported the motion to censure Cr Carlos. She thought his actions were inappropriate as he should uphold the good name of the City at all times. She thought that if Cr Carlos had spoken to all councillors confidentially, the issue would not have been in the public arena and created a furore: T4478 28/1/05. Mrs Mackintosh was not aware at the time that Mr Smith had admitted that he did not have any university degrees. Nevertheless, she said she would not be concerned if there was a discrepancy in his CV as she judged people on performance and Mr Smith was not hired on the basis of his qualifications.
65. Mrs Mackintosh said that she did not compare Mr Smith's CV with what he had said in court, as he was doing a good job: T4482 28/1/05. She said that she voted for legal advice because allegations were made against him in the performance of his duty and Council owed a duty of care to him. She accepted that the relevant allegations were that he had lied in court and lied to the City about his qualifications: T4483 28/1/05. Mrs Mackintosh believed that the decision to allow Mr Smith to obtain legal advice would enable him to counter the attacks that were being made against him in his capacity as CEO: T4486 – 4487 28/1/05. Mrs Mackintosh considered that it was for the benefit of the City that these funds were being authorised: T4497 28/1/05. She believed the decision was in accordance with the City's policy on legal expenses.
66. Mr Kimber gave evidence that he moved the motion to censure Cr Carlos as he believed he was acting outside the resolution of Council of 17 December 2002 which put to rest any issues regarding the CEO's qualifications. He also believed that Council needed to distance itself from his actions. He hoped that censuring Cr Carlos would mean that he would stop pursuing the matter: T5518 – 5519 14/2/05. It was a significant factor for Mr Kimber that Cr Carlos did not produce his documents when requested. Mr Kimber also believed that Cr Carlos made negative comments in relation to the CEO's performance review which was discussed earlier in the meeting: T5521 14/2/05. When asked about what he meant by "ongoing attacks" by Cr Carlos against the CEO Mr Kimber said that the mere fact that Cr Carlos called for Mr Smith to stand down was an attack. He believed that the other attacks between 17 December 2002 and 18 February 2003 were reports in newspaper articles. Mr Kimber also said that the reference to attacks on staff and former staff were made in relation to his comments about the performance review, although he could not say what staff in particular were being attacked: T5524–5525 14/2/05. Mr Kimber said that he did not prepare this censure motion before the meeting, but drafted it and would have had it "word smithed" by staff during the course of the debate: T5527 14/2/05. Mr Kimber said that by making the statement in the motion that Cr Carlos was bringing the City of Joondalup into disrepute he

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was implying that Cr Carlos was doing so by acting in isolation and speaking publicly on the CEO issue without any resolution of Council. This, in his opinion, had the result of reflecting in a disparaging way on the City of Joondalup. He also considered that his conduct in relation to meetings such as briefing sessions, where ratepayers were present, warranted the censure motion: T5528 – 5529 14/2/05.

67. Mr Kimber said that he voted in favour of the motion to authorise the CEO to expend \$5,000.00 to seek legal advice because he wanted to ensure that the City's position would not be jeopardised or be subject to litigation because of Cr Carlos' actions. Mr Kimber believed that he was authorising the CEO to seek legal advice on behalf of the City although he did not envisage that the City would be advised to sue anyone; he was more concerned about the City itself being sued. He wanted to get advice about what position the City was in and ensure that the City had not been exposed to any risk by the actions of Cr Carlos: T5532 – 5533 14/2/05. Mr Kimber also said that one of the reasons why he moved a censure motion against Cr Carlos was the fact that the motion had been leaked to the media and also the reasons and comments Cr Carlos gave in speaking to the motion in debate: T5548 – 5549 15/2/05. Mr Kimber gave evidence that he gave no consideration to whether a censure motion of a fellow councillor should be dealt with behind closed doors or in open chamber. When asked why he moved the censure motion in open chamber, Mr Kimber said that it was to ensure that the public knew both sides of the story and they were hearing the fact that Council did not endorse Cr Carlos' activities: T5800 – 5801 21/2/05. Mr Kimber said that if he had received the advice of Freehills, he would not have acted any differently: T5821 15/2/05.
68. Ms Barnett gave evidence that she did not support the censure motion as she believed it was Cr Carlos' democratic right to voice his opinion and concern. Ms Barnett supported the motion of confidence in Mr Smith as she thought that he was doing an excellent job and she had full confidence in his abilities as a CEO: T6476 28/2/05. Ms Barnett thought that the motion for the CEO to seek legal advice, which she supported, was for him to seek advice on behalf of the City: T6477 28/2/05.
69. Mr Kenworthy said he voted for the censure motion as he felt that Cr Carlos was not listening to the majority of councillors. He felt that the qualifications issue had been dealt with. He felt that the main issue was standing the CEO down and the effect of that on the operation of the City: T6651 – 6652 3/3/05. Mr Kenworthy conceded that the word "attack" was probably a strong word to use in relation to Cr Carlos' actions: T6653 3/3/05. He

thought that Cr Carlos was entitled to raise issues relating to Mr Smith's performance but had to do it in a manner which did not damage the credibility of the City: T6655 3/3/05. Mr Kenworthy said that he supported the motion to authorise the CEO to seek legal advice as the Council had a duty of care to its staff. He thought that it was for the benefit of the City that this advice was being obtained in relation to the allegations made as there was significant damage being done to the image and reputation of the City and its senior officers: T6658 – 6659 3/3/05. Mr Kenworthy said that he was not aware that the resolution meant that the CEO could obtain legal advice on his own behalf: T6660 – 6661 3/3/05.

70. Mr O'Brien voted against the censure motion but in favour of the confidence motion. He gave evidence that he had hoped that the matter could be conciliated and finished and he did not see the need to expend money on legal advice at that stage: T8662 12/4/05. At the meeting he counselled strongly against the expenditure of City funds on legal advice.
71. Mr Kadak gave evidence that he voted against the motion to censure Cr Carlos as he believed that he had the right to raise these issues in the Council forum, and that imposing some form of punishment would not achieve much: T12094 1/6/05. Mr Kadak said that he did have full support and confidence in Mr Smith; he was happy with his performance and he supported what he was doing for the City of Joondalup. Mr Kadak said that he would not have discounted the findings of Gibson J outright, but could not recall how it affected his thought process in deciding the motion. He said the overwhelming factor was the performance of Mr Smith. Mr Kadak thought that the motion of confidence was in the interests of the City of Joondalup: T12095 1/6/05. The purpose was to inform the public at large of Council's confidence and support: T12098 1/6/05.
72. Mr Kadak gave evidence that he voted against the motion to provide Mr Smith with legal funding, approaching it in a similar way to the censure of Cr Carlos. He believed that Cr Carlos had a right to raise this issue in Council and he did not see any value in bringing in lawyers to take action against that as he did not want a "Smith v. Carlos" situation: T12098 1/6/05.
73. Mr Bombak said that he was swayed by debate to censure Cr Carlos, and did so because of the attacks on himself and the staff: T9484 26/4/05. As to the "ongoing and repeated attacks" on Mr Smith, Mr Bombak said that Cr Carlos was waging a campaign against him by making allegations and not providing evidence: T9487 26/4/05. Mr Bombak said the City had a duty of care to Mr Smith and there were possible workers' compensation or other legal

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issues that could have arisen. He thought the allegations were very serious and without foundation and that the censure motion was the only way the Council could deal with it: T9489 – 9490 26/4/05. He was of the view that if Council was doing anything improper then the staff would have brought it to Council's attention.

74. Mr Bombak exercised a casting vote on the censure motion. He did not agree that his casting vote should preserve the status quo or with the proposition that different considerations apply when exercising a casting vote as opposed to an ordinary vote: T9493 – 9495 26/4/05. The Chair's casting vote should be exercised to preserve the status quo. The reasons behind this is that those advocating a motion can move it again on another occasion, despite its defeat, whereas it is more difficult for opponents of the motion to have it subsequently rescinded. The use of the casting vote to censure Cr Carlos was inappropriate.
75. Mr Bombak thought that it was appropriate to congratulate Mr Smith for the City of Joondalup's low taxes as he restructured the organisation, resulting in substantial savings: T9497 26/4/05. Mr Bombak said that he supported the motion to grant Mr Smith funding for legal advice as he thought that the City had an interest in protecting its employees from adverse comments. Mr Bombak said that he understood the funds were not for personal use and that Mr Smith would obtain advice on behalf of the City: T9501 – 9503 26/4/05.
76. Mr Smith gave evidence that he understood the motion to authorise him to seek and obtain legal advice on his personal behalf, not on behalf of the City. He said that Mr Robinson, the day after the resolution, sent him a memorandum indicating that the Council had authorised the CEO to seek and obtain legal advice, and giving Mr Smith procedures that he had to follow. Mr Smith said he had discussed before the meeting with some councillors, whom he could not exactly recall, the motion regarding the authorising of \$5,000.00 in legal expenses. He said he did not discuss the censure of Cr Carlos or the motion of confidence, but conceded that he possibly could have discussed it with Mayor Bombak: T4562 – 4563 31/1/05. Mr Smith said that he did discuss with some councillors the fact that he thought the City should allow him the opportunity to seek legal advice: T4564 31/1/05. Mr Smith said that he thought the expenditure was appropriate otherwise he would not have submitted it for payment: T4568 31/1/05.
77. Mr Robinson gave evidence that on the afternoon of 18 February 2003, Mr Smith showed him a document relating to a proposal to get advice from BDW in relation to allegations made by Cr Carlos. Mr Robinson said in response to the document that it should be subject

to a limit on expenditure to \$5,000.00, referring to Policy 2.2.8. He understood when speaking with Mr Smith that the legal advice to be obtained was for him in his personal capacity rather than as an employee of the City. The City had had no previous dealings with BDW and he was aware that Mr Smith had used them previously in the eastern states: T7175 – 7177 14/3/05. Mr Robinson said that the amendment to the censure motion moved by Cr Baker regarding the CEO seeking legal advice was very similar to the document he had seen earlier that day, he could not say whether it was exactly the same, but was clear that it was similar and incorporated his suggestion of the \$5,000.00 limit: T7181 – 7182 14/3/05. Mr Robinson said that after this motion was passed Mr Smith asked him to convey in a memorandum to him what the resolution of Council was in respect of the censure motion against Cr Carlos and the decision regarding authorising the CEO to obtain legal advice: T7185 14/3/05. Mr Robinson said that he got the impression that Mr Smith had not drafted the motion regarding legal advice himself and presumed it had come from an elected member: T7470 – 7471 17/3/05.

78. Mr Baker gave evidence that he supported the motion of censure on the basis that he was tired of the allegations being made against Mr Smith and thought that the issue had already been covered. He felt that the matter would go away in the media and the public domain if whoever was “feeding” the media stopped: T8261 5/4/05. Mr Baker believed that Cr Carlos was using this issue as a platform to run on for his campaign as Mayor, by becoming well known in the media: T8272 5/4/05. He said that he believed that Cr Carlos was not motivated by the best interests of the City, that he was always negative towards the City and had voted against previous budgets: T8273 5/4/05. Mr Baker said he had a suspicion on reasonable grounds that Cr Carlos was in part acting in bad faith in that he was seeking to promote himself as the alternative Mayor: T8275 5/4/05. Mr Baker conceded that he may have drafted this motion, or played a part in drafting it as he could recall trying to think of some good things to say about the City and Mr Smith, which were contained in the second part of the motion: T8298 6/4/05. Mr Baker said that he did not draft the amendment to the motion relating to legal advice. He did not collaborate with Mr Smith, but he recalled Mr Smith asking for funds to take action against Cr Carlos so that the campaign would stop, which would have been made before the meeting: T8299 - 8300 6/4/05. Mr Baker said he did not know how he came to move the motion, but conceded that it could have come from Mr Smith: T8301 6/4/05.
79. This motion most likely came from Mr Smith, given that Mr Robinson was shown the motion that afternoon, and Mr Baker said he did not draft it. It is reasonable to conclude Mr

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Smith was instrumental in the preparation of the motion relating to legal expenses and having it moved by Cr Baker. In doing so he improperly manipulated the processes of Council for his own benefit.

80. Mr Baker said that the City owed Mr Smith a duty of care and it was hoped that if Mr Smith obtained legal advice and a formal letter was sent to Cr Carlos regarding his statements and alleged defamation then that may cause him to stop his campaign and allegations: T8302 6/4/05. Mr Baker then hoped that Cr Carlos would stop feeding the media and the matter would be dealt with internally by the City: T 8322 6/4/05.
81. At no stage in debate did Mr Baker disclose that he was putting this motion up at the request of Mr Smith, which he should have. The Code of Conduct required “Elected Members, Committee Members and Employees to: (a) observe the highest standards of honesty and integrity; (b) be frank and honest in their official dealings with each other”. These rules were not observed by Cr Baker. Mr Baker contends that there is no obligation to disclose who has approached a Councillor asking the Councillor to support a motion. The ethical obligation of frankness is a higher ethical duty than mere legal obligation. The reason for an ethical responsibility of frankness in this circumstance is the financial interest which Mr Smith had in the matter. It is distinguishable from other circumstances where there may have been undisclosed collaboration between Councillors and electors, residents and ratepayers in preparing resolutions which may be in the interests of the City as a whole.
82. What Mr Baker understood by the words “ongoing and repeated attacks” on Mr Smith were the allegations in Cr Carlos’ motion and the allegations in December 2002. Mr Baker could not say whether the allegations raised were knowingly false, but said he took into account circumstances where the authors of the allegations were not referred to, no documentary evidence was referred to and Cr Carlos had refused to provide documents he had referred to in December 2002: T8343 - 8344 6/4/05. Mr Baker relied on Section 5.40 (obligation to treat employees fairly and consistently) as the basis for the City owing Mr Smith a duty of care and he believed these allegations were raised against Mr Smith in the course of his employment as the allegations had been made in the Council chambers. He considered that Mr Smith had a right to respond: T8362 6/4/05. Mr Baker also said that there was a common law duty of care to Mr Smith in negligence to prevent agents of the City from making arguably defamatory allegations regarding one of its employees: T8366 6/4/05.

83. The allegations raised by Cr Carlos, provided that they were raised otherwise than out of a motive of malice, which I am not satisfied they were, were raised pursuant to a duty imposed by Cr Carlos' office and the interest which the Council had in the matters raised: *Adam v. Ward* [1917] AC 309, at 334. The fact that Cr Carlos was collaborating with Mr Magyar, Mr Cusack or anybody else in relation to the motion of 18 February 2003, without disclosing that he was, does not establish malice or lack of bona fides.
84. It is alleged by others that Mr Carlos was intending to create an issue to support his candidacy for Mayor in May 2003. They suggest that an inference should be drawn to that effect. Mr Carlos denies that and said in evidence that after seeking to encourage other candidates for the position; he did not decide to contest the election until May 2003. There is no evidence which contradicts him. He has given evidence of his intention prior to May 2003 of going on an extensive caravan holiday with his wife at the end of his term in 2003, and produced documentation of his purchase of the caravan.
85. While that documentation is equivocal, I am not satisfied that I should disbelieve what he said. Even if he had been intending to seek that office in February 2003, I am not satisfied that there is any cogent evidence that his motive for raising the issue of the qualifications of Mr Smith was not based on a genuine belief in the appropriateness of raising an issue as to the probity of the CEO, or that it was with the purpose of enhancing his own electoral prospects (whether or not it may have incidentally had that effect) or for any other improper or malicious purpose. In arriving at that conclusion I take into account findings I have made concerning instances of Mr Carlos' statements which were made with a lack of care in ascertaining their truth and accuracy.
86. Carelessness as to the truth, particularly if combined with a positive belief in the truth of what is said, is distinguishable from malice: *Roberts v Bass* [2002] HCA 51. The raising of the issues contained within the motion of Cr Carlos in the Council meeting is, in those circumstances, protected by qualified privilege.
87. It is not the case either, on the evidence, that Council had any reason to think that the Carlos motion or any other acts on his part gave rise to any foreseeable risk of injury to Mr Smith: *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15, (2005) 79 ALJR 845. Neither was there any reasonable basis upon which to conclude that any duty of care owed to Mr Smith was capable of being discharged by the provision of legal advice.

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88. In any event, Mr Smith took the opportunity to respond to the matters raised by Cr Carlos through the officer's report, which he was instrumental in preparing, and at the meeting at which he was present, and would have had a further opportunity to do so if Council had opted for an inquiry.
89. The DLGRD provides guidelines on clarity in Council resolutions. Badly worded resolutions, such as the one moved by Cr Baker authorising Mr Smith to seek legal advice are difficult to interpret. Ambiguity will often mean individual members of Council may have a different concept of what is intended from the staff who implement the decision. There is a need for clarity and purpose in resolutions. The legal advice motion was ambiguous as to whether personal advice or advice on behalf of the City was being authorised. Councillors who took the view that Mr Smith was authorised to seek personal advice failed to recognise the difference between Mr Smith's individual interests and the interests of the City. It would have been appropriate to obtain legal advice on the extent of any perceived duty of care before passing a motion granting funding for legal advice. That the decision was beyond the scope of the City's legal expenses policy was another obvious reason for obtaining advice. The result was that the decision was uninformed and ill advised.
90. Councillors who supported the motion by and large lacked sufficient understanding, to the extent that the motion was capable of being understood, of its meaning and intent, not to mention its likely effect. References in the evidence to concepts like "duty of care" revealed a fundamental lack of understanding by some councillors of the legal nature of the employment relationship. The premise that Cr Carlos had made "ongoing and repeated attacks" on the CEO and senior staff was misconceived and wrong. Cr Carlos' actions in speaking against the Nixon motion of confidence on 17 December 2002 and in raising his subsequent Notice of Motion were appropriate and in accordance with his duty as a councillor.
91. There was no "media campaign". *The West Australian* and *The Sunday Times* had covered the decision in *Jones v. Sutton* in November/December 2002. There were two articles on the case. In January 2003 Mr Smith had given an interview to the *Joondalup Community*. The only other articles were two relating to the Carlos' Notice of Motion which were published in the *Joondalup Community* and *The West Australian*. The various articles to that date were clearly newsworthy. They reported matters in the public interest. None of the articles could reasonably be described as unfair or inaccurate. In any event Cr Carlos had no control over the publication. The Nixon motion of confidence on 17 December 2003 was debated with

open doors. Cr Carlos' opposition to the motion was a matter of public record. The issue of the CEO's qualifications had attracted questions from the public at the ordinary meetings of Council in November and December, although the questions had been ruled out of order. There was no reasonable basis upon which any councillor could conclude that Cr Carlos was attempting to bring the City of Joondalup into disrepute.

92. The decision to express confidence in and support for the CEO was also uninformed and ill-advised. In the final analysis this decision, like the decision on 17 December 2002, had major legal ramifications in terms of compromising the City's position in relation to issues relating to Mr Smith's contract of employment. The decision was not in the interests of the City, although it may have been perceived by those councillors who supported it to be in Mr Smith's interests. The CEO had been roundly criticised in legal proceedings in NSW in a manner that reflected on his honesty and integrity. It was clearly evident to councillors that the issue of Mr Smith's qualifications was one of considerable concern to ratepayers, electors and residents and one that had attracted widespread media attention as well as comment in State Parliament. The Council's duty was not to protect Mr Smith from these issues, but to resolve them.
93. Council had little information on which to censure Cr Carlos. There is no evidence of "ongoing and repeated attacks" on the CEO by Cr Carlos. There were no newspaper articles during this period except for those relating to the Notice of Motion itself. The transcript of the meeting on 17 December shows that Cr Carlos' speech in opposition to the motion of confidence was in non-judgmental terms. Also, his quoted remarks in newspaper articles on 11 December (1204MCOB7) about the performance review, and 15 December 2002 (1204MCOB8) calling for an inquiry, addressed matters of process and did not reflect adversely on Mr Smith's character.
94. None of the three parts of the motion was in the interests of the City. This motion was not a matter of urgent necessity and should have been dealt with behind closed doors. No officer commented on this motion at the time it was moved or during debate. The CEO failed in his statutory duty to ensure that the Council was properly advised in this matter. Whilst the responsibility for the failure is the CEO's, he had an interest in the matter. The CEO's role should have been delegated to another officer. Council should have given relevant directions in this regard. This was not done. The need to deal with the CEO's conflict of interest should have been recognised by him, by the Mayor, and by Council.

95. According to Renton, *Guide for Meetings and Organisations*, 6th edition, Law Book Co, 1994, Vol 2 p191, a censure can be the “airing of some real or imagined grievance, the soliciting of an apology, the seeking of some change in the conduct or attitude of the person concerned or the desire to avoid the repetition of some incident”. In the case of censure or want of confidence motions, natural justice dictates that the person affected be afforded an adequate opportunity to respond. Reasonable notice of the motion and the meeting at which it is to be discussed should be given, and at that meeting the person affected should be given enough time to put their side of the story and produce any relevant evidence.
96. Notice of the motion should have been given. Councillors had been previously warned of passing motions with no notice on 28 August 2001. The Standing Orders Review Committee on 13 August (report attached to Council minutes on 28 August 2001 and noted by Council on 28 August 2001) said that:

*“The Order of Business of meetings does not include any heading for late and urgent business. Making decisions at a meeting without the benefit of a thoroughly prepared report is considered to be a highly dangerous practice that must be avoided at all times. It is difficult to identify any matter that could not be held over to the next meeting, particularly as Council meets twice monthly. Alternatively, a special meeting could be held if necessary in order for a report to be provided and any decision being made on an informed basis. This approach is in keeping with responsible government management that is expected by the community.”*

### **CEO’s Memorandum of 19 February 2003**

97. After the meeting the CEO issued a statement to the staff of the City by e-mail on 19 February 2003, the substance of which was included in a press release of that date which set out the motions passed at the meeting, including the censure motion. Mr Smith accused Cr Carlos of a vindictive and vicious attack. He thanked councillors and staff for their support and said that he had been given a strong and overwhelming vote of confidence in the December and February meetings.
98. On 20 February 2003 an article was published in *The West Australian*, “Council rejects bid to stand down Chief”: 0206DSC134. Cr Carlos was quoted as saying that he had support from ratepayers and could not understand the Council’s stance. He hoped ratepayers would voice their opinion at the May elections. The article quoted Cr Baker as stating that “they were satisfied they had sighted documentation that ... he did have the qualifications that

were set out in his application”. He was also quoted as saying “my concern is whether this fellow is qualified to do the job and quite clearly he is by his own actions and performance to date”. Mayor Bombak was quoted as saying “This leaves no doubt that this has been a bitter and unfounded attack on Mr Smith that is without any substance or support whatsoever”.

99. Mr Ellis, in an advice dated 7 April 2003, in response to a request from Mr Robinson (discussed further below), advised that most of the information Cr Carlos relied upon was in the public domain. He did not consider that Cr Carlos intended to gain any advantage by using the information or that he intended to cause a detriment to any person other than Mr Smith. Upon a careful analysis of the meaning “improper” Mr Ellis arrived at the opinion that a Court would be unlikely to conclude that Cr Carlos’ conduct was such.

### **Defamation Advice to CEO by Blake Dawson Waldron**

100. Blake Dawson Waldron (“BDW”) subsequently advised the CEO that Cr Carlos’ Notice of Motion was likely to be found to be defamatory of him and that Cr Carlos and the *Joondalup Community* were unlikely to be able to establish a defence of truth or a defence of qualified privilege if they acted without honest belief in the truth of the allegations or with an improper purpose, or unreasonably. According to the advice, Mr Smith’s instructions were that none of the allegations was true. BDW advised potential damages of \$10,000.00 - \$15,000.00: 1703KBR63.
101. BDW wrote on behalf of Mr Smith to Cr Carlos on 7 March 2003 demanding an apology and an undertaking not to repeat the allegations which were the subject of the Notice of Motion, provision of the list of all persons for whom copies of the Notice of Motion had been provided and payment of Mr Smith’s legal costs: 0111DSC78. Cr Carlos did not respond.
102. BDW advised the CEO to write to the Mayor regarding the impact of Cr Carlos’ actions on his employment. On 11 March 2003 the CEO sent to the Mayor a memo in the form of a draft prepared by his solicitors in which he said that the Carlos allegations had had a “disruptive and time consuming impact” on him and other senior employees, that the Council was obliged to ensure proper conduct by its councillors and officers in order to avoid unnecessary damage to his reputation, and that it may not be possible for him to

maintain adequate focus on his usual duties if he was required to continually defend unfounded allegations.

### Mayor Bombak's Memorandum of 11 March 2003

103. On the same day Mayor Bombak wrote to councillors annexing the CEO's letter and concluding with the words:

*"Councillors, we need to be mindful of our obligations under the appropriate legislative acts and ensure that we do not subject the CEO to any unsubstantiated and scurrilous attacks that could open the City, or us as individuals to a breach of contract or workers compensation claim."* (2202CJM9)

104. The letter stated that questions about the CEO's credibility and professional integrity had caused the City to experience a great deal of unnecessary media scrutiny and speculation. It referred to advice from Freehills (14 February 2003) that the City was obliged to provide safe working conditions for the CEO and was liable to pay compensation for work related disability. It expressed the Mayor's concern for the health and well-being of the CEO.

105. On 19 March 2003 Cr Carlos e-mailed elected members and staff of the City: 1410DSC17. With reference to Mr Smith's e-mail to staff and elected members of 19 February 2003 of which he had only recently received a copy, he detailed:

- (a) the findings made against Mr Smith by Judge Gibson in *Jones v. Sutton*;
- (b) various newspaper articles and letters to the editor regarding the CEO; and
- (c) questions asked by ratepayers at public question time which had been ruled out of order.

He stated:

*"Mr Smith, if these allegations are false, then you could have prevented all the press articles and the continued questioning by the ratepayers if you had produced your qualifications and permitted me to compare them with your CV's that you provided to Coff's Harbour, Warringah and Joondalup Councils. I would also like to know why these three documents have inconsistencies."*

He also said, "I have been harassed by the Mayor, Mr Smith, his lawyers and some councillors who want to gag me from finding out the truth". Cr Carlos challenged Mr Smith

to produce his qualifications, alternatively, to start legal proceedings against him. He also said that although he had originally intended not to stand for election on 3 May 2003 so that he could travel, he had decided to offer himself for the position of Mayor. Cr Carlos received a further letter of demand from BDW (20 March 2003, 0111DSC79) to which, again, he did not respond.

106. On 7 April 2003 Mr Ellis of Freehills provided a letter in response to instructions from Mr Robinson dated 11 March 2003 for advice as to whether the actions taken by Cr Carlos in relation to the Notice of Motion constituted a breach of Section 5.93 which prohibits the improper use of information acquired in the course of an elected member or employee's functions to gain an advantage to that person or any other person or to cause detriment to the local government or any other person: 0112DSE16. Mr Ellis provided a detailed analysis of the allegations which were the subject of the Notice of Motion and attached the various newspaper reports on which some of the allegations were based. He did not consider that a charge would be proved. He said:

*“The picture of a councillor zealously, even over-zealously, pursuing impropriety in the Council would be very attractive to lay members of the public. In our opinion, a jury would be unlikely to convict in the absence of compelling evidence of personal advantage on the part of Cr Carlos.”*

107. The City incurred costs of \$4,000.00 (excluding GST) for this legal advice which was sought at the behest of Mr Smith. It was not authorised by Council. There is no evidence that Council received any report on the advice or was ever informed that the advice had been sought and obtained. In the course of evidence Mr Robinson was challenged as to his role in obtaining the advice, particularly as to whether he thought the matter merited legal advice and as to whether he exercised an independent judgment in following Mr Smith's direction. Mr Robinson maintained an affirmative answer to each issue. Mr Robinson said that Mr Smith had directed him to obtain the advice. He took it as a lawful direction: T7489 17/03/05. It was clearly inappropriate for Mr Smith to have directed Mr Robinson in this matter having regard to his conflict of interest. It was an abuse of his position as CEO.

### **Legislative Council: 10 April 2003**

108. On 10 April 2003 the Hon Giz Watson asked further questions in the Legislative Council regarding the issue of the CEO's qualifications: 2605LRB7. The Hon Ken Travers also

commented on the matter stating that he could see no reason why the City of Joondalup should not make public the CEO's CV, saying (1803TOG8):

*"I tonight call upon the Council to come clean and clearly identify the claims, if any, the CEO has made about his academic qualifications when he applied for the job, and the CEO to demonstrate that he has those qualifications. I also call upon the Council to publish the contract so that we can all see whether the correct processes for the remuneration, review and other matters in that regard have been followed. I urge the City of Joondalup to do that in the very near future."*

109. Mr Travers was quoted in ABC Radio news report on 11 April 2003. The news report indicated that the DLGRD had confirmed that it was examining the issue of the CEO's qualifications as part of an assessment of complaints about his appointment.

### **Second Decision to Pay CEO's Legal Fees: 29 April 2003**

110. On 27 March 2003 BDW sent a tax invoice to Mr Smith for \$11,109.32 (excluding GST). On 24 April Mr Smith wrote a memorandum to Mr Robinson setting out an explanation as to why his legal expenses had exceeded the original grant of \$5,000.00. He explained that Cr Carlos' Notice of Motion raised a range of matters and new matters were also raised in the e-mail: 0912DIS35. Part of this memorandum was included in a late item report recommending that Council authorise the payment: 2411AAW3. The report pointed out that Policy 2.2.8 was not directly relevant as "it only relates to defending legal proceedings arising out of the carrying out of the official responsibilities or terms of employment of present or former elected members and staff of the City".

111. Mr Robinson gave evidence that he incorporated into the report information from Mr Smith supporting his request. Mr Robinson said that he also went through the itemised accounts from BDW and matched items in that summary to comments made by Mr Smith in his memorandum of 24 April: T7187 14/3/05. He referred to Policy 2.2.8 as he believed Council was authorising expenditure for Mr Smith of a personal nature. Mr Robinson understood that Mr Smith would be responsible for meeting the additional costs and Council was not under any obligation to pay them (T7188 14/3/05 & T7538 17/3/05), but he recommended that Council pay the additional amount as there was a connection between Cr Carlos' motion on 28 February and the additional matters on which advice was sought such as the e-mail Cr Carlos sent to all staff: T7188 – 7189 14/3/05 & T7535 17/3/05. Mr Robinson said in evidence that he checked the itemised account line by line to ensure that the advice received

was within the terms of the resolution. At T7537 17/3/05 Mr Robinson said that he did not consider that the legal advice was limited to defamation. He said there were “general issues”. He was asked about the amount of the bill and the amount of time involved on the part of Mr Smith’s solicitors, i.e. 33.2 hours.

112. It was apparent from his answers that the terms of the motion did not provide any parameters in respect of the legal advice and that Mr Robinson was not in a position to assess whether the services rendered were comprehended by the motion, or the reasonableness of the time spent and fees charged. He agreed that the matter was complex and that Council would require detailed advice: T7538 17/3/05. In the circumstances, there appears to have been little basis for a recommendation to Council that the extra fees be paid. It is noted that this was the only occasion on which Mr Robinson made such a recommendation. In dealing with subsequent requests by the CEO for payment of his legal expenses, Mr Robinson left the matter for Council’s consideration.
113. Mr Rowlands said that he voted for the subsequent payment of Mr Smith’s legal expenses for the same reason he gave for his February decision, that he thought Mr Smith was going to leave at any moment, and hoped to keep him. He also mentioned that the Council owed Mr Smith a duty of care, and his health was not very good at this stage, and so he voted for the payment of more legal expenses, even though he was becoming concerned about the cost: T1576 16/11/04. Mr Rowlands was not able to articulate what legal advice he thought that Mr Smith was getting or the consequences of what the advice would be: T1582 16/11/04. Mr Rowlands’ evidence does not disclose any good reason for payment of the extra legal fees. He had no reasonable cause to think that the payment of Mr Smith’s legal expenses would dissuade him from leaving or that legal advice would improve his health.
114. Mrs Walker gave evidence that she voted against this motion purely for the reason that Mr Smith had been authorised to expend \$5,000.00 and he had expended nearly \$12,000.00 and at this stage she still was not aware that the legal advice was obtained on behalf of Mr Smith personally: T2190 24/11/04.
115. Mr Nixon said he understood the advice being received was in relation to defamation and that it was appropriate that these fees were incurred, as the report recommended: T3774 16/12/04. Mr Nixon thought that it was in the interests of the City to pay these expenses, but was not in a position to determine whether they were reasonable as he did not view the itemised account or know the hourly charge: 3776-3777 16/12/04. Mr Nixon was clearly not

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possessed of sufficient information to enable a reasonable decision to be made on this motion.

116. Mrs Mackintosh said that she voted for payment of the additional amount for the same reasons as the initial amount: T4527 28/1/05. She thought that the benefit to the City of paying this money was to retain the CEO. The big risk was the effect the stress of this would have on Mr Smith's health and she thought that having legal advice would reduce the stress and therefore be of benefit to his health: T4530 28/1/05. Mrs Mackintosh believed that it was an appropriate application of City funds: T4532 28/1/05. Similarly, Mrs Mackintosh was in no position to assess the reasonableness of the request for payment and her evidence does not explain how the legal advice would have benefited Mr Smith's health.
117. Mr Kimber said that the late item report was provided at the meeting. He said he would get an opportunity to read through the document when there were pauses in the Council meeting and also when the item came up: T5563 15/2/05. Mr Kimber said that the information in the late item report indicated to him that Cr Carlos had failed to respond to communications from BDW: T5565 15/2/05. Mr Kimber said that it was not obvious to him that Mr Smith was receiving personal advice. Rather, he thought Mr Smith was receiving advice on behalf of the City: T5567 15/2/05. He said he voted for the additional amount as the bill was for work that BDW had done to resolve the issue relating to the Notice of Motion and Cr Carlos, and because he believed it was in the best interests of the City to do so as it had a duty to its employees: T5574 15/2/05. Mr Kimber's misunderstanding as to the effect of the motion on 18 February 2003 demonstrates its ambiguity. He was not in a position to reasonably determine whether the City should pay the sum claimed on the information available to him.
118. Mr Kenworthy said that at this stage it did not appear to him that Mr Smith had obtained legal advice on his own behalf. He thought it was implicit in the report to Council that a defamation action by Smith would be difficult to defend. If it were defamatory of staff and the CEO it would impact on the City: T6665 3/3/05. Mr Kenworthy said that he thought the City was implicitly included in the advice when the report quoted the advice as being "the Notice of Motion is likely to be defamatory of you" as it not only related to the CEO but also to the City: T6667 – 6668 3/3/05. Mr Kenworthy said that he did not see the bill and was not informed of what work had been done: T6670 3/3/05. Mr Kenworthy was also somewhat confused as to the effect of the original motion and like other elected members, was not provided with sufficient information in order to assess the reasonableness of the request.

119. Mr O'Brien was against the payment of the CEO's legal expenses, as he was following the same proposition as for the first decision, that there was no need to resort to legal advice and the issue could be conciliated: T8666 12/4/05.
120. Mr Bombak supported this motion citing the City's duty of care and Mr Loader's concern about the way Mr Smith was being treated: T9512 26/4/05.
121. The itemised account of BDW (1403KBR25) showed that seven different lawyers had spent 33.2 hours on the matter at rates between \$180.00 and \$455.00 per hour. No legal advice was obtained by Council on the decision to pay the CEO's legal expenses. It is clear that following the initial decision to allow the CEO up to \$5,000.00 for legal advice, advice and representation was obtained at a cost far in excess of that limit. The officer's report contained Mr Smith's reasons for requesting the further funding, but no advice as to whether it was in the City's interests for the further amount to be authorised.
122. It was not in the interests of the City of Joondalup to expend over \$11,000.00 on legal fees for advice and representation obtained by the CEO in relation to the matters raised by Cr Carlos. Council was in no position to assess the reasonableness of the fees incurred and accepted them at face value. The account of BDW, although dated 27 March 2003, was not the subject of a request for payment by the CEO until shortly before the meeting of 29 April 2003, such that the matter was treated as a late item with the officer's report being provided at the meeting. It was unreasonable for councillors to deal with the matter on this basis. Insufficient consideration was given to it. The report contained a recommendation which was not supported by any reasons. To the extent that it was a matter for the exercise of Council's discretion, the City's Legal Representation Policy having no application, the report should not have carried any recommendation other than that Council obtain legal advice before giving consideration to the request.

### **Minister's Letter to Mayor Bombak: 29 April 2003**

123. On 29 April 2003 the Minister wrote to Mayor Bombak in response to a letter from Mr Smith of 23 April 2003 to the Director-General of the Department seeking urgent confirmation that the Department was not investigating the CEO's qualifications: 1503KBR52. The Minister advised that he had been made aware through the Department of concerns regarding the selection and appointment of the CEO which the Department was

investigating. He confirmed that the CEO's qualifications were not being investigated, but said that "as Minister I consider allegations of misrepresentation to Council in relation to qualifications, or indeed any other matter, to be very serious".

## **Conclusions**

- A. Cr Carlos was under a duty to raise his concerns relating to Mr Smith's honesty and acted appropriately in the manner he did so.**
- B. Mr Smith failed properly to address and deal with his conflict of interest in relation to the Carlos motion.**
- C. Mr Smith failed in his statutory duty to ensure the Council was informed and advised in relation to the motion.**
- D. The CEO otherwise failed to ensure that the Council was advised adequately in relation to the motion.**
- E. The need to deal with Mr Smith's conflict of interest and to obtain adequate information and advice should have been recognised by the Mayor and Council.**
- F. There was no sufficient rational basis upon which the Council could decide that it was in the interests of the City to censure Cr Carlos, express confidence in Mr Smith, and authorise expenditure by the City on his legal advice.**
- G. In respect of the third part of the motion dealing with legal advice for Mr Smith:**
  - It was unreasonable for councillors to authorise the expenditure when they did not have sufficient understanding of its meaning and effect or sufficient information upon which they could reasonably decide that it was in the interests of the City to do so.**

- **Mr Smith acted improperly by procuring Cr Baker to move that part, thereby manipulating the process of Council for his own benefit.**
  - **Cr Baker breached the Code of Conduct for not disclosing that he was moving that part of the motion at Mr Smith's request.**
- H. There was no sufficient rational basis for the officer's recommendation to Council in April 2003 to authorise further expenditure by the City on legal advice for Mr Smith, and no sufficient rational basis for Council to decide that it was in the interests of the City to do so.**



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## Part 5

### Dealing With Scrutiny

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#### Council Elections: 3 May 2003

1. The Council elections were held on 3 May 2003. The *Joondalup Community* published an article on 24 April 2003 headed “Mayoral Race Turns Nasty” (0604CJB16) in which the City of Joondalup’s returning officer, Mr Brian Moore, was quoted as saying that he was investigating 10 alleged breaches of the LGA and that the level of “sniping” in the elections was the worst he had seen in his 40 year experience in federal, State and local government elections. WA Electoral Commissioner, the late Ms Lyn Auld, was quoted as saying that Joondalup was at the top end of the scale in terms of volume of complaints.

#### Selecting a New CEO

2. A leaflet entitled “Public Question Time” (2611AAW8) was distributed prior to the election. It was authorised by a Mrs Delma Wiese. Mr Baker admitted that he was the unidentified author of the document. The leaflet raised questions about each of Crs Carlos, Walker and Patterson who were all mayoral candidates. Two questions asked in relation to all three candidates related to a decision to write-off a debt owed by the Wanneroo Basketball Association to the City. The leaflet stated that the DLGRD had serious concerns about the conduct of the councillors in question and cited a statement by Ms Gwilliam detailing the Department’s concern that a significant sum had been written-off without considering the effects of the decision on other sections of the community.
3. When asked about this decision Cr Baker said that he in fact drafted the motion to write-off the debt in conjunction with Mr Wayne Primrose, a member of the Association, and that in his opinion the decision of Council was properly made: T8393 6/4/05. He said the questions in the leaflet were intended to reflect the views of those who were opposed to the City writing-off the debt. These included the CEO, other City officers and Mayor Bombak, in support of whom the flier was written: T8395-8396.

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4. Other questions asked about the candidates in the leaflet were of a nature that imputed improper conduct. The evidence showed them to be without foundation.
5. Other questions asked about the candidates in the leaflet were of a nature that contained an innuendo of various elements of improper conduct. The evidence showed that on investigation the impropriety tended to evaporate. For example –
  - It raised a question as to participation in a decision to write off a sporting club debt which Mr Baker himself advocated and supported.
  - It suggested a financial interest in a decision requesting certain councillors to pay costs of a town planning appeal in respect of the Mullaloo tavern which the DLGRD found did not give rise to a financial interest which ought to have been declared.
  - Criticisms of expenditure on conference attendance, travel and baby-sitting expenses on the basis of quantity were made, without addressing the full range of issues which might have gone to the merit of the expenditure.
  - A suggestion, discussed below, was made that Ms Walker was under investigation by the DLGRD.
6. Mr Baker said that the pamphlet was circulated through the Perth Real Estate Guide which was distributed by a company of which the managing director was Russell Poliwka who was also a candidate for mayor. The cost of the pamphlet and its distribution was paid for by a local real estate agent, Geoff Baldwin, the principal of Roy Weston Joondalup, by which firm Mr Bombak is now employed.
7. Mr Baker gave \$1,000 to Mr Bombak for his mayoral campaign and \$600 towards the campaign of Mr Sam Grech: T8391-8392 6/4/05. Mr Baker also wrote a letter to the *Joondalup Community News* congratulating Mrs Wiese for raising the issues: (1204DD7). His anonymous authorship of this pamphlet breached the Code of Conduct in several respects. As a fellow councillor he was engaging in conduct which, by implication, made allegations which were likely to cause unwarranted embarrassment. Concealing his involvement constituted a failure to observe the “highest standards of honesty and integrity”. His preparedness to anonymously prepare such material breached his duty to “be frank and honest in his official dealings with” fellow councillors.
8. His letter to Community News concerning the election pamphlet falsely conveyed the impression that he was an interested commentator on the views expressed by the person said

to have authorised the pamphlet, when in fact he was the author of the pamphlet. He justified that level of deception as part of politics (Ts 6.4.05). It suggests a very low regard for the value of honesty and integrity in public life.

9. The Public Question Time pamphlet stated that Cr Walker was under investigation by the DLGRD. Cr Walker obtained a letter from Ms Gwilliam confirming that she was not under investigation. Mr Baker issued a press statement (2611AAW11) refuting Ms Gwilliam's advice on the basis of a letter from Mr Brendan Peyton, senior investigations officer of DLGRD, to Mr Sam Grech dated 17 February 2003 which stated that in relation to Mr Grech's complaint of 10 February 2003 of alleged non-disclosure of financial interests by certain councillors, "your concerns have not been allocated for assessment at this time due to the section's resources being allocated to higher priority matters". Mr Baker also based his position on a copy of a letter from an administrative assistant to the Minister dated 2 December 2002 which acknowledged a letter from Mr Grech and stated that his correspondence had been referred to the DLGRD for their "investigation and direct reply to you".
10. Mr Baker stated in his press release (2611AAW11) that the Director General had been misinformed by her staff. He said: "The truth is Cr Walker is under investigation, however, due to limited resources and other priorities, the investigation has still not been completed". On the evidence before the Inquiry Cr Walker was not under investigation, but awaiting assessment as to whether an investigation was warranted. There was no proper basis for Cr Baker's assertion which was made purposefully to damage her reputation. Such conduct is contrary to the Code of Conduct.
11. The issue of the CEO's qualifications was not one upon which Cr Carlos ran for Mayor. His election flyer set out his personal background and listed a number of objectives unrelated to the CEO. Mr Carlos said however that during the course of his door-knocking campaign many people raised the issue with him.
12. Mr Steve Magyar, on the other hand, in his candidate statement submitted to the City, pledged to have an investigation into the CEO's qualifications. The Administration referred this for legal advice to Freehills. Mr Ellis gave detailed advice by letter dated 25 March 2003 (0112DSC18) in which he advised that it was arguable that the profile was defamatory in the sense that it made the implied assertion that there had been some impropriety by Mr Smith even though defences might exist if an action for defamation were brought. In this

regard he referred to the implied constitutional right of free speech on political matters. He advised it would not be appropriate for Mr Smith to make the decision whether the matter should be referred to the returning officer.

13. Mr Magyar subsequently agreed to amend his candidate profile, but it is noted that the Electoral Commissioner wrote to Mr Mike Smith on 2 April 2003 (1404MGS23) in which she said that the matter had been referred for legal advice, but preliminary analysis indicated that the profile was not as clearly defamatory as Freehills had concluded.
14. At the meeting of Council on 29 April 2003 Ms K Woodmass of Kingsley asked the following questions in public question time:

*“Q1. “Q1. What University qualifications were listed on Mr Smith’s CV, as provided to the City, during the selection process for the appointment of our CEO?”*

*Q2. Will Mr Denis Smith provide full copies of all his qualifications and especially his professional University qualifications to the public?*

*Q3. Will Mayor Bombak confirm that he has sighted Mr Smith’s qualifications and that they do indeed match the qualifications listed on his CV, as provided to the City?*

*Q4. If the CEO’s qualifications do not match those listed on his CV and Mr Smith does not have the qualifications he claimed to have during the selection process, what action will this Council take to resolve this very serious matter?”*

15. No answers were given. At the same meeting, Cr Kadak, who was not seeking re-election, made a personal statement in which he said, *inter alia*:

*“I have not enjoyed witnessing the decay in personal relations between various elected members and it is disappointing to see that for some it seems politics has overtaken purpose. This is the time when people need to believe in their government and their leaders like never before and trust in their good intentions and professionalism.”*

16. As a result of the May 2003 elections, Cr Carlos was elected to the position of Mayor, defeating the incumbent Mr Bombak in each of the seven wards. Cr Carlos had campaigned with a “team” of Council candidates, namely, Felicity Lockyer (Lakeside), Stephen Magyar (Marina), Andrew Nixon (North Coastal), Tony Brown (Pinnaroo), Sue Hart (South), Monique Moon (South Coastal), and Michael Caiacob (Whitfords). This group was described in Cr Carlos’ election flyer as follows:

*“The Carlos team is a group of concerned ratepayers who believe they can work together as councillors to ensure we have democracy within the City of Joondalup.*

*We are all community minded people who believe we need a change in the Council direction and leadership.*

*In the past 14 months the Council has had to have six special electors’ meetings where thousands of ratepayers have voiced their displeasure with decisions made by Joondalup Council. Each one of these meetings could have been prevented if the Council had consulted with the ratepayers before decisions were made.” (2202PMK3)*

Of the team, Cr Carlos was elected as Mayor and Crs Nixon, Hart and Caiacob to their respective wards.

17. No evidence was received by the Inquiry which would indicate that by grouping themselves in this manner the candidates and the team acted inappropriately, or that those of the team who were elected, subsequently conducted themselves in a way which preferred any personal or group interest to those of the City.
18. However, the creation of a team of this kind is likely to create a perception that a group may be operating or intending to operate as a faction on Council and is likely to contribute to a division of Council into groups. It has the potential to run counter to the exhortation in the Code of Conduct of the City that –

*“An effective Elected Member or Committee Member will work as part of the City of Joondalup team with the CEO and other Members and employees. That teamwork will only occur if Elected Members, Committee Members and Employees have mutual respect and cooperate with each other in order to achieve the City’s corporate goals and implement the City’s strategies.”*

19. Sub-groups or teams within Council may have the effect of inhibiting communications between elected members as a group, detracting from their capacity to properly perform their primary function of decision-making. The creation of such groups is, therefore, not something which is to be encouraged as contributing to the good government of a local authority and has a significant prospect of detracting from good government.
20. The new members of Council elected in May 2003 were Cr Tim Brewer (Marina Ward), Cr Louis Prospero (Lakeside Ward), Cr Michael Caiacob (Whitfords Ward), Cr Sue Hart (South Ward), and Cr Janine Gollant (South Coastal Ward). At a special meeting of Council

on 5 May 2003 Cr Hollywood was elected Deputy Mayor. The Council also decided to maintain its three weekly cycle of meetings which consisted of a strategy session, a briefing session and a Council meeting at weekly intervals.

### **Media Attention: May 2003**

21. In a *Wanneroo Times* article “Carlos vows to rebuild bridges” (6 – 12 May 2003, 2104CJB19) it was reported that Mayor Carlos shook hands with Mr Smith after the election count. Mayor Carlos was quoted as saying that people knew his feelings about Smith’s appointment and Mr Smith was reported to have said that if the Mayor continued to question his appointment things would be difficult. Nothing in the article indicated that the new Mayor would not pursue the matter. The headline referred to “rebuilding bridges” with the Cities of Stirling and Wanneroo.
22. By this time, more media attention was being given to the issue. A transcript of an item on Channel 7 News on 5 May 2003 (2104 CJB18) reads as follows:

*“NEWSREADER: One of the most powerful men in local government is to have his academic record investigated by his own Council. Denis Smith’s university education helped him win the plum job of Joondalup CEO, but the Council’s new mayor wants his qualifications verified.*

*REPORTER: Denis Smith earns almost a quarter of a million dollars a year but new mayor Don Carlos is determined to check his university degree.*

*DON CARLOS – Mayor of Joondalup Council: I still only want the truth and once I know the truth I will then take appropriate action.*

*REPORTER: A year ago a NSW judge referred to evidence that a university had no record of Mr Smith’s name despite him claiming a degree. Questions have been raised in WA’s Parliament by two MPs.*

*GIZ WATSON – WA Greens: Has he used the same CV in his application to become CEO at Joondalup? And if he has, then he shouldn’t be holding that position.*

*REPORTER: This leaked CV details an impressive academic record. I want to ask Mr Smith whether these were the qualifications that he claimed to have but he says he won’t be interviewed under any circumstances.”*

23. The journalist involved, Mr Reece Whitby, gave evidence that the story came to his attention through an article in the local community newspaper. Mr Whitby’s producer lived in

Joondalup and was interested in the issue. When asked about the story's significance he said:

*“Normally where – we don’t usually cover Council because they don’t affect a large number of our viewers, but in the case of Joondalup we quickly discovered that it was the second biggest Council in Perth, that it represented one in ten ratepayers in the City of Perth, and so we thought, well, that was a fair amount of our audience on any particular night would have a direct interest in what was going on at that Council. And then I think later on the story became so interesting that it didn’t matter where you lived, it was a basic news story that got your interest.”*

Mr Whitby said public interest in the story was indicated by the fact that it was covered in *The Sunday Times*, *The West Australian*, and on Liam Bartlett’s ABC radio programme. Mr Whitby produced a video-tape of all items broadcast by Channel 7 on the subject through to December 2003: 0104RRW1. Mr Whitby and a number of other journalists who gave evidence were called at the request of the solicitor for Mr Kimber, Mrs Mackintosh and Mr O’Brien on whose behalf it was suggested that Mr Carlos had run a media campaign. This was also the position of Mr Baker and Mr Smith. When asked about whether he had any evidence of such a campaign, Mr Whitby said at T8115 1/4/05:

*“Certainly there were certain factions that I came to be aware on Council that had – one side had an interest, I guess, in the story not being covered and another faction or groups of people had an interest in the story being covered because of their feelings on the issue – but as far as I was concerned I was always motivated by journalistic instinct that it was a good story and that it was an important story.*

*PRESIDING MEMBER: When you say certain groups had an interest in it not being covered and certain in it being covered how do you come to that conclusion, from - ? -- - I guess if you were of a belief that Mr Smith should have owned up and revealed his CV to all and sundry then you probably would have wanted to see the stories continue to continue that pressure on him to do so.*

*Yeah. I was wondering whether you were indicating that certain people had approached you and urged you to cover it? --- No, not directly. They may have said, “well done”, after seeing a story, that, you know, we think this is a story that needs to be told but certainly I wasn’t approached directly and told or – directly that I had to do a story.*

*Yes? --- I mean, my major motivation was that it was a – a good story, an important story that affected a lot of people.*

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24. Mr Whitby was a truthful witness all of whose evidence can be accepted. It is evidence that the issue was covered by Channel 7 for its newsworthiness as a matter of public interest; not because of any campaign by Mr Carlos or any other person.
25. On 14 May 2003 Mr Bartlett interviewed Mayor Carlos who said that he would call a special Council meeting to deal with the issue as Mr Smith had failed to respond to his request to produce his documents. Following the interview Mr Bartlett received calls about the issue. Two callers, identified as Toni and Sharon, both ratepayers of Joondalup, rang in to comment, querying whether there had been a fraud. Another caller, Ernie, not a ratepayer, rang in to question why the qualifications were not verified in the first place. Yet another, Jim, called to ask whether the Council was “just a bit dumb”.
26. Mayor Carlos was interviewed by Mr Bartlett again on 16 May 2003. (1804LRB6) Mr Carlos’ contribution to the interview contained comments on the failure of councillors (whom he named) to attend the meeting he called for 15 May 2005. He questioned the legitimacy of the reasons of some of them for not attending and referred to them as having “boycotted” the meeting. Those comments caused elected members embarrassment. It was unwarranted for Mr Carlos to have made those allegations without at least first having taken the time to investigate them (regardless of what the facts may ultimately have turned out to be). This conduct of Mr Carlos, breached the Code of Conduct and further fuelled the hostility towards him in the Council chamber. Mr Bartlett, in the course of the interview, made some comments which were strongly critical of the Council and councillors.
27. Mr Bartlett is an opinion columnist with *The Sunday Times* as well as being a radio presenter. The issue first came to his attention through *The Sunday Times* which is related to *The Manly Daily*, both papers being owned by News Ltd. Mr Bartlett thought that the matter was newsworthy:

*“It was fairly obvious to me it was of extreme public interest in having a publicly-paid figure such as the CEO of a local authority of that size being paid that sort of money, and perhaps having secured the job without any formal qualifications.”* (T9071 18/4/05)
28. It was apparent to him that apart from the interest expressed by Joondalup electors, there was a more general public interest in the issue. He did not believe that the issue obtained any coverage because of a “media campaign”.

29. Mr Bartlett was a truthful witness all of whose evidence can be accepted. As a commentator and opinion columnist, he was entitled to express his views on the matter. The criticism of the media coverage that was made in evidence by a number of witnesses, and is also recorded in the transcripts of various Council meetings, failed to distinguish between straight reporting of Council affairs and what is commonly described as “op-ed”, both of which serve legitimate purposes in informing and stimulating public debate. The evidence did not indicate that Mr Bartlett’s treatment of the subject was unreasonable, even though it contained strongly expressed personal views.

### **Mayor Carlos’ Request for Proof of CEO’s Qualifications**

30. On 8 May 2003 Mayor Carlos e-mailed the CEO stating the reasons why he had previously asked him to produce his qualifications: 1410DSC19. Referring to conversations he had with Mr Smith during the previous week, Mayor Carlos wrote:

*“Would you please assemble all your documentary evidence about your qualifications (both work and academic) so that I can sight them. In this regard please arrange a meeting before 5:00pm Monday 12 May 2003 for the sighting, you may select the time and venue and please consult both our diaries. I am more than happy to have this meeting on a one to one or if you desire to have anyone else present, that is satisfactory. However, if other people are to be present, then all councillors will be invited and I may also invite my lawyers.”*

BDW responded to Mayor Carlos on 12 May 2003 stating that they would be advising Mr Smith regarding the request: 2010DSC55.

31. On 9 May 2003 Cr Kimber wrote to Mayor Carlos stating that he had been advised that the Mayor was “unilaterally issuing certain written directives to our CEO regarding his qualifications”. (1805PMK62) Cr Kimber said the Mayor appeared to be acting in “an autocratic, dictatorial, presidential style manner” and requested that he desist from dealing with the CEO regarding his contract until councillors had been consulted in a formal manner.
32. The Mayor of a city has no power to give a direction to a CEO. Council may resolve to do so. Although Mayor Carlos’ request was characterised as a direction by Mr Smith’s solicitors in their subsequent letter to the Mayor and councillors of 15 May 2003 (1810DSC27) and by the City’s solicitors, Freehills and Minter Ellison in their subsequent

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advices on this point, it would not be appropriate to view all and any requests made by elected members to a CEO or other Council officers as “directions”.

33. The Code of Conduct provides, under the heading “Interaction Between Elected Members, Committee Members and Council Employees” that:

*“The role of elected members and committee members compared to the role of Council employees is quite different. In essence, the Council decides policy objectives and the results it wishes to achieve and, subject to any specific directions from the Council, the CEO (and employees) has responsibility to put those policy decisions into practical effect.*

*A prime responsibility of Council employees and delegates is to assist elected members and committee members in their decision-making role. Employees should always provide frank and professional advice.*

*The Council or individual elected members or committee members may request or direct the provision of advice on any topic but shall not under any circumstance direct or request the advice to contain any pre-determined content or recommendation.*

*The CEO is responsible to the Council for the performance and direction of all employees and delegates in the day-to-day management of Council. It is appropriate that all requests by elected members or committee members for information be directed to the CEO, directors or business unit managers as appropriate.*

*Therefore, just as there are different obligations under the Local Government Act for elected members and committee members in comparison to employees, there is a distinction between the way the Code of Conduct applies to those parties.”*

34. The Code of Conduct goes on to state, amongst other things, that the City encourages “honest relationships by being truthful and sincere when dealing with others”. It also provides, under the heading “Conflict and Disclosure of Interest”, that:

*“Elected members and employees should ensure that there is no actual or perceived conflict or incompatibility between the impartial fulfilment of their public or professional duties and either their personal interests, or those of their immediate family members, business partners or close associates”*

and, moreover, that “all employees have a duty of fidelity and good faith towards the City”. Specifically, the Code of Conduct provides:

*“The mere fact that a person has both a professional duty and a private or personal interest in relation to a particular matter does not mean that the two must be in*

*conflict. A conflict of interest arises if it is likely that the person with the private or personal interest could be prejudicially influenced in the performance of his/her public or professional duties by that interest, or that a reasonable person would believe that the person could be so influenced.”*

35. Whilst the Code of Conduct and the legislation provides for the disclosure of interests in the context of Council decision-making, it is clear that the Code also requires, in the context of an employee’s duty of fidelity and good faith, that the rule dealing with conflict of interest be observed in respect of the performance of all an employee’s functions.
36. In other parts the Code of Conduct speaks of the need for elected members and employees to act in the interests of the City, to act in accordance with their obligations of fidelity, to observe the highest standards of honesty and integrity, to be frank and honest with each other, to bring to the notice of the Mayor or CEO any dishonesty, and to endeavour to resolve serious conflict through initial discussion facilitated by either the Mayor, or the CEO.
37. Under the heading “Relationships Between Elected Members, Committee Members and Employees” the Code provides that such persons should act as a team and that teamwork will only occur if they “have mutual respect and co-operate with each other”. The Code acknowledges that the role of elected members is that of leadership, not management or administration and that elected members have no capacity to individually direct employees to carry out particular functions. It also requires elected members to refrain from publicly criticising employees in a way that casts aspersions on their professional competence and credibility. Under the same heading the Code states:

*“At the same time, employees will recognise that elected members’ and committee members’ views and opinions often reflect valid community viewpoints that should be considered in conjunction with professional opinion. Employees will therefore make every effort to assist elected members and committee members in the performance of their role, and to achieve the satisfactory resolution of issues that they may raise in the performance of their official role.”*

38. In addition to these obligations, which elected members and employees are required to undertake upon appointment, there are the provisions of the LGA which set out the respective roles of the Mayor, the Council, and the CEO (Sections 2.7, 2.8, 2.9, 2.10 and 5.41), including, the case of the CEO, the functions of advising a Council, ensuring that advice and information is available to Council so that informed decisions can be made, and

liaising with the Mayor on the local government's affairs and the performance of its functions. The LGA requires an employee to disclose an interest, as defined by Section 5.60, in any matter in respect of which the employee is providing advice or a report to Council: Section 5.70.

39. It is in the context of these roles, functions and duties that the reasonableness of the Mayor's request, and Mr Smith's refusal, need to be considered. The form of words in the e-mail from Mayor to the CEO ("would you please") was that of a politely expressed request, which could reasonably be regarded as arising out of his desire to establish Mr Smith's honesty and integrity and put on a proper basis of mutual trust and respect their statutory relationship of mutual liaison under Sections 2.8(1)(f) and 5.41(e). That is not, of course, to say that Mayor Carlos was invariably polite to Mr Smith, as the evidence and Mr Carlos' admissions reveal he was not; rather, that on this occasion his request was reasonable..
40. Mayor Carlos did not have any statutory or executive power to have enforced such a request. Mr Smith had obtained legal advice on the request that he was not obliged to comply with it. It was not surprising that the form of the words used by Mr Carlos would not be enough to convince Mr Smith that the tension had dissipated from their relationship. After all he received the request only two days after Mayor Carlos having confronted him in his office and put to him: "*If you resign it will mean I will not have to expose you or your qualifications to the media*" (T12360-1, 2/6/05). However, if the relationship of liaison between the CEO and Mayor was to continue on any reasonable footing, it was a request with which Mr Smith ought to have considered complying.

### **Special Council Meeting: 12 May 2003**

41. At a special Council meeting on 12 May 2003 which was convened to deal with a Notice of Motion from Cr O'Brien for the establishment of a system of standing committees, the Mayor was asked in public question time about an interview he gave to a Channel 7 journalist which was included in a news item on 5 May 2003: 1510DSC23. The Mayor said in answer, *inter alia*, that since the election he had been approached by Channel 7, Channel 9, *The West Australian*, *The Sunday Times*, the *Wanneroo Community News* (sic), the *Sydney Morning Herald* and *The Manly Daily*. He said he had been asked prior to radio interviews about what he intended to do about the CEO's qualifications. Mayor Carlos said he was trying to keep the issue "low key", but that it was impossible in the environment in which he was trying to work.

42. Mayor Carlos also referred to his request of Mr Smith to produce his qualifications. He said:

*“When the documents have been sighted, I will then arrange for a report to be written to Council recommending a course of action. If for instance the documents are produced and there are no irregularities, then I will publicly apologise to Mr Smith and hopefully we can move on. I have now received a solicitor’s letter this afternoon from Mr Smith’s lawyers and been told the matter is being investigated and a reply will be received by Friday. This is again very strange, as Mayor Bombak stated that he had sighted the documents and is satisfied they are genuine.”*

43. On 9 May 2003 Cr Rowlands e-mailed Mr Smith with a message to be forwarded to Mr Loader:

*“Could you please look into the City’s obligations under the relevant laws to stop harassment in the work place. I feel the City as a corporate body has a duty of care to Denis to stop this ongoing stressful attack by Mayor Carlos. Can you please advise, and if you have the authority as HR Manager, please take all steps under the relevant laws to help Denis and to secure the City’s position against financial loss due to Mayor Carlos’ continued harassment.” (2502ML65)*

### **Delegation by CEO to Higham, Robinson and Loader**

44. On 14 May 2003, at the suggestion of Mr Robinson, the CEO purported to delegate to Mr Loader, Mr Robinson and Clayton Higham, Director, Planning and Community Development, the power to seek advice and advise Council in respect of the CEO’s appointment: 3101DIS38. The CEO also prepared a file note of a meeting with the Mayor at which he said he had been asked to resign: 2206MISC55.
45. Mr Higham, who was in charge of the City’s planning department, had no direct involvement in the CEO issue prior to this point. Mr Loader and Mr Robinson, who were part of the CEO’s business unit, were, however, familiar with the matter. The terms of the delegation were identical in each case. Mr Higham’s read as follows:

*“Over a period of some months there have been a number of allegations made pertaining to my appointment as CEO of the City of Joondalup. Former Cr Don Carlos and now Mayor Don Carlos has made many of these allegations. I have attempted to resolve these matters amicably however these attempts have been unsuccessful. As such I have been forced to seek legal representation in order to protect myself from this ongoing campaign of harassment.*

*As a result of my personal involvement in the matter, I am obviously not in a position to advise the City as to what action it should be taking to protect the City's interests. Accordingly, I authorise you together with Mr Robinson and Mr Loader to seek advice and advise Council on this issue."*

### **Mayor Calls Special Meeting to Discuss CEO Issue**

46. On 14 May 2003 the Mayor e-mailed councillors and relevant officers stating that he had decided to call a special Council meeting on Thursday, 15 May 2003: 1810DSC28. He said, "the purpose of this meeting is to fully discuss the situation with our CEO". Mayor Carlos' e-mail asked that each councillor be provided with a copy of the job specification and a copy of the CV presented to the selection committee. Mr Mike Smith responded with a message that the City was unable to provide a copy of a CV as none was ever submitted by any of the candidates. This was an accurate statement by Mr Mike Smith of his understanding at the time that Mr Dennis Smith had not submitted a CV as none had been mentioned in the records and there was no copy of the CV among the City's papers, but it was obvious that Mayor Carlos was referring to the MRA report which was based on Mr Smith's CV, which Mr Smith provided to MRA.
47. Mayor Carlos then e-mailed the councillors and relevant officers stating that he would distribute a letter from the University of Technology stating that it had no record of Mr Smith obtaining the qualifications mentioned in his CV, and a letter from GHD stating that Mr Smith had not been the General Manager for its NSW division. Mr Smith sent an e-mail to Mr Mike Smith in which he said that he was not prepared for a copy of his contract to be distributed to councillors as it was not a public document, but he said the Mayor and councillors were free to view the contract. He recommended that legal advice be obtained to see if it was in order for the City to provide copies of the candidate profile to elected members.
48. Mayor Carlos asked Mr Ellis of Freehills whether his firm would have any conflict of interest in the event that he was instructed to act for the City in connection with Mr Smith. Mr Ellis wrote to Mayor Carlos setting out matters in which Freehills had previously acted for the City, and indicating that there was nothing to prevent it from acting: 1510DSC26.
49. On 14 May Mayor Carlos gave an undertaking that by 5:30pm the next day he would provide to each councillor a copy of the information in his possession relevant to the CEO. Cr Baker e-mailed the Mayor and other elected members stating that the special meeting

should be adjourned until 4 June 2003, the date appointed for a special Council meeting called by Cr Kenworthy for the purpose of expressing confidence in the CEO. Cr Baker noted that Crs Kimber and Mackintosh would not be available: 1510DSC24.

50. Mr Smith said he had a meeting with Mr Mike Smith and the Mayor to discuss matters relating to the previous Council meeting and some electoral matters. At the end of the meeting he said that the Mayor told him that he intended to call a special meeting of Council at which he would put to Council that he would not be able to work with Mr Smith. According to Mr Smith, Mayor Carlos asked if he was prepared to resign. Mr Smith declined. Mr Smith recorded Mayor Carlos' response as follows:

*“If you resign, it will mean I will not have to expose you or your qualifications and there will be no further media articles. The City has been hoodwinked by you and it is totally unacceptable. I will have no hesitation in advising the Council to sack you. There is legal precedent for this matter both in Western Australia and NSW. I will pursue this matter to the enth [sic] degree. I have legal advice, the government's support and the Minister's support. Are you prepared to resign?”*

51. Mr Carlos admitted using the words stated by Mr Smith. His recollection was that it was at a meeting, on 6 May, not on 14 May 2003, as Mr Smith recorded in a memorandum of that date (p 1256.001) Mr Carlos did not recall another meeting except one that Mr Mike Smith was present at on 14 May 2003 when the special meeting was discussed (as is recorded in Mr Smith's memorandum of 14 May 2003): T12361 2/6/05.

### **Special Meeting of Council: 15 May 2003**

52. In relation to the proposed special Council meeting on 15 May, Mr Robinson obtained legal advice from Mr Neil Douglas of Minter Ellison, Mr Ellis being unavailable, that the Council should not take any action which would affect the rights or interests of the CEO, so as to expose the City or individual councillors to the risk of legal proceedings unless and until the Council had received appropriate advice and had properly identified and analysed the legal and other implications of the proposed action: 0312NFAD01.
53. This advice was circulated to elected members by memorandum dated 14 May 2003: 1510DSC25. The memorandum indicated that Mr Robinson was planning to confer with Mr Ellis the following day to discuss the options available to the City. There appeared to be

concerns within the Administration and amongst certain councillors that the meeting would be asked to decide to terminate the CEO's employment.

54. On 15 May 2003 the Mayor responded to Cr Baker by e-mail stating that he wished the special Council meeting to go ahead as planned. He said the purpose was to move two motions as follows:

*“(1) That we appoint a lawyer who will report to the Council and advise us on the best course of action to follow.*

*(2) That the CEO be instructed to produce the relevant documents for sighting within two working days after the special electors (sic – Council) meeting.”*

55. Mr Carlos said that until he received Cr Baker's e-mail he had no knowledge of what other councillors were doing, but later acknowledged that he knew Cr Mackintosh was overseas at the time. Mayor Carlos did not accede to Cr Baker's request to adjourn the meeting as he believed that once called, the meeting had to go ahead, but as a quorum was not reached, the meeting was adjourned to 20 May in any event: T1013 15/10/2004. The elected members who attended were Mayor Carlos and Crs Nixon, Hollywood, Walker, Hart, O'Brien and Caiacob. The minutes note that apologies had been received from Crs Gollant, Rowlands, Prospero, Baker, Brewer, Kimber and Kenworthy. Cr Mackintosh had been granted leave of absence.

56. Cr Kimber was absent from the district attending to work related matters in the South West of the State (which Mr Kimber said in evidence was known to Mayor Carlos). Cr Brewer was unable to attend due to a prior family commitment. Ms Gollant, is currently living overseas, and so has not attended to give evidence to the Inquiry. She has, however, made a submission to the Inquiry. Her submission included a statement concerning her non-attendance at the special meeting, which she wished to have included in the report of the Inquiry. The statement is not on oath and has not been tested by examination or made available to any other party; so I cannot deal with it in the way she requested. However, I am able to say that there is no evidence before the Inquiry from which I would conclude that she deliberately refrained from attending the special meeting for any strategic reason.

57. Mr Carlos gave evidence that he called this meeting at 24 hours notice as he believed that something needed to be done about the CEO issue and that he was being prevented from finding out what the problems were with Mr Smith and putting the matter to bed: T947 14/10/2004. Ms Hart thought that Mayor Carlos was acting reasonably in calling this

meeting at short notice, and not adjourning it when Cr Baker requested him to, as she had heard Mayor Carlos speaking to ratepayers about the CEO issue and he had said to them: “If I’m elected I will sort this out as soon as possible so we can get on with it”. By this she thought that he meant that he will get to the truth of the matter, as he had stated from the beginning: T1762 18/11/2004.

58. Mr Kenworthy said that he did not attend this meeting as he “would have had some form of family issue or something of that description” that meant he was unable to attend, but he was unable to specifically recall: T6682 3/3/2005. Mr Kenworthy said that he was unaware that some councillors boycotted the meeting and denied that he did so: T6683 3/3/2005. Mr Kenworthy’s evidence on this point is not accepted.
59. Mr Prospero said that he spoke to the Mayor on the phone regarding the issue of the special Council meeting, and he was told that the intention of the meeting was to sack the CEO. Being a newly elected councillor, he was not aware of the background of the issue and was told that Mr Smith did not have any qualifications and lied to get his position. Mr Prospero said he did not attend the meeting as he felt that he needed to get all the facts and all councillors needed to be present: T608 – 609 4/3/2005. Mr Prospero said in evidence:

*“I asked the Mayor if he would be willing to postpone the meeting because I felt that we’re talking about a person’s career or trying to sack a person on that night. I felt that we needed to get all the facts, relevant facts, together and if he would postpone it – because I also knew that there were certain councillors – well, a lot of the councillors weren’t going to be in attendance. I think if it was such an important issue we all needed to be there.”*

60. He said he had been told by Mayor Carlos that he would get all the information about the matter by 6:00pm. Mr Prospero received Cr Baker’s request that the meeting be postponed, which he supported. He also received the e-mail from Mayor Carlos stating that the purpose of the meeting was to appoint a lawyer to advise on the best course of action to follow and that Mr Smith be instructed to produce his qualifications for sighting. This appeared to Mr Prospero to be a different reason from that previously given to him by the Mayor: T6725 4/3/2005. Cr Prospero’s reasons did not justify his failure to attend the meeting. The proper course, if information was inadequate, was to move to defer consideration of the matter at hand. If a decision was made which was considered by Cr Prospero to have been inappropriate on its merits or because of the process involved then he could have given support to a motion to rescind it as provided by the Standing Orders. It is submitted on Mr Prospero’s behalf that his relative inexperience assists in understanding his behaviour in the circumstances in which he found himself.

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61. Mr Brewer in evidence at T11459 24.5.05 said that he did not attend the meeting because his wife and he had a prior engagement and he had been out every night for a week and a half. He denied that he was encouraged not to attend but admitted that Cr Baker spoke to him about the meeting. He did not “think through at any large depth exactly how the consequences of that decision [not to attend] might impact on the decisions that [might be] made at the meeting”.
62. Ms Gollant did not give evidence to the Inquiry as she was living overseas, but has submitted that she informed Mayor Carlos that she had a “significant prior engagement”. She also expressed concern about having inadequate time to consider the relevant issue and that Crs Kimber and Mackintosh would not be present. She submits that she requested Mayor Carlos to adjourn it.
63. Mr Baker said that he did not boycott the meeting, but did not attend for a number of reasons, one of them being that not all councillors could attend. He also stated that there was no specific motion that Mayor Carlos wanted to debate, just an agenda, which Mr Baker viewed suspiciously. He also viewed as suspicious that Mayor Carlos called the meeting on the day that Cr Mackintosh flew to Sweden on Council business: T8445 – 8446 6/4/2005. Mr Baker thought that the new councillors were not yet up to speed on the issue and was worried that they would simply act in accordance with what they had read in the media or had been advised by other councillors or members of public. Mr Baker was concerned that Mayor Carlos would get enough councillors to form a quorum and a motion would be passed to summarily dismiss the CEO: T8449 – 8450 6/4/2005. Mr Baker said that he raised with councillors his concerns about the possible consequences of attending the meeting. Mr Baker said that Mr Smith may have raised concerns with him that he had with the meeting and what Mayor Carlos would try to do at the meeting: T8451 6/4/2005.
64. Mr Baker gave evidence that he thought it was appropriate for councillors not to attend meetings for strategic reasons if it was in the City’s best interests. He said:
- “If I thought there was a real or appreciable risk that a motion would - - a resolution would be - - a motion would be passed and hence become a resolution summarily dismissing Smith without a pay-out, as the Mayor said he has wanted - - he wanted, it most certainly would not be in the City’s best interests if they attend that particular meeting.” (T10695 12/5/2005)*
65. Mr Baker gave evidence that in not attending the meeting he took account of the risk that the motion might be passed without his contribution to the debate and said that, “if that was

going to happen, then I was more than prepared to move the rescission motion to bring the matter back on for debate...”. (T10696 12/5/2005)

66. Mr Baker gave evidence that he spoke to Cr Brewer and Cr Prospero about his concerns regarding the consequences of this special Council meeting, and informed them that he was not going to attend: T10697 12/5/2005. Cr Baker had a considered strategy in not attending the meeting.
67. In his submission to the Inquiry he contends that he apologized for non-attendance and that he had a personal commitment with his son. That was one of the several reasons he gave in evidence for his non-attendance. I have no reason to doubt the evidence that he was in his office assisting his son with his homework when the meeting was convened. That is a worthy undertaking. However, the evidence of Mr Baker as to the additional strategic matters he took into account in not attending leave me in no doubt that if he thought it would have been strategically appropriate, as he judged the matter to be discussed, to have been in attendance, he would have adjusted his commitment to his son and been in attendance at the meeting, at least to move for its adjournment. The fact that he entered an apology does not detract from his strategic reasons for not attending
68. Mayor Carlos opened himself to criticism by calling a special meeting with 24 hours notice when he was aware that not all councillors could attend. It was not a reasonable thing to do in the interests of councillors, who may have had other commitments, or staff, who had no reasonable opportunity to prepare advice for the meeting. There was no compelling need to deal with the issue on short notice. The Mayor’s actions were unnecessarily provocative and had the effect of building further resistance to his intentions. At the same time it was inappropriate for councillors to make decisions not to attend based on a strategy of deliberately not attending the meeting. That strategy was adopted by some despite a stern warning to councillors issued by Cr O’Brien. Whilst Crs Kenworthy, Gollant and Brewer may have had other commitments, they objected to the meeting being called on short notice. Their prior engagements were fortuitous excuses in the circumstances.

### **Blake Dawson Waldron’s Letter of 15 May 2003**

69. The following day BDW wrote an eight page letter to the Mayor and councillors setting out Mr Smith’s position in relation to the Mayor’s request which was that the issues raised in relation to the CEO’s qualifications had been resolved by the Council’s decisions of

17 December 2002 and 18 February 2003, wherein the Council had expressed confidence in Mr Smith, and that there was no legitimate basis for Council to continue to agitate such issues: 1810DSC27.

70. The letter stated that it was not a prerequisite for the position that the candidate possess any tertiary qualifications and that no questions were asked relating to qualifications at the interview. It noted that Mr Smith, according to the performance review in November 2002, had performed above and beyond expectations. It acknowledged Cr Carlos' request in November 2002 for confirmation of Mr Smith's qualifications and said further that although he could not be compelled to do so, on or about 24 November 2002 Mr Smith met with the Mayor and Mr Loader, and produced original documentation concerning his qualifications. In relation to the decision of 17 December 2002 BDW said: "At this point, these matters in relation to our client's employment were effectively and efficiently resolved by Council".
71. It was submitted that the Mayor had no power to require production of documentation and that, in any event, the information could not be requested by Council. Further, it said that Mayor Carlos' conduct towards him constituted a repudiation of the contract of employment entitling him to elect to terminate and sue for damages. The letter concluded with a statement that Mr Smith was willing to discuss and consider a mutual separation between himself and Council on terms to be agreed.

### **Brewer and Prospero Sight Qualifications**

72. On 15 May 2003 the CEO showed Crs Brewer and Prospero documents evidencing his qualifications. This occurred after Cr Prospero sent the CEO an e-mail setting out a series of questions relevant to his employment: 0403LRP1:

*"I believe the issue of your employment needs to be resolved once and for all. In the interests of the City of Joondalup, its stakeholders and shareholders. I am concerned that issue can split the newly elected Council, which has the best intentions in moving forward in providing the best service and facilities to ratepayers, businesses and the potential tourist industry.*

*I received a facsimile from a constituent posing the following questions with some of my own in which I believe will bring closure to this matter.*

*There two significant requirements, which a Local Authority MUST follow, when employing a C.E.O. These requirements are pertained in Section 5.36 of the Local Government Act 1995 which states the following:*

5.36

*2 a person is not to be employed in this position of C.E.O. unless the Council -*

*(a) believes that the person is suitably qualified for the position; and*

*(b) is satisfied with the provisions of the proposed employment contract.*

*Under the requirements of the Act please provide the answers to the following questions:*

*Who wrote up the C.E.O. contract?*

*What brief was given to the employment agency?*

*Did the brief stipulate that applicants ' provide substantiated proof of:-*

*Qualifications, experience, performance and by whom, any pending Court enquiries and any criminal record?*

*Was there a closing date for the application for the C.E.O. position?*

*When did Mr Denis Smith submit his application?*

*Did the City of Joondalup receive Mr Denis Smith's application by the due date?*

*Was the whole employment contract scrutinised by Council's solicitors and when?*

*Is there written opinion from Council's solicitors on the contract?*

*Was the whole employment contact scrutinised by all Councillors?*

*How much time did all the Councillors have to scrutinise the contract or was the contract briefly cited (sic) only?*

*Which Councillors cited (sic), verified and satisfied themselves and fellow Councillors of Mr Denis Smith's qualifications, as required by Local Government Act 5.36(2)(a)?*

*Did the recruiting agency cite (cite) and verify Mr Denis Smith's alleged qualifications?*

*What criteria did the recruiting agency use to shortlist and recommend Mr Denis Smith to the City of Joondalup?*

*What criteria did Councillors use to make their selection of Mr Denis Smith?*

*Were the other applicants treated identically the same way by the recruiting agency and by Council?*

*If the recruiting agency has not met any of the laid down or professionally accepted criteria for selecting and recommending personnel, have they fulfilled their obligations*

*despite any disclaimers that may have been made? E.g. not citing or verifying documents?*

*If there is a lack of performance by the recruiting agency, are they entitled to any fee?*

*Does the Council have any recourse against the recruiting agency if it has provided Council misleading information?*

73. Later, Cr Prospero e-mailed the CEO stating:

*“I have seen your qualifications along with Cr Brewer and I am satisfied that they are authentic. However, to satisfy the public and put this matter to bed once and for all, would it be appropriate that you request a letter from the institutions where you have obtained your qualifications to have them verified?” (0403LRP1)*

74. In evidence Mr Prospero said that he inspected Mr Smith’s certificates and took notes of them which he did not retain. He professed, nevertheless, a clear recollection of the meeting. After reporting upon his inspection to the Mayor on 20 May 2002 he had cause to ask to see the documents again and did so. On the first occasion he said that Mr Smith correlated what he produced with the CV prepared by the recruitment consultant: T6713 4/3/05. Mr Prospero did not, however, correlate them for himself: T6715. Mr Smith told him that he did not have the first qualification called Bachelor of Business (Management), but had the others:

*COUNSEL ASSISTING: What did he say about that first qualification, Bachelor of Business (Management)? --- He said that was a mistake, it shouldn't have been put in there.*

*And did he say how the mistake was made? – He told me that he had verbally told Recruiters Australia over the phone what his qualifications were.*

*Did he say that Recruiters Australia had made a mistake? --- That's what he was implying, yes.*

75. Mr Prospero said that Mr Smith showed him the documents first, then showed him the CV from MRA. He did not suggest that there was any mistake in the description of the two diplomas mentioned in the CV. Mr Prospero could not recall whether it was apparent to him that there was no document which he was shown that was described as a diploma on its face: T6716.

76. Mr Prospero said he had an Advanced Certificate in Civil Engineering from TAFE and that he had seen degrees and diplomas of colleagues. That would have accorded him some knowledge as to what to look for, without giving rise to any expectation of expertise. He did

not, in any event, pick up any discrepancies between the documents he was shown and the qualifications listed in the consultant's report. It is not clear precisely what opportunity he had to do so. On the evidence neither Cr Prospero nor Cr Brewer had sufficient understanding or appreciation of the significance of the issues relating to those discrepancies. As a result, when Cr Prospero reported to the Council meeting on 20 May 2003 he was gravely mistaken. He said at page 33 of the meeting transcript (1910DSC54):

*CR PROSPERO: Councillor, what I witnessed was the first qualification there, it says University of Technology Sydney. It shouldn't – the words "Bachelor" shouldn't be there. What should be there is the post graduate of business management.*

*CR BAKER: Big deal, what's the big deal? Goodness me, so what?*

*CR PROSPERO: I also sighted, Cr Hart, the NSW Institute of Technology, the post graduate diploma of the environmental and pollution studies. The next one I sighted was the Royal Melbourne Institute of Technology. Now that should have referred to the diploma in Town & Country planning which is immediately under the post graduate diploma of environmental and pollution studies. So he actually qualified in that degree through the Royal Melbourne Institute of Technology. Understandable as explained to me by the CEO, it was underneath the Local Government Town & Country Planning Board.*

*CR HART: Cr Prospero do these diplomas have numbers on them?*

*CR PROSPERO: What I sighted and I believe to have sighted, seem to be genuine.*

...

*CR PROSPERO: May I move on, Cr Hart? Thank you, the next qualification I sighted was through the Local Government Town & Country Planning Board which was the certificate of qualification of Town & Country Planner, ordinance number 4. The other incorrect statement that says here – where it says NSW Institute of Technology, is actually the Sydney Institute of Technology, where the CEO obtained the land and engineering survey. They are the qualifications that I sighted.*

77. In fact Cr Prospero did not sight any of the diplomas he said he did. Cr Prospero and Cr Brewer had an opportunity not afforded to Mayor Carlos, and not taken earlier by Mayor Bombak and Mr Loader, to actually check the qualifications against the consultant's report. Mr Prospero was unable to produce his notes. His evidence was that when he recorded in his notes that Mr Smith held diplomas he did so because he "was writing down what Mr Smith had said that he had": T6737. It seems clear that he was relying on the description being given to him by Mr Smith of the document, rather than the actual words on the document he was shown: T6738. The discrepancies that have been identified in the course of the Inquiry should have been obvious upon such a comparison.

78. It is evident to the Inquiry that Mr Smith took advantage of the inexperience of Crs Prospero and Brewer, who were new to Council and whom he knew to be unfamiliar with the background to the issue. For their part, Crs Prospero and Brewer, through lack of appreciation of the issues, failed to take advantage of such opportunity as was given to them, and denied to others, to sufficiently scrutinise the documents. Had they done so, they would have informed the Council that none of the documents possessed by Mr Smith evidenced any post graduate diploma awarded by UTS or RMIT. Their submission that they did not in fact have such an opportunity is not supported by the evidence.
79. Mr Smith cancelled a meeting with Cr Caiacob where it was intended that he show his qualifications: 2502ML69. Mr Caiacob said that he wanted to view the qualifications to see if they were in order with the CV. If they were different from what was claimed in the CV then he would have perceived there to be a major problem: T1876 22/11/2004.
80. Earlier on the day of the meeting, Mr Higham, Mr Loader and Mr Robinson met with Mr Ellis of Freehills in relation to the employment of the CEO. Following the adjournment of the meeting, Mr Ellis was requested to attend on 20 May.

### **Mr Smith's Actual CV**

81. Mr Higham gave evidence that he had a meeting with Mayor Carlos in his office with Mr Loader and Mr Robinson on 15 May to discuss what had transpired with the lawyers that day and the meeting procedures for that evening. Mayor Carlos had suggested that the City had a copy of Mr Smith's CV within its records, which surprised Mr Higham as it had previously been his understanding that the CV did not form part of the information that councillors received at the time of the interview and that the City did not have a record of that CV. Mr Loader indicated that the City did not have a copy: T7775 – 7776 29/3/2005. Mr Higham said on 16 May he had a further discussion with Mr Loader and suggested that he obtain a copy of that CV from Management Recruiters Australia: T7776 – 7777 29/3/2005. On 16 May 2003 Mr Reynolds forwarded a copy of Mr Smith's CV to Mr Loader who showed it to Mr Robinson and Mr Higham. The CV was subsequently made available to elected members on 20 May 2003.

### Mayor Carlos' E-mail of 19 May 2003

82. On 19 May 2003 Mayor Carlos circulated a lengthy e-mail to councillors and senior staff stating that the CEO's credibility was in doubt because he presented a CV with tertiary qualifications which were suspect and had provided other information regarding his work history which was apparently incorrect. The e-mail detailed sources of Mayor Carlos' information including earlier CV's submitted by Mr Smith. The Mayor said that councillors had a responsibility to ratepayers to investigate the matter fully: 1810DSC31.
83. Mr Caiacob gave evidence that the information in Mayor Carlos' e-mail gave him cause for concern that the matter should be further investigated. This was because the Code of Conduct stipulated honesty and accountability: T1874-1875 22/11/2004. Mr Nixon gave evidence that Mayor Carlos' e-mail summarised his concerns thoroughly, but he had not received all of the information before this time. He said that it was obvious from the e-mail that there were a lot of things that needed to be looked at in detail and with appropriate legal advice. He thought that the legal advice would give Council the ability to decide on an appropriate course of action that would not expose the councillors and the City to severe consequences: T3785 16/12/2004. Mr Nixon said that at this stage he did not think it was unreasonable for Mayor Carlos to request Mr Smith to produce evidence of his qualifications, but did not know whether he had a legal right to do so. He also did not think it would have been unreasonable for Council to have requested Mr Smith to produce evidence of his qualifications: T3787 16/12/2004. Mr O'Brien gave evidence that he believed in Mayor Carlos' e-mail of 19 May had lied to the councillors by stating that he had asked questions of candidates in the interviews relating to their tertiary qualifications. He believed that Mayor Carlos' recollection was not just incorrect but a lie: T6117 – 6119 23/2/2005. Mr Baker gave evidence that he believed this e-mail was just a re-hash of the old allegations that had been made against Mr Smith: T8470 – 8471 6/4/2005.
84. On 15 May 2003 Mayor Carlos wrote to the Minister advising him that the special meeting that was appointed to consider motions dealing with the appointment of Freehills to advise Council and an instruction to Mr Smith to produce his documents had been boycotted by six councillors and therefore adjourned for lack of quorum, due to other councillors being otherwise absent. The request was the subject of a report by Mr Duncan Watson of the DLGRD (1005CMG9) which recommended that if a quorum was not present 15 minutes after the specified time for the special meeting on 20 May 2003 approval was granted for the quorum of the meeting to be reduced to seven and the number of members required for an absolute majority to four. That approval was communicated to Mayor Carlos but proved to be unnecessary.

**Freehills' Advice of 20 May 2003**

85. On 20 May 2003 Mr Ellis sent a letter of advice to Messrs Robinson, Higham and Loader, expressed to be of a preliminary nature: 1810DSC40. The letter identified the principal issue as being whether the CEO could be required to produce documentation confirming his tertiary qualifications and previous employment. There were related strategic issues. The letter went on to identify the following legal and factual issues:

- (a) *Were Mr Smith's qualifications and prior experience misstated in the material provided to the City in connection with his appointment? This includes a consideration of precisely what qualifications Mr Smith possesses and what statements were made to the City in this regard?*
- (b) *Was Mr Smith responsible for any misstatements, or were they the result of the actions of Management Recruiters Australia?*
- (c) *Were Mr Smith's formal qualifications taken into account by the City in determining whether to appoint him to the position?*
- (d) *If there were misstatements for which Mr Smith was responsible, would that ordinarily be a sufficient ground for terminating his employment, either immediately after the appointment, or subsequently.*
- (e) *Assuming that:*
  - (i) *there are inaccuracies in the materials provided to Council concerning Mr Smith's qualifications; or*
  - (ii) *Mr Smith failed to comply with a request for the provision of his qualifications;**is it lawful for the City to terminate Mr Smith's employment on the basis of those matters or is the City prevented from doing so by reasons of the provisions of the contract, Section 5.40 of the LGA, the previous conduct of the City or any other matters?*
- (f) *Must the present dispute be referred to mediation, and then to the Australian Industrial Relations Commission, in accordance with Clause 11 of the contract of employment and Clause 9.2.4 of the Local Government Officers (Western Australia) Award 1999.*
- (g) *Has the conduct of the City or any representative of the City effected a repudiation of the contract of employment between Mr Smith and the City, entitling Mr Smith to bring the Contract to an end and sue for damages?*
- (h) *If the City is found to have repudiated Mr Smith's contract, to what damages would Mr Smith be entitled?*

86. As to whether Mr Smith could be directed by Council to provide documentation, Mr Ellis advised that an employer would ordinarily be entitled to require an employee in the position of Mr Smith to provide information about his qualifications, but the contractual rights of the City were modified by the provisions of Section 5.40(c) which stated as a principle that “employees are to be treated fairly and consistently”. Mr Ellis concluded that there was a significant risk that a direction to Mr Smith to provide evidence supporting qualifications claimed by him would not be a “lawful direction” and that the contract with Mr Smith required the City to participate in mediation of any dispute. Mr Ellis recommended that:
- (a) the City take steps to gather together all relevant information concerning Mr Smith’s qualifications and experience, the representations made to the Council concerning those qualifications and experience, the previous investigations into these issues and the consideration of them by this Council, then carry out a thorough assessment of that information and the legal issues which arise from it;
  - (b) the City investigate mediation or a negotiated settlement with Mr Smith and his representatives; and
  - (c) in any event, no direction be given requiring Mr Smith to produce the information until sufficient investigations have taken place to enable a comprehensive direction to be formulated covering all relevant issues.
87. Mr Ellis’ letter recommended that further documents would assist the City in its deliberations including documents confirming Mr Smith’s previous employment, documents relating to his tertiary qualifications and his attendances at RMIT, University of NSW and University of Technology Sydney, correspondence between the City and MRA, correspondence between Mr Smith and MRA, and all documents provided to Council with regard to the nomination and selection of Mr Smith as CEO. The letter said it was necessary for all relevant documentation to be gathered. The letter also indicated that it would be necessary in order to provide a comprehensive advice on the issues to interview a number of persons associated with the disputed events.
88. In relation to the argument raised by Mr Smith’s solicitors that the issue had been dealt with by Council’s decisions of 17 December 2002 and 18 February 2003 Mr Ellis’ advice was as follows:

*“We are not presently in a position to say whether, at the end of the day this argument would be successful. “Fair” is an expression of very broad connotation and inevitably involves an evaluative judgment by the particular tribunal before whom the dispute comes.*

*The fairness of the City's conduct would depend on all the circumstances of the case, including the strength of the material available to the City suggesting that there were misstatements about Mr Smith's qualifications, whether information in addition to that provided in November 2002 was sought and, whether it appears that any of the statements set out in the memorandum are incorrect. The onerousness of the direction is also relevant. It is a reasonable assumption Mr Smith still has the documentation provided by him to the Mayor and Mr Loader in November 2002 so that providing the documentation would be easy for Mr Smith."*

### **Special Meeting of Council on 20 May 2003**

89. BDW wrote to the Mayor and councillors on 20 May 2003 in relation to the special meeting. (1810DSC41) The letter acknowledged Mr Smith's financial interest and stated that Mayor Carlos also had a financial interest which prevented him being present, apparently on the basis that he had been advised of potential legal proceedings for defamation. BDW also wrote a letter to the Mayor on the same day complaining that his e-mail of 19 May 2003 was "an extraordinary demonstration of the conduct being engaged in against our client destructive of the employment relationship": 1810DSC43. The letter addressed the five areas of concern set out in the e-mail, namely, "qualifications", "qualifications from RMIT", "GHD position held", "Coffs Harbour City Council" and "salary package at Warringah Council" and complained of Mayor Carlos' "media campaign", his comments about not working with Mr Smith, his failure to liaise with Mr Smith, his undermining of Mr Smith by forwarding materials to employees and bypassing him, his failure to abide by Council decisions and his continued intimidation and harassment. It accused Mayor Carlos of unprofessional, indiscreet and inappropriate conduct by which Mr Smith had suffered significant financial cost, and concluded with an invitation to Council to discuss a resolution of the matter. This letter was copied to councillors and Mr Loader.
90. At the meeting on 20 May 2003 Cr Baker told Council that Mayor Carlos should declare a financial interest on the strength of the BDW letter and that he believed Mayor Carlos had an interest affecting his impartiality regarding the CEO issue: T8454-8455 6/4/05, 1910DSC54. Mayor Carlos responded that he did "not believe that threats of legal action constitute a financial interest" and did not agree with Cr Baker that he had a non-financial interest: 1910DSC54.
91. Individual councillors have the discretion to decide whether they have a conflict of interest, and if they do, declare it. If it is an "interest" for the purposes of Division 6 of Part V of the

LGA, that is, a financial interest or a proximity interest, they must comply with Section 5.65 and 5.67 and, subject to Sections 5.68 and 5.69, absent themselves. The duty to declare an interest affecting impartiality arises under the Code of Conduct. An elected member having an interest affecting impartiality is not required to leave the Chamber and can participate in debate, and vote. Cr Carlos had a duty to raise the allegations made against Mr Smith, which was acknowledged by Freehills. All councillors voted on the motions relating to Mr Smith, so Mayor Carlos was no less impartial than any of the other councillors. He had no more of an association with Mr Smith than any other elected member, Mr Smith being the CEO of the City. Being advised that legal proceedings may be commenced in the future is not sufficient to create a financial interest.

92. The transcript of the meeting also shows that Mayor Carlos denied having asked Mr Smith to resign. In cross-examination by Mr Power for Mr Smith, Mr Carlos admitted that he told Mr Smith he wanted him to resign at a meeting which he thought occurred on 6 May 2003, but which Mr Smith had documented by means of a memo as occurring on 14 May: T12361 2/6/05:

*Mr Power: Do you not recall such a meeting in which you said to Mr Smith, "if you resign it will mean I will not have to expose you or your qualifications and there will be no further media articles"? --- I remember saying that.*

93. According to the transcript of the meeting Mayor Carlos stated:

*"I have on many occasions talked to Mr Smith on this account, I have never said "I want you to resign". I have never said "I intended to sack you". I wanted the matter fully investigated and then the Council would decide."*

94. There may be a distinction to be drawn between an invitation to consider the consequences of resignation and a direct request for a resignation but, on the face of it, the two statements of Mayor Carlos would have to be regarded as inconsistent with each other. The statement made at the meeting was when judged as a carefully chosen set of words, not untruthful. Mr Carlos had not, at least at that stage used the precise words put to the meeting. However, it is a breach of the Code of Conduct for elected members to be less than "frank and honest in their official dealings with each other". To draw that distinction when addressing that topic in a Council meeting was, at the very least, less than frank. It had the effect of concealing what had been said.

## CHAPTER 3

### PART 5

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95. That evening Council went behind closed doors to hear advice from Mr Ellis and deal with two motions relating to the CEO. Neither motion was the subject of notice under the Standing Orders. There was no officer's report. The letter of advice from Freehills was not provided to elected members. The first motion (moved Cr Hollywood, seconded Cr Walker) was in terms, as amended, that "Council appoints Freehills to act as the City's legal advisors in connection with matters relating to the employment of Denis Ian Smith as Chief Executive Officer of the City of Joondalup". This motion was defeated. The second (moved Cr O'Brien, seconded Cr Baker) in the following terms, succeeded, being passed unanimously:

- (1) *That the Council hereby appoints Freehills Lawyers, as the City's legal representative, to present a detailed report to Council for its further consideration, concerning the following matters:*
  - (a) *the CEO's legal obligations under the terms of his contract of employment and anybody of applicable law to provide the Mayor and/or any councillor when directed or requested to do so, documentary proof of all or any qualifications that the CEO currently holds or held at the date upon which he was employed by the Council as the City's CEO;*
  - (b) *the potential legal liability of the City and the quantum of any such liability, if any, under the terms of the CEO's contract of employment with the City, and any body of law, should the City purport to terminate the CEO's said contract as a consequence of the CEO's alleged refusal, failure or neglect to provide the documentary proof as described in paragraph 1(a) hereof;*
  - (c) *the potential legal liability of the City to date, if any, arising out of the City's performance of its obligations under the said contract and any body of law;*
  - (d) *detailed reasons for the potential legal liability of the City described in 1(a) and 1(c) hereof;*
  - (e) *detailed advice to Council in response to the matters raised in the letter dated 15 May 2003 addressed to Mayor/councillors, City of Joondalup, from Blake Dawson Waldron lawyers their reference AOD:09133365842 Re: Mr Denis Smith;*
- (2) *that the CEO's legal representative be at liberty to make submissions to the City's aforementioned legal representative in response to each of the terms of reference, during the preparation of the said report;*
- (3) *that the expenditure associated with (1) above be charged to account 11.10.11.111.4020.0001 with the limit being placed at \$20,000.00 with any further expenditure requiring the approval of Council;*
- (4) *that it be noted that account 11.10.11.111.4020.0001 has been fully expended however the over-expenditure can be funded from account 11.10.11.111.3320.0001;*
- (5) *that the CEO continues to carry out his duties to the best of his ability in accordance with the terms of his contract with the City, pending Council's consideration of the said report.*

96. Mr Hollywood said that he drafted his motion, because he did not like Cr O'Brien's motion as he believed that it only covered the period after Mr Smith became the CEO: T2429 26/11/2004.
97. Mr Baker gave evidence that he drafted the O'Brien motion either in its entirety (except for the account numbers) or in part. Mr Baker said at this stage there was a view that legal advice needed to be obtained about compelling Mr Smith to produce his qualifications and on the issue generally: T8475 – 8476 6/4/2005. Mr Baker said that he was concerned about the City's liability and the City's entitlement to see copies of the qualifications: T8481 6/4/2005. He did not turn his mind to whether Council as a whole could compel Mr Smith to produce his qualifications or the issue of misrepresentation: T8483 - 8484 6/4/2005. Mr Baker said that this motion was not intended to support the CEO (as Mr Neil Douglas later noted) but was to inquire into the City's potential legal liability if a certain course of action was pursued: T8492 6/4/2005.
98. It is clear to the Inquiry that the intent behind Cr Baker's input into the motion was to obtain advice that the Mayor could not direct the CEO to produce his qualifications and that the Council could not do so without running the risk of being liable in damages as BDW had submitted in its letter of 15 May 2003. It is also clear that few councillors understood that intent, including Cr O'Brien.
99. At the meeting on 20 May Mr Ellis was present to give advice. During debate on Cr Hollywood's motion he stated that he had concerns about both the O'Brien and Hollywood motions. With the Hollywood motion he was concerned about it only dealing with the appointment of Mr Smith, which would not deal with issues that had arisen subsequently. He was of the view that it should deal with the employment of Mr Smith more generally. His concern with the O'Brien motion was that, although it was more specific, it might not cover all the issues raised in connection with the employment of Mr Smith. The transcript of the meeting at page 45 reads:

*CR WALKER: Mr Ellis, does that motion of Cr Hollywood encompass Cr O'Brien's motion?*

*MR ELLIS: The motion of Cr Hollywood, as amended, would enable me to advise on all the matters set out in Cr O'Brien's motion.*

*CR WALKER: Plus more.*

*MR ELLIS: Yes, it would enable me to do things, as well as just prepare a report.*

...

*Yes, under Cr Hollywood's motion as amended it would be open to me for example to hold discussions with the representatives of Mr Smith as they have asked, or as they have suggested. The – Cr O'Brien's Notice of Motion simply instructs me to prepare a report.” (1910DSC54)*

100. Cr Baker convinced Mr Ellis that by virtue of the reference in 1(e) of Cr O'Brien's motion (the BDW letter of 15 April 2003), he would be able to address the issue of Mr Smith's qualifications: 1910DSC54. At page 56 of the transcript Cr Hollywood said:

*“You will not let our lawyer look at the qualifications of our CEO. That's what's at issue here. That's always been ... its not in there Cr Baker – Cr O'Brien. Before we employed him, you say we cannot look into it. If you change your motion to say before we employed him, then I will sit down and I will agree with your motion.”*

Cr Baker responded saying:

*“Point of --, Mr Mayor, it is in the Blake Waldron – it is in that letter, it refers to the circumstances giving rise to the provision of his qualifications and the terms of that letter of 15 May from Blake Dawson Waldron are deemed to be incorporated into the terms of reference under Cr O'Brien's motion.”*

At page 61 of the transcript Mr Ellis asked:

*“With the Mayor's permission, I seek to ask a question of Cr Baker. There was some discussion earlier about whether the motion as put enabled me to inquire into the accuracy of information provided to Council in relation to Mr Smith's qualifications and you indicated it was an issue which was raised by the letter from Messrs Blake Dawson and Waldron. It would assist me if you could point out where in the letter that is raised, because I have not been able to find it. I will be able to deal with that issue.*

*CR BAKER: Yes, certainly, thank you very much. Paragraph 5 of that letter refers to the qualifications issue in the letter of 15 May. Throughout the reference – throughout the text of that letter, the eight page letter dated 18 May ...*

*MR ELLIS: Mine is 15 May.*

*CR BAKER: Sorry, dated 15 May, I apologise. There is reference to the qualifications issue and in relation to that paragraph (e) deals with the issue of detailed advice in response to matters raised. Matters raised generally within that letter can be expanded upon by ..*

*...*

*MR ELLIS: I am sorry, where in the letter of 15 May is the question of the accuracy ...*

*CR PROSPERO: Page 2, item 5.*

*CR BAKER: Item 5. 6(a) deals with the issue of qualifications, what was said by Mr Loader. Next, the – just bear with me – there is a memo referred to in sub-paragraph 6(b) on page 2 of that letter. If you read through that letter you will see that there is reference to qualifications on several occasions, and the intention is that (e) will allow you to certainly import the letter and matters raised in that letter and because the word “qualifications” is raised in that letter on several occasions that gives you the scope. So it’s a matter, if you like, by looking at the broad scope of the – within paragraph (e) within the motion.*

*MR ELLIS: Thank you for that explanation.”*

101. Cr Baker went on to say that “its certainly as I understand it is the intention of the mover, Cr O’Brien, that the scope is already in there, so to speak, there is a broad scope imported”. The transcript continues:

*CR O’BRIEN: My indication at the last instance from Mr Ellis was that he was satisfied with point (e) covering the Blake Waldron matter, and that covers the – all of those employment areas.*

*MR ELLIS: I propose to deal with those initial employment issues on the basis of what I have heard to that. What I indicated was that if the motion is put in terms like that, I would deal with the question of the qualifications initially provided.*

102. Mr Ellis gave evidence that his view was that the whole of the matter should be investigated. He said that he suggested an amendment to the Hollywood motion to broaden it so that it was not confined to just the appointment of Mr Smith, but it was related to his employment as he was concerned about the subsequent conduct of the Council being relevant. Mr Ellis said that if he had to vote on the motions he would have passed the Hollywood motion with his amendment, as he had concerns about the narrowness of the O’Brien motion: T2563-2564 1/12/2004.
103. Ms Hart gave evidence that she would have liked to amalgamate the Hollywood and O’Brien motion to ensure that Council got the best possible legal advice in order to make a considered decision on the issue. She hoped that the legal advice obtained from the motion she was favouring would enable the Council to give a direction to view Mr Smith’s qualifications and provide options in finding out what qualifications he possessed. Ms Hart believed that the Council needed to see the qualifications before a decision could be made on how it should proceed. She did not draft a motion amalgamating the Hollywood and O’Brien motions as she was a new councillor and inexperienced, but on reflection agreed that this would have been the appropriate course of action: T1766-1767 18/11/2004. Ms Hart also said that she expected that Council would get legal advice on all the issues that Mr

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Carlos had raised in his e-mail on 19 May, in relation to Mr Smith's qualifications, the position he held at GHD & Coffs Harbour and his salary package at Warringah: T1769-1770 18/11/2004.

104. Mr Rowlands gave evidence that he supported the appointment of Freehills to deal with matters pertaining to Mr Smith as he had no choice; the matter was dragging on and something had to be done about it. He said that he did not particularly want to get to the bottom of the issue, but just wanted to get on with running the Council, and he believed that Mr Smith was doing a good job: T1585 16/11/2004. At this Council meeting, Mr Rowlands said: "He's got the lot. The only issue is that Mayor Carlos at this stage doesn't like what he's heard and that is just stiff as far as I'm concerned". He claimed that he said this for the benefit of the new councillors. It was suggested that this statement could have misled councillors into believing that Mr Smith had all the qualifications he had claimed in his CV. Mr Rowlands agreed that he probably should not have said those words, but said he meant that he was fully qualified to do the job as he had other tertiary qualifications besides the degree and had done the same job elsewhere: T1591-1583 16/11/2004. In any event, he believed that it would not have misled the new councillors, as they would have known that Mr Smith did not have a degree.
105. Mr Brewer said that at the time of this meeting he wanted the issue to be sorted out. There was no particular direction that he wanted to take; he just wanted to make an appropriate decision to put it to bed: T1638 17/11/2004. He thought the best way forward was to appoint Freehills to give a legal opinion on what options the Council had, rather than just have councillors' opinions bandied around: T1643 17/11/2004. Mr Brewer said that he relied on the outcome of the legal advice as he had no expertise in this area. He thought that the allegation of misrepresentation was a significant issue that needed to be looked at because of the perception of the Council in the community. He also said that if the appropriate path was to dismiss the CEO, he would have taken that course: T1648-1649 17/11/2004.
106. Mr Caiacob said that he voted in favour of the motion to appoint Freehills believing it was appropriate from the information before him. Mr Caiacob believed that it would be appropriate for all councillors to view Mr Smith's qualifications, and did not agree with Mr Smith only showing certain councillors: T1876-1878 22/11/2004.
107. Mrs Walker gave evidence that she thought the issue at this stage to be that there was controversy over his qualifications, and that Council did not know what qualifications he

possessed, if any. She did not believe that Council could avoid the issue. The community wanted something done, so the Council needed to know what the ramifications were, including the potential for legal liability. Mrs Walker also said that she asked “could we have some form of mediation” with the CEO. She was aware that part of his contract provided that “if there was a dispute between the CEO and the council, mediation needed to be put into place reasonably immediately”. She said she was told by the CEO that the CEO did not have a dispute with Council. “Some councillors had a dispute with him, so therefore mediation wasn’t a process that we could go down”: T2199 24/11/2004. Mrs Walker said that she preferred Cr Hollywood’s motion to Cr O’Brien’s, particularly with the verbal advice received from Mr Ellis that the Hollywood motion was greater in scope: T2203 24/11/2004.

108. Mr Nixon voted in favour of the O’Brien motion. He thought Cr O’Brien was knowledgeable in the local government area, and had respect for his opinion. Mr Nixon said that although he disagreed with Cr Baker on a number of issues, this one involved legal questions and Cr Baker presented a strong case in favour of the O’Brien motion that swayed him: T3788-3789 16/12/2004. Mr Nixon felt that legal advice needed to be obtained, as it was obvious this issue was not going to go away, especially with the change of Mayor: T3789 16/12/2004. Mr Nixon said that he wanted to ensure that Council would be given the best advice with which they could make a decision: T3794 16/12/2004.
109. Mr Kimber gave evidence that he thought the legal advice would help to resolve the matter. He assumed that this would include looking at all the evidence available relating to the issues that had been raised: T5589 15/2/2005. Mr Kimber said that he voted in favour of Cr O’Brien’s motion as it actually prescribed certain events to occur and also dealt with the City’s duty of care to the CEO which the other did not: T5591 15/2/2005. Mr Kimber thought that the Hollywood motion was too general: T5594 15/2/2005. Mr Kimber said at this stage he did not think there was sufficient evidence to warrant an investigation into Mr Smith’s qualifications. He did not think this motion related to an investigation, but was about seeking legal advice on all the issues: T5604 15/2/2005. Mr Kimber said that “inquire” meant to gather the relevant documentation and peruse it, whereas “investigate” meant dealing with issues relating to the documentation. An inquiry would determine whether an investigation was required: T5605 15/2/2005. Mr Kimber was of the mistaken view that BDW had been engaged on the City’s behalf. He thought that at this stage it was clear that Mr Smith needed his own advice and the City needed its own lawyers because of the content of the letter from BDW on 15 May: T5599 – 5601 15/2/2005. He thought that

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by this stage the issue raised by BDW regarding a mutual separation was an option that needed to be explored, as he wanted to resolve the issue: T5602 15/2/2005.

110. Mr Kenworthy said that he supported the O'Brien motion as it had more detail and covered the issues better: T6691 3/3/2005. He thought it was up to the lawyers to decide how far back they needed to go and whether they needed to look at the issue of what qualifications were held and whether they were the same as were represented. He said Council gave the lawyers the overall aim and they had to make the decision: T6694 3/3/2005. He considered that the O'Brien motion required the solicitors to look into all matters to do with the CEO's employment, including the qualifications that he represented he had: T6729 – 6730 4/3/2005.
111. Mr Prospero preferred the O'Brien motion because it was specific as to what was to be investigated and restrictive as to the amount budgeted for the legal advice. He asked a question of Mr Ellis at the meeting as to the legal significance of Mr Smith's memorandum of 25 November 2002 because he was concerned as to its accuracy: T6731 4/3/2005. Mr Prospero thought that the qualifications issue was an important issue to seek legal advice on and he felt that Council would appease the community by doing so: T6739 – 6740 4/3/2005.
112. Mr O'Brien gave evidence that he was clear in his own mind that an individual elected member did not have the power to compel Mr Smith to produce his qualifications, but was unsure on the question of whether the whole Council had the power and whether there were any legal ramifications in doing so: T8732 – 8733 13/4/2005. He said that he wanted this advice to be obtained in order to weigh up the possibilities as to whether Council ought to request Mr Smith to produce his qualifications: T8735 13/4/2005. Mr O'Brien thought that if legal advice was sought, which said what he thought it would, that the Mayor did not have the power alone to compel Mr Smith then it may have clarified the position for the Mayor and his supporters, who thought that the Mayor could do anything he wanted: T8744 13/4/2005. Mr O'Brien said that the motion was not intended to support the CEO but was intended for the City, as employers of Mr Smith, to get some legal advice on what the City should do: T8758 13/4/2005.
113. Mrs Mackintosh was absent in Sweden for this vote and was not aware of the motion before she left: T4592 28/1/2005.

114. After the resolutions were read out to the public, Mayor Carlos said:

*“Councillors, and members of the public, and staff, and the media – and because we are now in an investigation situation, until the investigation is complete and a report comes back to Council, I have decided that I will not make further media comments – further comments to the media – and I will let the investigation progress so that we get a full report back from Freehills. Councillors have – most councillors have agreed that – sorry, some councillors have also agreed to that but I think all councillors have undertaken that no comments will be made until we get a report.”* (1910DSC54)

115. A further motion (moved Cr Kimber, seconded Cr Baker) that the councillors re-affirm full confidence in the CEO and congratulate him on his achievements was withdrawn, as was a motion (moved Cr Rowlands, seconded Cr Kenworthy) that the Mayor be directed to desist from carrying out further action or investigation in respect of the employment contract of the CEO or his qualifications, refrain from making any further derogatory or defamatory remarks pertaining to the CEO’s credibility and apologise for the remarks made during the Channel 7 interview on 5 May 2003.

### Questions by Grech

116. The minutes of the special Council meeting of 15 and 20 May 2003 set out a long series of questions asked by Mr Sam Grech of Ocean Reef, a candidate whom Mr Baker had supported in the election. There was a series of some 32 questions addressed to the Mayor and implicitly critical of him. Mr Baker acknowledged at T9146 that it “would certainly seem” that he asked Mr Grech to raise the questions. He accepted that the factual premises of the questions indicated that he had authored them: T9148.

117. Notwithstanding the fact that on many occasions Mr Baker accused Mayor Carlos and his supporters of orchestrating public question time, he did not consider there was anything wrong in getting Mr Grech to ask questions and did not accept the proposition that he did so in order to avoid breaching the Code of Conduct which prevented him from reflecting adversely on a fellow elected member. One of the questions was: “What do you say about the community perception that you are drunk with power following your recent election as Mayor?” At T9156-9157 Mr Baker stated that he believed it was appropriate for him to ask a question through a resident at public question time which was calculated to embarrass or criticise the Mayor. Mr Baker said: “The same methodology had been used before and had

been accepted and not criticised”. He thought that many questions asked in Council were orchestrated by councillors:

*“It was like an orchestrated meeting, particularly special electors’ meetings; they were – they ran so smoothly in terms of people asking questions, and the questions seemed to be linked, that they were well orchestrated.*

*COUNSEL ASSISTING: So you inferred from the way in which those meetings proceeded that other people were doing as you had done? --- As I had done. Well, on this occasion, yes. It was not unusual for questions to be, in my view, either – how do I point it, penned by a councillor or for questions to be prepared with the input of a councillor or the knowledge of the councillor, and that those questions would be then asked at a meeting.”*

118. The Inquiry revealed no evidence of any orchestration of public question time except to the extent admitted by Mr Baker in relation to the questions asked by Mr Grech.

### **CEO Changes Delegation**

119. On 23 May 2003 the CEO e-mailed Mr Loader and Mr Higham (copy to Mr Robinson) stating that on the advice of his solicitors he authorised Mr Higham and Mr Loader to:

*“Act on behalf of the City to receive and give advice or information as sought, relevant or necessary, to permit Freehills to carry out their instructions, strictly in accordance with the terms of the Council’s resolution of 21 (sic 20) May 2003. I am not giving any authority for matters that fall outside the terms of the resolution passed by the City.”*

120. Mr Robinson gave evidence that he was astonished to discover that there was a CV as he had previously understood that none had been provided to the consultant. He agreed that the production of the original CV “crystallised” the issue of the qualifications. He felt that he had been misinformed. It is apparent that Mr Robinson’s relationship with Mr Smith deteriorated after that point leaving Mr Smith, a few days later, to purport to withdraw Mr Robinson’s delegation. The change in relationship was noticed by Ms Hill who said at T9605 27/4/05:

*“I do recall instances of disagreements and raised voices between Denis Smith and Kevin Robinson. I couldn’t be specific about what they were about but they were certainly more frequent towards the latter part of Denis’ employment there.*

*COUNSEL ASSISTING: Did Mr Robinson ever tell you what cause he had to disagree with Mr Smith or raise his voice? --- No. Kevin doesn’t say an awful lot but it was quite clear there was something that they didn’t agree on.*

*Yes. And would you be able to place this in time if it was a withdrawal of his delegation or later? I think he – he went away at some - ? --- He went away to Europe and it was during that time I believe that the delegation was withdrawn and I'd say subsequent to him returning from that trip that things pretty much went down hill."*

121. He also directed that faxes and e-mails be directed to Mr Loader for security reasons: 3101DIS43. Mr Higham e-mailed Mr Ellis that day referring to a conversation with Mr Smith regarding Mr Robinson's involvement. Mr Ellis' response was that it was not appropriate for Mr Smith to be providing "directions" about matters which are for Mr Robinson, Mr Loader and him to decide. He saw no reason why Mr Robinson should not remain involved following his return from leave: 0112DSE23. This incident highlights the difficulty encountered by the City's officers due to the CEO's conflict of interest. Questions of delegation should have been a matter of direction by Council on independent advice.

### **Freehills' Letters to Elected Members and Senior Staff: 23 May 2003**

122. Subsequently on 23 May 2003 Mr Ellis wrote to all elected members and a number of senior staff setting out the terms of the motion appointing Freehills and the issues which were raised by the letter from BDW of 15 May 2003 as follows (2801CJM5, 1810DSC44):
- (a) *Have there been any inaccuracies or misstatements in connection with information supplied to the City about Mr Smith's qualifications and, if so, to what extent was Mr Smith aware of or responsible for those inaccuracies or misstatements?*
  - (b) *Are there matters connected with Mr Smith's qualifications which might lead or might have led to a breakdown in the relationship of trust between the Mayor or the City and Mr Smith?*
  - (c) *Is the City entitled to terminate the employment of Mr Smith?*
  - (d) *Is the City entitled to require Mr Smith to provide evidence of his qualifications?*
  - (e) *Has the contract between the City and Mr Smith been repudiated by the City as a result of the conduct of the Mayor or the City?*
  - (f) *What is the effect of the following matters:*
    - (i) *the apparent provision of qualifications to the then Mayor and Mr Loader on 24 November 2002;*
    - (ii) *the memorandum of 25 November 2002;*
    - (iii) *the resolution of 17 December 2002; and*
    - (iv) *the resolution of 18 February 2002 (sic 2003) on any issues arising in connection with Mr Smith's qualifications and employment?*
  - (g) *Was a copy of the report presented by Recruiters Australia to the City in relation to Mr Smith disclosed to Channel 7 as asserted by Mr Wayne (sic Warren) Reynolds?*
  - (h) *Should the Council pursue an agreed separation between the City and Mr Smith?*

123. Mr Ellis requested the production of any relevant documents or information. In response to the request Mayor Carlos attended at the offices of Freehills to hand over various documents to Mr Ellis.
124. BDW wrote to the Mayor and councillors on 26 May 2003 making eight complaints about the conduct of Mayor Carlos, requesting Council to order that he cease the relevant conduct, and expressing disappointment that no response had been made to their letters of 15 and 20 May 2003: 1810DSC45. On the same day BDW wrote to Mr Ellis seeking information about his report and requesting the opportunity to respond to the report in draft form: 1810DSC46.
125. The issues identified by Mr Ellis were comprehensive and wholly appropriate in the circumstances. He articulated fairly and precisely the matters which, in the interests of good government, the Council was bound to address. His formulation of the issues reflected his appreciation of the seriousness of the matter and a careful study of the evidentiary material then available. Whilst the express terms of the motion did not necessarily indicate the necessity for an investigation of such breadth, nevertheless, the concessions made by Cr Baker and Cr O'Brien in the course of debate clearly entitled Mr Ellis to take the course he did, resolving any uncertainty over whether the terms of the motion comprehended an investigation of the CEO's qualifications.

### **CEO's Objection to Freehills**

126. A further letter by BDW to Mr Ellis dated 26 May 2003, faxed nine minutes after the first, requested that Freehills consider whether or not, in the circumstances, it should decline the instructions from the City for the reason that Freehills had acted for the defendant in *Jones v. Sutton*, whose counsel had attacked Smith's credibility. The letter expressed concern that Freehills would not be able to report impartially or objectively to the City in matters relating to Mr Smith. (1810DSC47)
127. The next day Cr Baker e-mailed Mayor Carlos, (copied to other elected members and Mr Smith), questioning whether Freehills should be engaged to provide the report:2010DSC57. Cr Baker expressed the view that Freehills had an actual conflict of interest and if not, then a potential conflict of interest. He recommended the substitution of Minter Ellison. This e-mail followed a conversation which Mr Baker had with Mr Ellis in which Mr Ellis refused to divulge the information which Mayor Carlos had given him in response to his (Mr Ellis) letter of 23 May 2003. Mr Ellis confirmed his advice in an e-mail: 1801CJB9. Cr Baker said in his e-mail that the Mayor had no authority to speak to Mr Ellis.

128. Mr Baker said in evidence at 29169 21/4/05, in answer to a question as to what caused him to advocate for a change of solicitor, that –

*“Dennis phoned me before then and said he had heard that Mr Carlos had been on the phone to Scott Ellis speaking to him, speaking to him, and he was upset, that this was inappropriate and he was annoyed about that.*

*Why was Mr Smith telling you this?---Well, I don't know. Because I assume he thought that I should know and I should try and find out whether that was the case. And then following that I phoned Scott Ellis...and asked whether or not Mr Carlos had been on the phone to him and what he'd said. Mr Ellis said he could not tell me what was said because it was confidential...And I recall thinking “Well that's not right.” Mr Carlos may be saying things like he asked questions of all the candidates regarding their qualifications. I was a councillor of the City of Joondalup. I had a right to know what was being said to him, to make sure that what was being said was the truth”.*

129. Then this exchange occurred between Counsel Assisting and Mr Baker at T9172-3:

*COUNSEL ASSISTING: Did Mr Smith ask you to find out from Mr Ellis what Carlos had told him?---He - - no, he asked me to ring him and find out what - - well, yeah, he asked me to find out what Mr Carlos had told him about whatever it was he had told him.*

*So did you consider that you were being used as an agent for Mr Smith to find out what information the City's solicitors were obtaining about Mr Smith's qualifications and perhaps other things?---No, I think that - - I think that - - my understanding is that Mr Smith was concerned that Mr Carlos was not telling - - or saying something, or may be saying something that wasn't the truth about the matter.*

*He was very concerned, wasn't he, to protect his position in terms of his employment contract?---I think he was concerned that the - - well, that was never discussed. I suppose you could draw that inference, obviously, but I think the real issue was that it was important that the advice that the City got was correct and it was not slanted because of misinformation that was being given to the City's Solicitors by a councillor.*

*COUNSEL ASSISTING: Yes, but it wasn't - - would you agree it wasn't for Mr Smith to know what was going on between the council and its solicitors in relation to his contract of employment? ---Well, not in terms of the - - well, certainly - - well, not in terms of the advice given, certainly not.*

*And you intended if Mr Ellis had given you information as to what Councillor Carlos had - - or Mayor Carlos had disclosed to him to communicate that to Mr Smith?---No, I think - - I don't recall - - no, I don't recall having that intention at all.*

*Well, there was no other point, was there?---Well, to find out for myself what was going on.*

130. The Council had authorised Mr Ellis to provide a detailed report on various matters, including those raised in the BDW letter of 15 May 2003. In order to do so it was

appropriate and necessary for him to obtain information on those matters from various persons, including Mayor Carlos, in such manner as he saw fit. No individual councillor had any right to demand information from Mr Ellis, and he was entitled and apparently deemed it appropriate to reject any approaches to him of that kind.

131. Counsel Assisting submitted to me that the only reasonable inference to be drawn from the evidence is that Cr Baker was seeking to obtain, for the benefit of Mr Smith, and without revealing to Mr Ellis that that was the purpose of his inquiry, confidential information provided to the City's solicitors in circumstances where Mr Smith's interests were clearly and unequivocally in conflict with those of the City, his solicitors having given notice of a potential claim for damages. Mr Baker contended that his evidence does not support that contention. I agree that Mr Baker's evidence does admit of the alternative inference that Mr Baker was only motivated by a desire to ensure that the information Mr Carlos was providing to Mr Ellis was accurate. It is open to conclude that he had the belief that as a Councillor he had the right to know what was being communicated to Mr Ellis and that he contacted Mr Ellis in pursuit of that perceived right.
132. Mr Smith's position was becoming increasingly untenable. The Council had not responded to two invitations by his solicitors to discuss settlement. His original CV had been disclosed, proving that he did provide written information about his qualifications to MRA, and Mr Ellis had identified issues which, if determined unfavourably to Mr Smith, could lead to the Council rescinding his contract for misrepresentation or dismissing him for misconduct.
133. Mr Ellis wrote to Messrs Higham, Robinson, and Loader on 27 May 2003 stating that Freehills had no conflict of interest and therefore no reason to decline the instructions: 1810DSC48. However, he also pointed out that the issues raised by BDW would impede the progress of the report and it was in the interest of the City for the matter to be dealt with expeditiously. This letter was referred to in Mr Higham's report to the Council meeting that evening wherein he recommended that Minter Ellison be appointed in lieu of Freehills.
134. In a further letter of the same date (which was not referred to Council) Mr Ellis advised that he had been provided by Mr Loader with a copy of a facsimile sent by the Sydney office of Freehills to Mr Smith on 6 November 2002, from which it was apparent that Mr Smith had been well aware from that time of Freehills' involvement: 2010DSC60. He said:

*"These circumstances must raise significant doubts about the bona fides of the concerns which Mr Smith is said to have expressed to his lawyers about our*

*impartiality. Further, if Mr Smith had any legitimate basis for those concerns he must be taken to have waived any right to complain as a result of failure to raise the matter in the timely fashion.”*

135. In his report Mr Higham recommended that, irrespective of whether Freehills in fact had any conflict, it was in the interests of the City that other solicitors be instructed. Accordingly, Council unanimously passed a resolution in the same terms as the resolution of 20 May 2002 appointing Freehills, but substituting Minter Ellison. There is no cause for criticism of Mr Higham, but it is plain that the change of solicitors was in all the circumstances unnecessary and caused a considerable waste of money.
136. Freehills’ accounts show fees charges of \$14,545.00 (excluding GST) for the period 14 May – 27 May 2003 for advice in relation to the CEO issue (including \$1,502.00 for the advice in relation to the conflict issue raised by BDW which seems to have taken Mr Ellis 4.8 hours to prepare) and a further \$2,463.00 (excluding GST) for work done pursuant to the Council decision of 20 May 2003: 0112DSE28, 0112DSE29.
137. It is important to note that Cr Baker, who was instrumental in all decisions and actions taken by the Council in relation to the CEO, did not expect the motion to appoint Freehills to lead to an investigation. Asked about the instructions to Freehills at T9183, Mr Baker said:
- “Well, it could be arguably described as being an investigation but it was more a case of getting legal advice, but you might say that, then again, you cannot give the advice without having the facts or what have you. So you could argue it both ways but the thing is that the media report said on the 5th that the City was going to investigate Mr Smith’s qualifications, which wasn’t true at that stage anyway, and the motion wasn’t one of investigating his qualifications, it was a motion dealing with, if you like, obtaining legal advice regarding a whole raft of matters.”*
138. In his evidence Mr Baker expressed no satisfactory reasons to support the argument made in his e-mail to councillors calling for the substitution of Minter Ellison. The fact that Freehills had given advice in relation to the CEO’s contract of employment was not a disqualifying factor as no issue of construction of the contract of employment had arisen and Freehills did not, as a matter of fact and law, have a conflict of interest by reason of having represented Mrs Ruth Sutton in NSW. Furthermore, he had no cause to accuse Mayor Carlos as he did, of having an interest in the appointment of Freehills. Cr Baker had seconded the O’Brien motion on which he had been consulted and which, on the evidence, had been discussed with officers of the City and the CEO’s lawyers.

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139. Cr Baker in preparing the O'Brien motion did not expect that it would result in an investigation of Mr Smith's qualifications. The motion focused on the potential liability of the City for damages if Mr Smith sued. Cr O'Brien, in an e-mail to councillors and staff of 19 May 2003 (1705MCOB15.6), attaching the first draft of the motion distributed to councillors, said it "is a motion I intend to move to assist the matter for which the adjourned special meeting of Council has been scheduled for 7:30pm on Tuesday, 20 May 2003. I trust it will protect the interests of all parties". He provided a second draft adding paragraph 1(e) with an e-mail of 20 May 2003, saying: "It is of course the responsibility of elected members to determine appropriate terms of reference in order to protect elected members by receiving considered and detailed legal advice".
140. On the basis of Mr O'Brien's evidence as a whole and his general demeanour as a witness and his behaviour as a councillor, as revealed in the evidence before this Inquiry, there is no reason to believe that he did not genuinely believe what he expressed to be the purpose and likely effect of the motion. However, it is also clear from an e-mail he sent to ratepayers on 18 May 2003 (1705MCOB15.26) that he was still of the view which he expressed to Mr Carlos on 3 January 2003 by e-mail (1204MCOB13) that he was not satisfied that there was the proof beyond reasonable doubt that Mr Smith lied, which he would require in order to justify an investigation of Mr Smith's qualifications, and that Smith "should be allowed to get on with the job".
141. The standard which Cr O'Brien set in order to be satisfied that there should be an inquiry was unreasonably high. The usual standard applied before an investigation should be commenced is that of there being reasonable grounds for suspecting that what is alleged may have occurred. It may be that to the extent that Cr O'Brien was relying only on information from Mayor Carlos he was applying a threshold for the veracity of what was being represented to him which was affected by his belief that Mr Carlos had lied about asking Mr Smith about his educational qualifications during the recruitment interview.
142. It is clear from Mr Ellis' advice and his evidence to the Inquiry that on the information provided to him, upon which his advice was sought, he recognised a serious question of probity. None of his advice indicates any reluctance to deal squarely with that question. To the extent that a strategy was required, it was only to ensure that sufficient information was gathered to ground a lawful direction to the CEO to produce evidence of his qualifications, Mr Ellis recognising a "significant risk that, in circumstances where the qualifications had previously been produced and confidence expressed in the CEO by the Council on two

occasions, such a direction might be viewed as unfair or oppressive, and therefore ‘unlawful’”. The existence of such a risk, however, was not sufficient to contra-indicate an investigation of the substantive issues.

143. Mr Ellis’ letter of advice of 20 May 2003 (1810 DSC40) identified legal, factual and strategic issues in relation to the CEO’s qualifications. Importantly, it advised that the integrity of the CEO was important to the operation of the City, that the Assignment Specification had indicated that the possession of tertiary qualifications was of relevance to the selection process, and that an employer would ordinarily be entitled to require an employee to provide information about such qualifications. Dealing with Section 5.40(c) he said the fairness of the City’s conduct would depend on all the circumstances of the case, including the strength of the information suggesting misrepresentation. It was also relevant that the production of the documentation was not onerous on Mr Smith.
144. It is important to view the Freehills’ advice in the context of BDW’s letter of 15 May 2003. The letter contended that the contract of employment could not be wilfully terminated by the Council and that any purported termination would be wrongful and a breach of contract. The conduct of Mayor Carlos was stated to be an ongoing repudiation of the contract entitling Mr Smith to elect to terminate and sue for damages. The letter also suggested that Mr Smith had suffered ill-health as a consequence of Mayor Carlos’ conduct and that the City would be liable for any physical injury to him. The letter argued that the special meeting on 15 May 2003 should be closed to the public and concluded with an offer to discuss a negotiated termination of the employment contract.
145. Mr Ellis recommended that the City investigate a negotiated settlement, and possibly mediation. It recommended that it would be prudent to conduct an impartial investigation of the allegations and to give Mr Smith the reasonable opportunity to provide any information which might affect the City’s decision as to whether he had breached his contract or misconducted himself notwithstanding that there was a significant risk that a direction to Mr Smith to provide evidence of his qualifications would not be a “lawful direction”. It was recommended that the City gather together information and conduct a thorough assessment of it, with no direction being given to Mr Smith until sufficient investigations had taken place. This advice should have been followed.
146. The change of solicitors on 27 May 2002 laid waste to significant costs incurred by the City in respect of Freehills’ advice. By the time Mr Douglas was instructed by Mr Higham and

Mr Loader on 30 May 2003, he having read a number of documents provided to him during the previous two days it was apparent to him that the Council wanted to support Mr Smith. His note was, “resolution of 27/5/ is aimed at supporting DS”: 0312NFAD3. In this context he said, “The advice is all about trying to implement the wishes of the Council so you need to know what the wishes of the Council are”: T2788-2799.

147. The transcript of the meeting shows that Cr Baker advised councillors at the meeting to read a Supreme Court decision in *Conway-Cooke v. Town of Kwinana* [1999] WASC 229. He said:

*“Read it, comprehend it, -- comprehend very very very very much indeed.*

*...*

*In closing, please read the decision, Supreme Court decision, single judge decision, Town of Kwinana, three years ago. Read Judge Scott’s decision. And check your bank balances very quickly. Off load your assets, perhaps, for some of you, because there may be some difficulties down the track.”* (1810DSC50)

148. This decision was later the subject of extensive advice from Minter Ellison. It is likely that Cr Baker was informed of the decision by Mr Smith. To the extent that Cr Baker’s statement suggested that councillors faced personal liability it was misleading and unhelpful. Cr Baker had no reasonable basis for making that suggestion.

## Conclusions

- A. Cr Baker breached the Code of Conduct by drafting an election pamphlet on behalf of Mayor Bombak which erroneously imputed improper conduct to Mayoral candidates Cr Carlos, Cr Walker and Cr Patterson, and by asserting without a reasonable factual basis that Cr Walker was under investigation by the DLGRD.**
- B. Cr Baker breached the Code of Conduct by procuring Mr Grech to raise questions in public question time calculated to embarrass Mayor Carlos.**
- C. It was not reasonable for Mayor Carlos to call the special Council meeting on 15 May 2003 with only 24 hours notice.**
- D. Crs Baker, Kenworthy and Prospero when they intentionally failed to attend without reasonable excuse the special Council meeting of 15 May 2003 breached the statutory duty which they undertook when elected to perform the duties of their office.**

- E. Crs Prospero and Brewer, through lack of appreciation of the issues, failed to take advantage of such opportunity as was given to them to sufficiently scrutinise the documents evidencing Mr Smith’s qualifications, resulting in Cr Prospero unintentionally misleading Council as to what he actually saw.**
- F. Mr Smith took advantage of the inexperience of Crs Prospero and Brewer in misleading them as to the qualifications which the documents he produced to them revealed.**
- G. At a meeting of Council on 20 May 2003 Mayor Carlos breached the Code of Conduct in that he was less than frank and honest with other councillors when he denied that he had asked Mr Smith to resign, having conceded that on 6 or 14 May 2003 he suggested to Mr Smith that it would be to his advantage to resign.**
- H. Cr Baker, as a councillor and as a legal practitioner, acted unreasonably in giving advice to councillors that they risked personal liability in embarking on the course they had by passing the resolution to obtain legal advice in relation to Mr Smith.**
- I. The interest of the electronic and print media in the issue of Mr Smith’s qualifications and the Council’s dealing with that issue was not a result of any “media campaign” by any group of people using the media to elevate public awareness of the issue.**



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## Part 6

### The Council's Strategy

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#### Police Investigation

1. On 2 June 2003 an Incident Report was prepared by Detective Senior Constable Bartlett of the Public Sector Investigation Unit of the Western Australian Police Service regarding an allegation raised by Cr Walker that the CEO had provided false information regarding his qualifications when applying for the position. The report resulted in the preparation of a briefing note which was referred to Detective Sergeant Stefan Reksmiss. DS Reksmiss and DC Robert Martin subsequently carried out an investigation of the allegation.
2. On 17 July 2003 DS Reksmiss completed a report on his investigation which was communicated by Mr Barry Matthews, Commissioner of Police, to Cr Walker and Mayor Carlos by letters dated 31 July 2003 (0111DSC95) in which the Commissioner stated that the investigation established the following:

- “(1) Mr Smith was the holder of a post graduate diploma in environmental pollution studies when he applied for his position with the City of Joondalup.*
- (2) Mr Smith was not the holder of a Bachelor of Business degree when he applied for his position with the City of Joondalup.*
- (3) Mr Smith completed a management skills course in the Faculty of Business of the University of Technology in 1989.*
- (4) Mr Smith’s entry on his Curriculum Vitae in relation to the completion of the management skills course referred to in (3) reads: “(a) post graduate qualification, Bachelor of Business (Management)”;* and
- (5) Mr Smith alleges that he did not personally type his curriculum vitae but rather his wife did before it was faxed to Recruiters Australia Pty Ltd.*

*The entry in Mr Smith's curriculum vitae as referred to in (4) could not be solely relied upon as a basis for a criminal prosecution against him for "fraud". Mr Smith declined to be interviewed so it is open to conjecture whether this entry or any of the others could be viewed as purposefully false. For a conviction for "fraud" to be achieved, the representation must be proved to have been purposefully made and done so with a criminal intent to defraud."*

3. Commissioner Matthews said it was necessary to establish that Mr Smith gained a benefit and that this was brought about by fraudulent means. He said the investigation had established that:

- "(1) Formal educational qualifications were not essential criteria for the position gained by Mr Smith, therefore those involved in the recruitment and interviewing of Mr Smith did not view formal educational qualifications as an essential determinant for selection prior to interview.*
- (2) The lack of essentiality of the formal educational qualifications is corroborated by the fact that neither the City of Joondalup (during the interview process) nor its agent (during the short listing of candidates in their interviews in New South Wales) asked Mr Smith about his qualifications, their relevance to his performance in the position, sighted a copy of them or verified their existence or authenticity."*

4. The Commissioner stated that Mr Smith could not be said to have obtained his position through the apparent misrepresentation if the matter was never material to his gaining employment. Accordingly, he had concluded that there was insufficient evidence to establish a prima facie case of "fraud".
5. Mr Reksmiss, in evidence, said that when he considered Mr Smith's CV he did not interpret the words "post graduate qualification, Bachelor of Business (Management)" to be a degree. In his experience a degree was not necessary in order to do a post-graduate course and he considered that the words may have been a reference to a post-graduate course in that discipline. He indicated that to sustain a charge of fraud you needed to show that there had been some misrepresentation of Mr Smith's qualifications, that the misrepresentation was deliberate and that it was made for the purpose of obtaining the position. In the course of his investigation he interviewed Mr Reynolds, Mr Loader and the councillors who were present at the interview of Mr Smith. He also made inquiries of Coffs Harbour and Warringah to see whether they retained CVs of Mr Smith.
6. Mr Smith did not make himself available for interview but his solicitor, Mr Tony Davies and counsel, Mr Robert Mazza, attended at a meeting at which they produced copies of Mr

Smith's documentation certified by Mr Davies which Mr Reksmiss copied. Mr Reksmiss said that Mr Mazza told him that Mr Smith's wife had typed the CV and that he had not checked it properly. Mr Reksmiss said he was not told by Mr Smith's representatives what part of the CV was in error and there was no discussion about whether Mr Smith had a degree or not. Mr Reksmiss said that this information indicated to him that Mr Smith had not constructed the document and perhaps did not check it. No other information was obtained from Mr Smith's representatives.

7. The first statement obtained by Mr Reksmiss was that of Cr Walker who told him she did not wish to make a formal complaint, but thought the matter should be investigated. Amongst the papers provided by Cr Walker was a section of transcript from *Jones v. Sutton* in which Mr Smith denied having any degrees. Ms Walker's statement said that if she was aware that Mr Smith did not have a degree she would not have supported his appointment. She also said that qualifications were addressed in the interview itself. Mr Reksmiss understood from the Assignment Specification that the successful candidate would probably, but not necessarily, have some sort of tertiary qualifications: T2045 23/11/04.
8. Mr Reksmiss said that one of the reasons he wanted to speak to Mr Smith was to ascertain what the words "post-graduate qualification" meant when used in his CV: T2048 23/11/04. Yet, it appears from his evidence of the conversation he had with Mr Smith's legal representatives that that question was not addressed and was not submitted on behalf of Smith that he understood the description to mean anything other than a degree. Curiously, Mr Reksmiss said that he saw no point in questioning Mr Smith's solicitor about matters that he needed to speak to Smith about: T2052 23/11/04.
9. While it is the case that Mr Smith's solicitors could not be the source of evidence as to the facts, one would have thought that the meeting with Smith's lawyers would provide an opportunity to obtain as much information as they were capable of giving by way of an explanation of discrepancies in the CV. What they indicated to be the facts, as they were instructed by Mr Smith, as to the discrepancies, would be matters which could then be an indication of what evidence should be sought to corroborate or dispel Mr Smith's version of the facts. This opportunity was not taken.
10. Mr Reksmiss agreed that by the time he saw Smith's lawyers he had obtained written statements, most of which indicated that Mr Smith's qualifications were immaterial to the selection committee. It was put to Mr Reksmiss that the qualifications did not matter at the

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time of the interviews because it could be assumed that shortlisted candidates met the selection criteria. Mr Reksmiss said that at the end of the day he was of the view that he would not be able to prove that Mr Smith had deliberately and deceitfully forwarded the document, knowing it to be false, in order to get the job. He could not do that because Mr Smith had declined to be interviewed and because his lawyer said that he had not constructed the document.

11. Mr Reksmiss thought that he may have seen, but could not recall, Mr Smith's Coffs Harbour CV which also described a Bachelor of Business (Management). Asked whether the reference to this qualification previously would tend to exclude mistake as an explanation, Mr Reksmiss stuck to his position that the words "post-graduate qualification" made the description ambiguous: T2062 23/11/04.

*COUNSEL ASSISTING ... I think its torturing the meaning of the words "Bachelor of Business Management" to construe them as being a discipline in which you might obtain a post graduate degree. --- Well, that's the view I took.*

12. Nevertheless, Mr Reksmiss conceded that Mr Reynolds had, in his statement, assumed the qualification so described to be a Bachelor degree. He said it seemed odd to him that Mr Reynolds should have taken the view that educational qualifications did not make any difference to him after authoring the Assignment Specification which specifically mentioned such qualifications, and describing Mr Smith in his report as having an "excellent education": T2068 23/11/04.
13. Mr Reksmiss agreed that for the purposes of Section 409 of the Criminal Code, obtaining a position of advantage in a selection process would be regarded as a benefit, namely, the opportunity of selection from a smaller field: T2071 23/11/04. He described his decision as a "line ball".
14. Mr Reksmiss said he was not influenced by the fact that Council had resolved to express confidence in and support for Mr Smith: T2074 23/11/04. He said it was not an easy decision and that he thought about it "pretty hard": T2075 23/11/04. Mr Reksmiss, in relation to the statement of Cr Baker indicating that the investigation was politically motivated, said that he discovered no evidence that suggested that the investigation had been so instigated: T2089 23/11/04.
15. Mr Baker, in his evidence at T1852-1853 22/11/04, said that he was told by Mr Reksmiss and Mr Martin that they believed the investigation was "just a political beat up that smacked of politics".

16. Whether or not words to that effect were said is not relevant to this Inquiry. The police investigation does have relevance, however, for two reasons. The first is that it reveals an explanation on the part of Mr Smith that had not been made before, to the effect that his wife typed the CV and that he did not check it, thereby implying that the document contained some unspecified mistake; and the second, that Mr Reynolds, Mr Loader and the councillors involved in the selection process deposed to statements which addressed the significance which they gave to the qualifications in the selection process.
17. It is not the function of this Inquiry to make any criticism of the investigation. Yet, to the extent that the decision not to prosecute Mr Smith was seen as some form of vindication of him and his supporters, it has been useful to obtain an understanding of how the final recommendation was shaped by Mr Smith's refusal to speak to the police and the consistency of the statements of the majority of witnesses to the effect that Mr Smith's qualifications were immaterial.
18. On a different view of the evidence, and perhaps with the benefit of some more pointed inquiries, a different position could easily have been reached. It was open to conclude from an inspection of Mr Smith's documents that his qualifications were misrepresented in his CV. For example, the conclusion reported in the Commissioner's letter that Mr Smith was the holder of a post graduate diploma in environmental pollution studies was not one which would have been borne out by an inspection of Mr Smith's documents. Negligent misrepresentation could be excluded to a significant extent by reference to the Coffs Harbour CV, which was in similar terms.
19. On the question of reliance, an analysis of the candidate profiles prepared by MRA, which reported and made recommendations on the candidates to the Council, shows that all persons who were selected in the shortlist met the qualifications criterion set out in the Assignment Specification, in that they professed to have tertiary qualifications in an appropriate business discipline, and the report relied on those educational qualifications as a significant factor mentioned in the recommendations made to Council as to those who merited an interview. The test of materiality was not whether qualifications were considered at the interview stage. It seems reasonable to conclude also that had a decision to prosecute been made, which on the evidence before this Inquiry it could have been, Mr Smith would, in all likelihood, have been stood down on pay pending the outcome and the governance problems subsequently experienced by the Council thereby avoided.

20. As far as the witness statements are concerned, apart from their focus upon the interview process rather than the recruitment consultant's recommendation, it is important to note that all were obtained after 17 June 2003 when councillors received legal advice that an investigation was contra-indicated because of the risk of litigation and most of the statements (Mackintosh, Kenworthy, Hollywood, Barnett, Bombak, Baker and Reynolds) post dated the meeting on 24 June 2003 at which Mr Douglas gave the following advice on the elements of fraud (0111DSC68):

*CR HART: My second question is to our lawyers. If it is the case that Mr Smith's qualifications are not accurate, that he doesn't have what he states he has, is that fraud?*

*MR DOUGLAS: Fraud requires an intention to deceive. So not only must the statement, if it's a statement, be false, but it must be intended to deceive and it must actually deceive. So there are three elements are [sic] needed, and for fraud, you need to prove that beyond reasonable doubt. Now, in this case, the material we have indicates that there may be an inaccuracy in the qualifications. Now, it looks fairly clear that there may be an issue there about whether it's misleading.*

*There is no information at all about whether or not --- the intention of the CEO was at the time, whether it was inadvertent or whether misleading --- sorry, was innocent or inadvertent, or whether it was done deliberately. That would have to be proved. It's a very difficult thing to prove what someone's intention was at the time of doing something. We also don't have any information about --- sufficient information about the third element, about whether or not, if it was misleading and deceptive, whether it was intended to mislead or deceive.*

*Thirdly, whether the Council was in fact deceived about it, because much of the information we have in the documents indicates this was a very minor issue, if it was an issue at all, during this selection process. So unless you can prove each of those three beyond reasonable doubt there won't be fraud.*

## **CEO's Complaints About Mayor Carlos**

21. On 4 June Mr Smith indicated in an e-mail to Mr Loader and Mr Higham that he wished to complain formally that the City, through the Mayor, was failing to exercise its duty of care: 3101DIS45. He said he was "fed up" with the "constant intimidation and harassment" which the Mayor was permitting in the form of questions in public question time pertaining to the contract of employment and other matters. He suggested that transcripts of public question time at recent meetings be referred to Minter Ellison for advice. Mr Loader subsequently wrote to Mr Douglas on 5 June 2003 seeking legal advice as follows:

*“The City seeks your advice on how to implement strategies to mitigate any potential damages that may result in these allegations of intimidation and harassment being substantiated. In other words advice the City needs to give to the Mayor and elected members about ways of reducing the possible impact of allegations of harassment.”*

### **Third Decision of Council to Pay CEO’s Legal Fees**

22. Prior to the Council meeting of 17 June 2003 the CEO submitted to Mr Robinson a request for payment by the City of further legal expenses. This was the subject of a report to Council by Mr Robinson, which he referred to Mr Douglas for comment (2502ML74), recommending that consideration be given to the CEO’s request for payment of \$9,933.94 (excluding GST) to BDW. The report set out the text of the CEO’s request in which he stated:

*“I firmly believe that the Council has a duty of care to protect all staff, which includes the CEO, to give them the right to be able to seek legal advice on matters pertaining to their contract of employment where issues have been raised by an elected member.”*

23. The report noted that some \$11,109.32 (excluding GST) had previously been authorised and paid to BDW, that the Council’s Policy 2.2.8 relating to the funding of legal representation was not relevant as it only related to defending legal proceedings, and that the budget for legal expenses had been substantially over-expended.
24. This report contained the text of a memorandum Mr Smith sent to Mr Robinson outlining the grounds for his reimbursement request. These included:
- a) that it is in Council’s interests for the CEO to be properly and independently advised;
  - b) BDW had been contacted by Freehills seeking advice and clarification of matters;
  - c) council has authorised an additional \$20,000 to be spent on their legal advice, therefore it is only fair that the CEO have the same opportunity;
  - d) BDW were required to examine Council minutes relating to resolutions behind closed doors on matters relating to the CEO; and
  - e) CEO had to defend himself from unwarranted attacks. (0712DIS27A, 0712DIS27 and 2110DSC64)
25. Mr Robinson gave evidence that he was shown an itemised account, but not able to retain it. In the presence of Mr Smith he matched the items in the invoice with Mr Smith’s e-mail memorandum to make sure that the matters raised seemed to fit within the general ambit of what was actually being provided to the Council. Mr Robinson’s understanding as to why

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he was not able to keep an itemised account was that the first one had been provided to Cr Carlos when he became Mayor, which caused Mr Smith some difficulties. Mr Robinson said that on at least one occasion, but more like two or three throughout 2003, in reviewing the itemised accounts, he felt there were matters included that did not strictly fit within what he thought the City should pay for. In those circumstances, he advised Mr Smith who subsequently provided Mr Robinson with an amended itemised account. Mr Robinson understood that Mr Smith had two accounts with BDW. He believed that this was mentioned by Mr Smith at executive meetings and in other conversations, and he was told that he incurred a very significant amount of fees beyond what was being incurred by the City: T7197 – 7198 14/3/05 and T7614 – 7615 17/3/05.

26. He said he was aware from the itemised invoices that BDW were corresponding with Minter Ellison so he was conscious that he did not have a full and complete understanding of those issues. Mr Robinson said that the duty of care issue, although he raised it in his report, was not a fundamental part of his advice: T7200 – 7201 14/3/05, 7626 18/3/05. Mr Robinson said that he did not obtain legal advice as to whether the City had a duty of care which extended to paying the CEO's legal expenses, although he e-mailed a number of the reports to Mr Douglas for an overview, but did not ask for specific advice in relation to that point: T7627 18/3/05.
27. The request for payment related to an account dated 23 May 2003. Mr Smith did not explain why he had waited so long to request the payment of these costs and Mr Robinson said the delay did not occur to him. Mr Smith would submit these expenses on the same day as a Council meeting which Mr Robinson said required him to prepare a late item report and sometimes obtain advice. This affected the time that he had for consideration of the payment: T7608 – 7609 17/3/05. Mr Robinson gave evidence that Council was in a better position than he to make a determination as it possessed more information: T7611 17/3/05. He said that if he thought that the City should not be paying these accounts then he would not have recommended it for consideration, and it was open for the Council to pay, if it thought it was appropriate: T7617 17/3/05.
28. Mr Robinson said that in relation to this item, he provided some information to Council, which would have been complemented by any additional advice that the lawyers would have been able to provide and information the Council itself would have been aware of as Mr Smith's employer. Mr Robinson did not know whether the legal advisers gave legal advice to the Council on this occasion, as he was not present during debate: T7624 18/3/05.

Unfortunately, the report did not suggest to Council that legal advice should be obtained before the request was considered. The motion was carried 14/1, Mayor Carlos dissenting.

29. Mr Brewer said that he voted in favour of paying the BDW account because he thought the Council had a duty of care to the CEO. He thought by voting in this way he would be putting the City's position first: T1669-1670 17/11/04. Mr Brewer said that he was given no information that led him to believe that it was inappropriate to grant the CEO's request for payment of legal expenses. He supported the payment of an extra \$10,000, as he thought it would help diffuse the situation between the Mayor and the CEO. It was evident to him that the Mayor did not like or understand the legal advice the Council was getting or the direction the Council had taken. He did not have any idea what legal advice the CEO would receive but did not think it would be appropriate for an employer to fund an employee to take legal action against it: T1679 17/11/04.
30. Ms Hart said she voted in favour of the CEO's request because Cr Baker had said that the City could face litigation, and what she had heard in the debate swayed her. Ms Hart said it was the first and only time she supported the payment of Mr Smith's legal fees. Ms Hart said that as this was a late item, she was unable to do any of her own research on this Policy 2.2.8 and did not know what it provided: T1806-1809 18/11/04.
31. Mr Caiacob gave evidence that he voted in favour of this motion as he had no information before him to say that he should not. He was not fully aware of the policy on legal representation. He believed that the expenditure was to protect the best interests of the City of Joondalup regarding the allegations that had been made and that a report would be brought back to Council outlining how the allegations were detrimental to the City's position and how it was affecting the city and its operations: T1892 22/11/04. Mr Caiacob understood that the Council would get a report as he thought Mr Smith was not obtaining legal advice personally, but as the CEO of the City: T1893 22/11/04. Mr Caiacob felt that he did not have enough information to make this decision, as he did not have a copy of Policy 2.2.8, a copy of Mr Smith's contract, the reports from the previous payments or legal advice as to whether it was appropriate: T1933 22/11/04.
32. Mr Hollywood said that he supported the motion for the reimbursement of the CEO's legal expenses as the recommendation advised Council to consider the request and did not say that the payment would be illegal. He also considered the fact that the report said that "*I firmly believe that the Council has a duty of care to protect all staff, including the CEO*". Mr

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Hollywood believed at this stage that Mr Smith had every right to protection: T2450 29/11/04. Mr Hollywood believed that Mr Smith was entitled to legal advice as to his rights not to show his qualifications. Mr Hollywood gave evidence that he thought it was in the interests of the City to fund the CEO in a dispute with the Mayor: T2455 29/11/04.

33. Mr Nixon said that he voted in favour of the motion as Mr Douglas had advised the Council that they had a duty of care to Mr Smith as his employer and he thought that the authorising of legal funds was extending that support to Mr Smith whilst the issue was ongoing. Mr Nixon thought that the payment was appropriate and part and parcel of his entitlements: T3802-3803 16/12/04. Mr Nixon also said that the City should pay because BDW, on behalf of Mr Smith, were arguing that the conduct of Mayor Carlos constituted a repudiation of the contract, and he thought that if Council did not provide these funds then it could be liable later. Mr Nixon was aware of the fact that he was funding an employee to take action against their employer: T3804-3805 16/12/04. Mr Nixon also said that there was nothing to suggest that the request for legal funds was unlawful, and the report did not persuade him that it was not appropriate to pay: T3806-3807 16/12/04.
34. Mr Kimber gave evidence that he supported the request of the CEO for payment of legal costs as he thought at this time that the CEO needed to have legal advice with respect to the activities of Mayor Carlos. He thought the amount was appropriate as there had been similar amounts expended in the past: T5630 – 5631 15/2/05.
35. Mrs Mackintosh said that she supported the request for legal funding as allegations had been made against Mr Smith in the performance of his duties and it was interfering with the performance of his duty. He was entitled, by reason of the City's duty of care to legal representation. Mrs Mackintosh said she was sure that at this stage Council had obtained legal advice that it had a duty of care to any employee who was harassed or intimidated, and as a consequence could not perform their duties to provide legal representation, but was unable to state who provided this legal advice and whether the advice could have been provided by an officer: T5963 - 5964 22/2/05.
36. Mr Kenworthy gave evidence that he supported the motion as he believed the City owed Mr Smith a duty of care. He also said the City's policy on legal representation was not directly relevant and so he made a decision which he thought was reasonable: T6708 3/3/05. Mr Kenworthy assumed that Mr Smith was getting advice about what his rights were in terms of his contract: T6710 3/3/05. He also thought that it was in the best interests of the City to pay for Mr Smith's legal advice: T6712 3/3/05.

37. Mr Baker said that at all times he thought that there was a dispute between Mayor Carlos and Mr Smith, not Mr Smith and the City. He said this money was for Mr Smith to get legal advice in relation to the conduct and behaviour of Mayor Carlos. Mr Baker said that Mr Smith was getting legal advice on his entitlement to terminate his contract and sue for damages on the basis of the actions of Mayor Carlos, not the City: T9199 – 9200 21/4/05. He assumed that the purpose of the funds was the same as the original motion when funding was originally given for Mr Smith to deal with his dispute with Mr Carlos: T9204 21/4/05. Mr Baker said that he did not understand that he was providing funding for legal advice for Mr Smith to take action against the City: T9205 21/4/05. Clearly, however, Mr Smith was no longer obtaining advice relating to the matters mentioned in the February decision and was in conflict with the City.
38. The reasons expressed by those elected members who were asked about the decision show little understanding or appreciation of the issue. As the City was not obliged to make the payment requested by Mr Smith, which it clearly was not, the decision to pay his legal expenses could only be justified if it was in the interests of good government of the City. Mr Smith's solicitors had by this time given clear and unequivocal notice of Mr Smith's reservation of his right to sue the City for damages for repudiation of his contract. He had not sued Mayor Carlos or anyone else for defamation and had no contractual rights which could be enforced against Mayor Carlos.
39. In any event, the Council had no idea what services were reasonably required by Mr Smith or what a reasonable allowance for the value of such services would have been. To authorise the payment without that knowledge was irresponsible. There was no advantage or benefit to the City to be gained by the payment of Mr Smith's legal expenses and, accordingly, the decision had no rational basis.
40. The Administration failed to provide adequate advice, which should have included legal advice dealing with the grounds of Mr Smith's request and the City's legal obligations. Whilst Mr Robinson did refer his draft report to Mr Douglas for comment, there is no evidence that any advice was received in respect to it, and the transcript of the meeting on 17 June 2003 does not indicate any legal advice on this point. The recommendation should have been for deferral of consideration of the matter until such advice was provided in writing, and in sufficient time for councillors to give due consideration to it.

### **Minter Ellison's Advice to Council Meetings of 17 June 2003**

41. Mr Loader and Mr Higham met with Mr Douglas and his partner, Mr Andrew Burnett, on 30 May 2003. The City's instructions from Minter Ellison were confirmed by letter dated 4 June 2003 which Mr Douglas acknowledged on the same date, proposing that an interim report be provided to Council in time for its meeting on 17 June 2003: 0312NFAD4. Mr Douglas and Mr Burnett are both senior practitioners with considerable specialised experience. Mr Douglas has honours degrees in Jurisprudence and Law from the University of Western Australia and a Master of Public Law degree from the Australian National University. He worked for 12 years for Federal and State Attorneys General and has been at Minter Ellison for 15 years practising mostly in local government law. He chaired the Inquiry into the City of Cockburn which reported in April 2000. Mr Douglas gave evidence that Minter Ellison acts for almost half the local governments in the State. Mr Burnett has been in practice for 28 years and obtained a Masters degree in labour law in 1984. He has practised in employment law and industrial relations in South Africa and has worked in that area at Minter Ellison since 2000.
42. It is clear from Mr Douglas' evidence that he viewed his role as being to give strategic advice to the Council to resolve the issue of the CEO's qualifications. At T2794 3/12/04 he said:

*"It seemed to be in the interests of everyone to resolve it quickly. It seemed to me, and I think I expressed that in the written advice and also the oral advice expressed at the meeting, that this had the potential to be a very significant matter and very costly for the City in terms of time and money and I could see that at the time. I thought my job was to alert the Council to the potential dangers if it didn't act appropriately, and my focus was to try to give the Council enough information so that they could resolve the matter and then get on with the job of governing the City."*

43. At T2795 3/12/04 Mr Douglas was asked what he understood to be the central issue affecting the Council, based on the information and instructions he had received:

*MR DOUGLAS: At that stage, and I adverted to this briefly earlier, the issues weren't as clear as they are now. There were a lot of issues at the time but clearly the qualification issue was paramount and the qualification issue came down to a number of specific matters that were set out in our advice. They were things like was there, in fact, a misrepresentation, and although it's now, as I say, fairly clear it wasn't and took some time to clarify that. Just to what extent Denis Smith misrepresented his qualifications rather than it being done by Management Australia and so on. So the extent to which each of those were responsible for wrong information coming before*

*the Council. So that was the first issue. Others alongside that were if there was a misrepresentation then was it material and what impact did it have on the decision to select a short list first and then select Denis Smith. So I don't think it took too long to clarify those as broad issues.*

*COUNSEL ASSISTING: Do you think that your instructions required you to advise Council on the merits of those issues? --- The resolution itself wasn't clear about that and I think regardless, in some senses, of the broader terms of the resolution, I saw my role as being a broader one – to assist the Council to resolve the dispute and come up with a solution. So, in some senses, we may well have gone beyond the precise terms of the resolution but I always saw this as “how can we reach a solution?”*

*And the dispute being really whether there had been a misrepresentation to Council that might affect the CEO's suitability for the position? --- No. That would have been the question to be asked when he was appointed. The question at this stage looked beyond that. It looked at also, I understand, the materiality of it and the reliance. The information I was getting early on was that although there may have been a representation, and we could spend sometime trying to determine that question, it was going to depend in the end on whether or not Council had actually relied on the misrepresentation, and on that issue it seemed to me that there was [sic] issues of credibility involved and, again, there may be differences of opinion about a better way to go about it but my view was that we were going to have great difficulty determining that issue of credibility simply in the form that we had. We had, essentially –*

*Was that because of the different views that you were aware of with respect to materiality, accounts given by councillors in that respect? --- Yes, more reliance, but we had Cr Carlos, at the time, saying very strongly that he asked questions about qualifications at the time, and very strongly about it, and none of the other evidence seemed to support that. Others, including the discussions we had with councillors, seemed to be of the view that academic qualifications were of little, if any, consequence to them in terms of the appointment.*

*How did you come to that view? --- I'm just giving you my impressions that you asked for.*

*Well, how did you come to the view that there was any issue about that? --- That there was an issue about it  
?*

*Yes. --- Well, in terms of –*

*About the qualifications? --- Well, if one of the issues for us to consider and the Council to consider was whether or not Denis Smith should have his contract of employment terminated, then we had to come up with a ground for termination. One ground for termination that was put forward was that he misrepresented to the Council his academic qualifications. That, as I understood it and still understand it, that couldn't constitute a ground for termination unless the Council relied on that misrepresentation in appointing him, and that was the – in the end, that seemed to be the critical issue.*

*But the first issue was whether there had been a misrepresentation; had you come to a view on that? --- No. As I've said, and looking back, that issue was left unclarified for some time.*

*Was there any reason why it was left unclarified? --- I guess because we kept taking the next step, or I kept on taking the next step. No matter what the answer was on whether or not there had been a misrepresentation, if there had been no reliance on that, and I must say, there seemed to be a misrepresentation, the extent to which Denis Smith was involved rather than Management Recruiters was something that needed to be determined, but there was a misrepresentation, and it seemed to be as well that it was the CEO had misrepresented it. But if at the end of the day there was no reliance by the Council on that, then there's nothing further they could do, and to attempt to terminate his employment would result in at least a risk of litigation and I understand that – that point is not a point that's been the subject of any questioning by any of the legal advice that's been given.*

44. Mr Douglas agreed with the proposition that in terms of governance, it would be important for the Council to know whether the CEO had lied about his qualifications because it would reflect on his probity and integrity and bring into question his suitability for the job (T2801 3/12/04):

*COUNSEL ASSISTING: It terms of specific governance, it would be very important, wouldn't it, to know whether, given the – in the light of these allegations, whether in fact the CEO had lied about his qualifications to Council? --- Absolutely.*

*And that's – that's the first issue and that's very important because it reflects on his probity and integrity? --- That's right.*

*And it also brings into question his suitability for the job of CEO? --- Yes it certainly could do.*

*A position in which a Council reposes a lot of trust, where public confidence is required in the office? --- I am agreeing with you on all those.*

*Yeah – okay. So you would accept that the issue having been raised, it was an important one in the – for the City to address? --- The critical question here is the timing. ... There's three periods, I would suggest. One is at the time of appointment, on the material available; the second time is the crucial time in December 2002 when Council became aware for the first time that Mr Smith's academic qualifications had been misrepresented, leaving aside whether it was deliberate or not, and then the third period we're looking at is as at May 2003 or June 2003. So I think its important we clarify which period we are talking about. When [we] became involved, the Council had had two opportunities, knowing that the information before it that the academic qualifications had been misrepresented, to deal with that issue, on two fronts; the first one, as to whether or not they regarded academic qualifications as significant. The*

*clear answer seemed to be that it wasn't. On the second one, as to whether or not the misrepresentation affected integrity and suitability, apart from academic qualifications being suitable for the job, the same answer, in both December and February. Now, having made that decision with that material available, the question then is, back in June, later on, is it then open to the Council to revisit the issue. (T801-802 13/10/04)*

45. Mr Douglas said he did not consider whether the decision made in December 2002 was proper: T2803 3/12/04. At T2806 3/12/04 he agreed that there was no investigation done by Council prior to its decision in December 2002. He had never reviewed the Minutes and was unable to say whether Council had taken into account the evidence and judgment in *Jones v. Sutton*. [In the submission that was made to the Legislative Council Standing Committee on Public Administration and Finance in November 2003 however, at page 90, Mr Douglas stated that at its meeting on 17 December 2002 Council was fully and properly informed having details of, *inter alia*, various press articles and the transcript of, and judgment in, the New South Wales defamation case: 1512NFAD76.]

46. Mr Burnett was asked a question about his understanding of the issue based on his initial instructions and the information given at T2589 1/12/04:

*COUNSEL ASSISTING: Did you have an idea as to what it was that the Council was grappling with, why it was getting lawyers involved? --- They were concerned about whether the – if the contract with the chief executive officer were terminated whether there would be damages, and we were asked to advise about that. They were generally concerned about the issues arising from their conflict.*

47. He agreed that it was arguable that the Council could resolve to direct the CEO to provide proof of his qualifications:

*COUNSEL ASSISTING: Why arguable, rather than clear? --- Well, I think because – I think 18 months had gone down already of the contract, or 15 months had gone, and the issue had apparently been dealt with a number of times. So that – that would be the view that we took.*

48. At T2593 1/12/04 Mr Burnett was asked how the liability of the City referred to in paragraph 1(b) of the resolution of 27 May 2003 would arise:

*COUNSEL ASSISTING: It all depended on whether the request or the direction to produce the documents was within the Council's or the City's power? --- Yes. Yes, well, it did, that is correct. And as you will know from our advice that we gave, we looked at it slightly broader than that. I think we looked at it as whether that would be in the interests of the City.*

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49. Mr Burnett said at T2598-9 1/12/04 that over the period from 28 to 30 May 2003 he spent time familiarising himself with the relevant documents before participating in a meeting with Mr Higham and Mr Loader on 30 May 2003. It was on that basis that he agreed with a suggestion from Counsel Assisting that “*the majority of councillors supported the CEO and didn’t want any investigation into matters raised by Councillor Carlos*”. He responded: “*I don’t know that I would put it quite like that, no. I think we had been told that there was a dispute that the majority of councillors did not want to go the route that Mayor Carlos wanted to go. I think we would have certainly been told that*”. Mr Loader (T6378) denied that he or Mr Higham said that, and Mr Higham (T7980) denied that there was any bias in the instructions given to Mr Burnett and Mr Douglas.
50. Mr Burnett’s evidence can be best understood as reconstructing the general impressions of what he had gleaned from things told to him and what he had read. It is not a basis for concluding that precise words of that content were communicated to him by Mr Higham or Mr Loader or founding a conclusion that Mr Higham or Mr Loader approached the task of giving instructions to Minter Ellison with a bias in favour of Mr Smith or against Mr Carlos’ position.
51. Mr Burnett said that he formed a view that the allegations made against the CEO were serious and went to questions of integrity and honesty which would reflect on the CEO’s capacity to hold the office. He said at T2605 1/12/04 that on his instructions one issue was whether the CEO had sought to deceive the Council and he agreed that if that conclusion was open then it would require careful consideration by the Council. He agreed that the issues raised in the Freehills’ letter of 20 May 2003 were all relevant:

*COUNSEL ASSISTING: Yes, and in particular there was the issue that is described or expressed at sub-paragraph (d) as follows:*

*“If there were misstatements for which Mr Smith was responsible would that ordinarily be a sufficient ground for terminating his employment either immediately after employment or subsequently.”*

*--- Yes.*

*Was that issue a particular one that also raised itself in your mind? --- Yes.*

*Is it your view that if there was a misrepresentation that wasn’t innocent in the sense that it was purposely made - ? --- Hmm.*

*– that it might give the City cause to rescind the contract of employment? --- No. I think our view was expressed in our advice to the City, and that was that it would not be possible to establish that in the circumstances, and given the time which had elapsed since the issue had first been raised. (T2606 – 2607 1/12/04)*

52. It was put to Mr Burnett that the Assignment Specification specified tertiary qualifications as a criterion and that the recruitment consultant's report described Mr Smith's qualifications as "excellent":

*COUNSEL ASSISTING: Yes. So did it occur to you early on, once you were in possession of this information, that if it were the case that Mr Smith had purposefully misrepresented his qualifications, then the consequences might be quite serious? --- Yes. There would be a serious question mark over why he had done it? And once one had investigated that, if he'd concluded that he'd done it for dishonest purposes it would be very serious. You'd have to weigh that against whether that was relevant, but I think the honesty issue was very important.*

*PRESIDING MEMBER: Why else could he have done it if he had done it purposefully? --- To boost his chances, yes. There'd be no reason other than to gain an advantage dishonestly.*

*The real question is whether it was purposeful or not, not what the purpose would be? --- Yes. It was relevant – sorry; I'm – it was relevant. It would be relevant if he had done it purposefully, yes.*

53. At T2619 1/12/04 Mr Burnett agreed that a misrepresentation may reflect not only a lack of honesty, but unsuitability for the job. He said that such issues were "*unproven, but they were at stake, certainly. And we made no finding on those issues*". Asked about the approach taken by Freehills, Mr Burnett said at T2623 1/12/04 that an investigation would have been "toothless" unless a Court was involved. At T2623 1/12/04:

*COUNSEL ASSISTING "All the evidence that was available would enable the view to be taken, wouldn't it? --- Well, it may, but our view was that that's where the risk came in. If they were wrong, they were going to run a risk of a successful Court action against them which would have cost the ratepayers thousands or hundreds of thousands of dollars. And that's the point we made.*

*Yes, but like any person in a situation that the Council was in, you would do the best you could on the information that you had, in coming to a view as to what the answer to the question is? – I understand, and – and – I understand exactly and I understand that is an option. We considered that option. We viewed the Council's position in its totality, in our view, and we felt that the better option was not to pursue an imperfect investigation of this sought because it would – bound to lead to problems and we took*

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*Why would it be bound to lead to problems? --- Well, we took the view that it would lead to litigation for Mr Smith. And that's expressed in our written advice to the Council."*

54. At T26281/12/04, the following exchange occurred:

*COUNSEL ASSISTING: But if an investigation showed there was a reason for the Council, good grounds for the Council to claim rescission of the contract on the basis of misrepresentation then why would you expect that the Council would not be successful? --- Because during the investigation the Council's conduct would amount, in our view, to repudiation.*

*What, the Council couldn't properly investigate allegations into its employees? --- Yes, because it would have to demand of Mr Smith to provide his qualifications.*

*PRESIDING MEMBER: Why would repudiation make any difference if the end result was that they discovered that he had misled them in a material particular? --- At the ultimate – I understand your question, Commissioner. If he – at the end of the day, if he sues them in a Court and the Court finds that he has misrepresented his position materially and that his conduct which if they had known about they wouldn't have appointed him on, he couldn't win his case. I think that's where you're coming from.*

*Yes? --- I agree with you. I agree with you.*

*COUNSEL ASSISTING: You see, there seems to be in your advice, with respect, great emphasis on the potential liability of the City? --- That's the question we were asked to advise on.*

55. Mr Burnett said that he understood Council to have “*decided to waive or to endorse him and move forward*”. He agreed with the proposition that councillors had a duty to raise and pursue issues about the administration of the City and described the duty as “*the obligation of good governance*”:

*COUNSEL ASSISTING: And that would require the councillor to raise rather than cover up questions about the conduct of Council officers - ? --- Yes.*

*– if that conduct might be viewed as dishonest or lacking in integrity? --- Well, even if it was simply prejudicial to good governance he ought to raise it – he or she. (T2641-2642 2/12/04)*

56. Mr Burnett found absolutely no reason to think that Cr Carlos was motivated by any factor other than the best interests of the City. He said, ‘He struck me on every occasion as a man who was dedicated to resolving the issue that he saw as important’. He also agreed in

principle with the general proposition that an employer is entitled to investigate allegations of dishonest behaviour made against an employee provided that the employer acts reasonably: T2642 2/12/04. He also agreed that if a person, dishonestly, and with the intention of acquiring a job, misled the employer as to his fitness for the role, and the employer was able to prove that, the employer would be entitled to terminate the employment: T2660 2/12/04.

57. Mr Burnett acknowledged at T2681 2/12/04 that he was aware that all of the information provided to his firm was not available to councillors:

*COUNSEL ASSISTING: Did you know whether the councillors had all the information that you had about Mr Smith's qualifications, and the other issues that had been raised by Mr Carlos? --- No, no, I don't think we did, certainly not on the 17 June. Don't you think an employer would have to be informed of what the evidence was that founded the allegations? --- The evidence, yes.*

*Wouldn't that much at least be required of you, in order to discharge your instructions? To set out what the evidence was that you'd received and - ? --- Oh, okay.*

*- what significance it had? --- I think that we were aware from the documents we had that councillors had debated the issues, that they knew the issue was whether or not Mr Smith had tertiary qualifications and whether he'd misrepresented them. So to that extent, I think we had really covered that duty.*

*PRESIDING MEMBER: Well, that's not right, is it, if you were aware – well, that they may not have had all the information? You were then the repository of a huge - ? --- Yes.*

*- body of information? --- That's fair.*

*And you didn't assume that every councillor had the same six volumes of information that you did? – No. No, we did not.*

*COUNSEL ASSISTING: Did it occur to you that the Council was relying on you for that information and then comment upon it and advise upon it? --- Yes.*

*To do that, you'd need to identify what it was? --- Yes.*

*It hasn't been done? --- Yes, we took a decision not to go into the factual details.*

*It might be viewed as keeping Council in the dark? --- That may be wrong, but I've – I've made the point that we did, made the decision, and obviously its open to this Inquiry to say, "well, you should have done something else" but I can only say what I can say, okay.*

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58. It was apparent from Mr Burnett's evidence at T2694-2695 2/12/04 that he understood the City's instruction not to require legal advice on matters, which if established, would support a termination of the CEO's employment.
59. Mr Burnett and Mr Douglas attended the meeting on 17 June 2003 and provided oral advice (behind closed doors) which Mr Douglas described as "*a preliminary briefing*": 2110DSC62. There was no written advice. On the issue whether the Council could direct the CEO to produce evidence of his qualifications, Mr Douglas said there was no clear cut answer as it depended on a number of factual matters, some of which were in dispute. He considered there was a real risk that such a direction could be seen as unlawful and that such action should not be taken.
60. Mr Burnett's advice was that if the CEO were dismissed in breach of the contract, damages could be \$460,000.00 - \$550,000.00. Whilst he thought that the actions of an individual councillor or group of councillors who did not represent the majority would not constitute repudiatory conduct, nevertheless if such conduct made it impossible for the CEO to do his job, then that conduct could result in constructive dismissal, leading to liability for breach of contract. He referred to the decision of the Supreme Court in *Conway-Cook v. Town of Kwinana* [1999] WASC 229 as an example of employment-related litigation which was resolved against the local government on the basis of wrongful dismissal (although that was not a case of constructive dismissal).
61. Mr Douglas told the meeting that "*there's a lot of issues, legal and factual, and there's a lot of inter-relation between them, so they're not easy to get on top of*". Minter Ellison's itemised account for the period (0112ABB2) shows that up to the time of the Council meeting in excess of 130 hours of professional time had been spent on the matter since 27 May 2003 when Mr Burnett was first telephoned by Mr Loader. Apart from Mr Douglas and Mr Burnett, two other persons were engaged, namely Nada Raphael, an articled clerk and Catherine Reid, a solicitor. The itemised bill shows that there were many documents collated and indexed. Mr Burnett produced an index (0212ABB1) of some 392 documents, which were collated into eight lever arch files and included all the documents provided to Minter Ellison by Freehills and the City.
62. The itemised bill shows that an issues paper was prepared as well as an options paper and that commentaries were prepared on the basis of research carried out. It was somewhat surprising therefore for the Inquiry to discover that notwithstanding such an immense

amount of legal input, no report was available for the Council's consideration on 17 June 2002, and that Mr Douglas actually considered that a written report was not required. He said in the transcript (2110DSC62) at page 27:

*“If Council is in a position tonight to determine the matter, and if you think it can be resolved once and for all, then that would be an even better result ... Now, if you think its suitable to do that on the basis of an oral report, then so be it. If you think it is better long term to have a written report for that, then that's something – I mean, we're in your hands.”*

63. The matters facing the Council were not of a nature that they could properly be dealt with on the strength of oral advice. The solicitors appointed by the Council had a duty to the Council as a whole, not just the majority, to provide the report that the resolution of 27 May 2003 required.
64. The advice was based on a view which Minter Ellison held which is identified in their submission to the Inquiry (and which was explicit in what was said and implicit in what was not said in the advice provided to the Council) that the investigation ought not to be conducted because it would be inconclusive, costly to the City, likely to continue the divisive atmosphere (rather than provide prospects of a united position and stable outcome), and thereby cause a loss of public confidence in the City, and was not appropriate given other investigations by the DLGRD and Police had been commenced. The solicitors assumed the role of strategists, based on those views and taking into account the majority decisions, which had been made in the past, ie. 17 December 2002 and 18 February 2003. They exercised their own value judgments as to what they considered the Council ought to be concerned with. For example, at page 29 of the transcript Mr Douglas said:

*“We wouldn't propose to go through a detailed analysis. I'd hoped to make it selective as we've done tonight. We've only given you tonight a fraction of the issues that arise from this. There are a lot of them. Our assessment is – and we'd indicate the others that we haven't dealt with by way of the report, but it can confuse the issues having everything listed in the report; to have a very detailed one. It's far better, in our assessment, to give you the selected issues that are of major importance to you.”*

65. In arriving at that position Mr Douglas effectively deprived councillors of the benefit of much of the work that had been carried out by his firm and for which the City would pay. The effect of the advice was to avoid an investigation of the serious probity issues that had arisen with respect to the CEO. The amount of time spent by Minter Ellison personnel

would have enabled a very detailed analysis to be prepared of the evidence and the issues open to be drawn from that evidence. Minter Ellison was taking over the instruction from Freehills who had done a considerable amount of work. In the interests of the City one might have expected that a conference might have occurred between the two firms in which the work done by Freehills could have been taken into account by Minter Ellison.

66. If the approach recommended by Mr Ellis on 20 May 2003 was not to be followed, Counsel Assisting contends that it should have been clearly stated by Minter Ellison to the councillors. Minter Ellison contend that they are not open to criticism for not articulating the difference between their approach and that of Freehills because there was no basis to conclude that it was not clear that Minter Ellison’s advice differed from that of Freehill’s.
67. Minter Ellison was not remiss in assuming that Council members might have had the capacity to recognise the difference between what was being advised by the two firms. However, it might have been a wise precaution to make that clear, because it is not readily apparent from the evidence of events which occurred at the meetings where advice was given that councillors understood that they had any choice as to the different approaches available. The final sub-paragraph of the letter of 24 June 2003, which it is not clear councillors had time to consider and was not specifically mentioned when Mr Douglas “walked them through” the letter advised –

*“while it is for the Council itself to determine which course of action is in the best interests of the City, it would be lawful and proper for the Council to act in accordance with our advice, including these conclusions and recommendations and, in particular, to pass resolutions in the form that accompany this advice.”*

68. The advice acknowledges the Council’s power to disagree with the recommended course, but is persuasive against any disagreement or any other course being taken. In the result, because of the strategic approach taken by Minter Ellison, Council did not receive legal advice which presented the options available to the Council and assessed the relative merits of each. Advice was not provided on all the issues which might be said have arisen from the BDW letter of 15 May 2003 (1810DSC27), particularly –
- (a) what level of risk there was in the Council requiring production by Mr Smith of material concerning his qualifications;
  - (b) whether there might be any basis for lawfully terminating Mr Smith’s employment following an investigation; and

- (c) whether there was good reason for the Council entering into a discussion of a mutual separation on terms agreed with Mr Smith.
69. Rather the Council was advised that it would be “*lawful and proper*” for it to implement a strategy said to be “*in the interests of the City, including the good governance of the City*” which was set out in a draft resolution (2110DSC66, pp1630-1629) “*not to question or pursue any further issues relating to the selection and appointment of the CEO, including his qualifications*” and to reiterate “*its previously expressed strong support for and full confidence in Denis Smith as the City’s CEO (see resolutions of 17 December 2002 and 18 February 2003)*” That strategy was advised to the exclusion of others.
70. The extent of the advice as to how that was in the interests of the “*good governance of the City*” was limited to advice concerning the “*priorities of the City*” in using its financial and other resources in governance, and “*particularly in delivering services to its ratepayers.*” (0111DSC68, p1615.003). That advice was supported by the view of Minter Ellison that they would not have sufficient “*power to determine what is the truth*” because they could not “*compel anyone to produce documents or answer questions*” (2110DCSC65 at p 1621). Minter Ellison contend that they advised the City that other State agencies had the necessary powers, statutory role and functions to carry out the investigation. There is no record of such advice being given.
71. Perhaps it might be said that because the fact of such investigations being in progress by the DLGRD and the W.A. Police Fraud Squad was discussed it could have been presumed that Minter Ellison was implicitly saying “leave it to them”. There is a difference, however, between any such investigations and an employer determining whether an employee is a fit and proper person to remain in its employment. Nevertheless, Minter Ellison contend that their advice was given in the context of circumstances whereby:
- a) it was unlikely that the City could dismiss Mr Smith, given that the council had not relied on his misrepresentation and had twice confirmed his contract;
  - b) there was a risk that Mr Smith could claim he had been constructively dismissed and/or that the City had failed in its duty to provide him with a safe workplace;
  - c) the City’s potential exposure if it wrongfully dismissed Mr Smith, constructively or otherwise, would have been in excess of \$1 million;
  - d) that it was unlikely that Mr Smith could be made to produce his qualifications; that even if an inquiry established the misrepresentation, it was unlikely that anything could now be done;

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- e) Mr Smith was highly regarded by the majority of councillors who wished to retain his services, notwithstanding that he had apparently misrepresented his qualifications;
  - f) the dispute was impacting upon the ability of Council to provide good governance and needed to be resolved quickly; and
  - g) Mayor Carlos had committed to abide by the decision of Council, so that there appeared to be a real prospect that the dispute could be resolved quickly.
72. The strategic advice given by Minter Ellison was open as an approach, but, in my opinion, it placed far too little emphasis on the significance of the honesty and integrity of Mr Smith and the impact on the public standing of the City of maintaining a person in the position of CEO where there remained unresolved questions as to his honesty and integrity. It also assumed unfavourable results from the process of an investigation which it could not be clear would be the case at that stage of their consideration of the matter.
73. In my opinion (which it would have to be conceded may be coloured by the events which I have now seen unfold) it would have been preferable, given what I regard as the seriousness of the probity matters raised, to have progressed the investigation of the facts further to a point where advice could be given on the three matters which I have identified above as being raised by the BDW letter.
74. The single strategy advice Minter Ellison gave can now be seen to have been a high risk strategy which had the potential to fail and take the City in the direction of a Panel Inquiry. It would seem that was not so apparent to Minter Ellison from the circumstances in which they were viewing it at the time. Minter Ellison submit that, as they saw it at the time, the strategy advised was designed to –
- (a) minimize harm to the City from the Council’s earlier public support of the CEO;
  - (b) end conflict between councillors.
75. The Minter Ellison contention is that the strategy was expected to be successful in securing public confidence in the Council because of –
- a) the immediate publication of the resolution articulating the Council’s reasons for its decision;
  - b) a 12/3 majority support of councillors for the resolution;
  - c) Mayor Carlos’ undertaking to abide by the resolution;

- d) Cr Hollywood's commitment to support the result of the Fraud Squad investigation;
  - e) Minter Ellison's warning that continued disputation could lead to suspension of the Council and an Inquiry under the Local Government Act; and
  - f) Optimism arising out of the matters referred to at (i) to (iii) above that the decision (based on Minter Ellison's advice) would not result in a loss of public confidence in the Council.
76. Minter Ellison contend that any loss of public confidence (which they do not concede is supported by evidence) following the decision on 24 June 2003 arose not from the Council's decision or the advice upon which it was based, but the subsequent events of Mayor Carlos and Cr Hollywood not abiding by their undertakings, which caused the controversy to continue. They contend that if those undertakings had been complied with "the entire controversy would have disappeared".
77. Minter Ellison concede that (in the words of Cr Nixon at the meeting) at the time of the meeting the Council was "on the edge of a precipice" of a crisis. Minter Ellison's view is that the crisis was constituted by the internal dispute and its effect upon the Council's capacity for good governance.
78. I respectfully disagree with that assessment, noting that my capacity to disagree is enhanced by the distance in time from which I now view the events. By June 2003 the controversy was the subject of State-wide media attention which was, in general, negative to, or at least questioning of, the position of in relation to Mr Smith and his qualifications:
- Articles appeared on the topic in the *Joondalup Community News* on 14 May 2003 (2104MDM1)
  - Liam Bartlett on ABC radio took talk-back calls from Toni, Sharon, Ernie and Jim on the topic on 14 May 2003 (1804LRB6, pp1253.001-012);
  - Liam Bartlett interviewed Mayor Carlos on 16 May 2003 (1804LRB6).
79. Such media attention was causing or responsive to a significant level of public expression of similar views, which was reflected in public questions taken on notice about the CEO's qualifications at Council meetings (see Minutes, 8 July 2003, pp 4-5):
- 20 May 2003: 77 by Mr Sam Grech; 3 by Mr Steve Magyar; 2 by Mr K Zagrevsky; 6 by Ms K Woodmass; 1 by Mr M Sideris; 5 by Mr V Cusack; 1 by Mr H Reason

- 27 May 2003: 3 by Mr S Grech; 1 by Mr S Magyar
- 17 June 2003: 1 by Ms M Moon; 2 by Mr K Zagrevsky.

80. In my view it was over optimistic to believe that the silence of councillors following the resolution would have resulted in the controversy going away. It was at least an equally predictable result that, if Mayor Carlos and other councillors had remained mute on the topic, the public gallery and media debate might have intensified. The only change may have been to include the whole Council in the expressions of concern which followed the decision of 24 June 2003. For example, in *The West Australian* on 27 June 2003 (3005CMH39) the decision was reported on with supportive comments from Cr Kimber and Mr Smith, and it was further reported that –

*“Mr Carlos said he hoped the council could now get on with running the city. Mitch Sideris, who heads the Mullaloo Progress Association, said the matter is not over and he had collected enough support to call a special electors’ meeting on the issue.  
“We are positioned also to make a representation to the State Government,” he said.”*

81. On 1 July 2003 Liam Bartlett, interviewing the CEO of the Western Australian Local Government Association on ABC Radio on various topics (transcript at 1804LRB6) asked and commented–

*“...have you got a position on this unbelievable situation at Joondalup at the moment?  
...*

*...wouldn’t you agree this...the ridiculousness of this situation reflects badly on local government right across the state?*

*...but Ricky, this is about basic honesty, basic accountability and basic transparency. It doesn’t get more basic than this. Should the Minister intervene?*

*...but they’re elected members, even though they’re your members, of the association, they’re elected members representing the public?*

*...Ricky Burgess, the chief executive officer of the WA Local Government Association, who doesn’t know whether the Minister should intervene or not in the Joondalup situation, so for 100,000 out at Joondalup, you’re still well and truly in the dark.”*

82. On 2 July Mr Bartlett interviewed the Minister for Local Government the Hon. Tom Stephens on ABC Radio (1804LRB2) and made the following comments in the course of questioning the Minister:

*“..Now Minister, local government, Joondalup. Ratepayers have been locked out by this censorship...”*

*Well let's look at the basic principles of this, because this obviously has ramifications for the 144 councils throughout Western Australia...*

*Minister, wasn't the Local Government Act of 1995 intended to combat exactly this, the covert goings on between elected members and staff behind closed doors of council, local government?...*

*Well I don't get frustrated as a media commentator. I get frustrated as a matter of common sense. And I can tell you from the e-mails and the faxes and the letters we've had from Joondalup ratepayers, they're the ones who are truly frustrated, because this is their money, their council and they have been crippled by this since November last year.*

*...the fact is that we can discuss this because part of their motion in coming to this gag order; in voting for this public gag situation; part of the motion alluded to the fact that their lawyers had informed them it would cost them a lot more to keep going if they chose the path of litigation, if they want to go to Court, which tends to suggest to me that that option is available, if they decide to spend more money. Well they've already spent almost 60 grand and this fellow who is the CEO, has at least three-and-a-half years to go on his contract at \$236,000 a year. Do we make the decision every day of the week in Western Australia or anywhere in the western world, for that matter, that justice and the pursuit of truth is a question of economics?"*

83. Less than an hour later Cr Baker rang Mr Bartlett's programme and they had a strenuous debate on air about the issue. Cr Kimber issued a press release dated 4 July 2003 (at 3101DIS51, pp 1739-1736, which Cr Baker said in evidence he had a role in drafting) commenting on a proposed Legislative Council inquiry into the appointment of the Joondalup's CEO. Mayor Carlos announced at the Council meeting of 8 July 2003 that, in the light of Cr Baker's discussion on talk-back radio and Cr Kimber's press release he would continue to speak out on the subject "*until the matter is resolved*".
84. I am also unable to agree with the assessment of Minter Ellison that the good governance issue was one of internal disputation between councillors. That was merely a symptom of the real issue. The real issue was the effect on the good governance of the City of the perception that there was an unresolved issue as to the CEO's honesty and integrity. Unless and until that issue was dealt with, it is now apparent, if it was not then apparent to Minter Ellison, that the agents of agitation to resolve that issue would not let the matter rest.
85. The **Conway-Cook** case was offered as an illustration of the likely consequence to the City of a decision by Council to require the CEO to produce evidence of his qualifications, as if a similar outcome could be expected in Mr Smith's case. There was no advice given as to the magnitude of the risk that a direction to the CEO to produce his qualifications would be regarded as unlawful, or the risk that, if the CEO brought a claim for damages against the

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City for constructive dismissal, that he would be successful. Unless the merits were assessed according to the findings that were likely to be made on the evidence as to the veracity of his qualifications any risk could not be quantified. The advice emphasised that the Council should take a course of action that is in the best interests of the City. However, the only interest identified was the avoidance of litigation and the expenditure of funds on other priorities of the City. There was no mention of the need to preserve public confidence in the office of CEO and the City by respecting virtues such as honesty and integrity.

86. On any analysis of the documents available to Minter Ellison there was clear evidence of serious misrepresentation of the CEO's qualifications. It was in the interests of good government that those issues be addressed and determined. The interest which the City had in preserving a working relationship between the Mayor and the CEO was not addressed. The Act requires the Mayor to provide leadership and guidance to the community (Section 2.8(1)) and to liaise with the CEO on the local government's affairs and performance of its functions. The CEO's functions are set out in Section 5.41 and include advising the Council in relation to the functions of a local government, ensuring that advice and information is available to the Council so that informed decisions can be made, causing Council decisions to be implemented, and liaising with the Mayor.
87. It was apparent that the Mayor had no confidence in the CEO because of the findings that were made in *Jones v. Sutton*, and other information available to him, that the CEO had falsely represented his qualifications. The Mayor had been elected with resounding success in May 2003, notwithstanding his censure by the Council in February. Considerable media attention had been given to the Mayor's position. Questions asked in Public Question Time indicated that he had support, and that there were ratepayers who shared his concerns.
88. The Council decided to instruct Minter Ellison to provide a written report and for this purpose to authorise further expenditure of \$15,000.00 over and above the sum of \$20,000.00 originally budgeted. The amount allowed was evidently the subject of discussion between the solicitors and Mr Robinson. The itemised account shows that following this meeting a further 39.1 hours was spent in preparation of the report with the result that a total of 176.9 hours were spent. On this basis Minter Ellison's time-based charges came to over \$49,000.00 for the period 27 May to 24 June 2003 but the bill was limited to \$35,000.00 in accordance with the Council decisions. The quantum of the bill was very high, viewed against the advice given. It would have been preferable that Council receive the benefit of all of the evidential and factual analysis done by its solicitors rather than a selection of it.

### **Minter Ellison Advice of 24 June 2003**

89. The meeting was adjourned to 24 June 2003. Mr Douglas and Mr Burnett again attended. On this occasion councillors were provided with a detailed letter of advice of the same date to which Mr Douglas spoke, essentially confirming the previous advice regarding the risk of litigation that would arise if the Council directed the CEO to produce proof of his qualifications and enforce that direction: 2110DSC65. The letter of advice was not made available to Council before the meeting, but handed out during the meeting. There was no opportunity for a detailed reading. Mr Douglas said it was a very lengthy report and that it would be easier if he “*walked you through it*”.
90. The letter acknowledged at paragraph 1.2 that a considerable amount of work had been done in preparing the report, including a review of the documentation and identification and analysis of the legal and factual issues relevant to the Council’s resolution. The letter went on to say that the challenge for the Council was to find a resolution that met the overriding objective being that the Council should act in the best interests of the City and not according to personal considerations. At paragraph 2.2 the letter stated:

*“It is in the interests of the City to resolve the matter in a way that is timely, cost efficient and effective (having regard to both financial and other costs) and it satisfies good governance principles, including complying with the relevant legal constraints.”*

91. The letter acknowledged that the Council would be best served by being provided with advice, including warnings, of the potential dangers that lay ahead and acknowledged that some aspects of the advice would not be welcomed by everyone and may be confronting. It said that the situation had the potential to result in long, drawn out and expensive Court proceedings, and possibly a formal inquiry under the LGA that could involve the suspension of all councillors. The legal advice offered “would ensure that the Council is in the best position to make informed decisions, appreciating the consequences of the choices available to it at this critical time”. It suggested that the Council should apply procedural fairness and explained the need for confidentiality to be preserved and an order to protect legal professional privilege.
92. The letter went on to say at paragraph 3.1 that many complex legal and factual issues were raised, the most important of which, described as “the key issues”, being:

*(a) the power to direct the CEO to provide proof of his qualifications;*

- (b) *the potential liability of the City to the CEO;*
- (c) *whether there has been or might be:*
  - (i) *a repudiation by the City of the CEO's contract; or*
  - (ii) *constructive dismissal of the CEO; and*
- (d) *the lessons to be learnt from **Conway-Cook v. Town of Kwinana**.*

93. The advice was that a direction by Council to the CEO to produce qualifications was problematic and would depend on various factual issues, including the significance given to the qualifications in the selection process, the circumstances in which the documentation was provided to Mayor Bombak in November 2002 and the effect of past resolutions to endorse the CEO's appointment. It concluded that there was "*a significant potential risk that a direction of this type by the Council would not be lawful and enforceable*".
94. No explanation was given as to why such a direction would not be lawful and enforceable or what the magnitude of the "significant potential risk" was. The letter stated that making such a direction would expose the City to the risks of legal liability, particularly if it were to attempt to enforce the direction. For these reasons, the letter stated, the solicitors recommended that Council not direct the CEO to produce proof of the qualifications.
95. The next section of the letter of advice (paragraph 3.3) dealt with the limitations of a non-statutory investigation, advising that whilst there would be advantages in establishing the truth as to:
- (a) whether the CEO's qualifications were accurate;
  - (b) what significance was given by Council to the qualifications in the selection process; and
  - (c) whether any inaccuracy was made intentionally to mislead and deceive the Council;

the solicitors did not have the power to compel anyone to produce documents or answer questions or test evidence on oath or by cross-examination, so that the conclusions reached would necessarily be qualified and open to further question or challenge. The advice was that only a Court had jurisdiction to make definitive findings. Accordingly, the letter advised, the question for Council was to decide whether it was in the public's interest to take a course of action which may result in these issues being determined by a Court.

96. The difficulty with this advice is that it purports to dissuade the Council from attempting to determine the facts of matters that are of importance to it on the basis that only a Court can determine facts. This of course is not the case. Fact-finding, and the drawing of conclusions from facts, is regularly done, formally and informally. Mr Douglas admitted that he had participated in many non-judicial investigations requiring factual findings. Whilst it is true that Courts have a particular role in making binding findings of fact in respect of issues joined before them, it is not the case that only Courts are capable of making valid findings. In any event, the solicitors were not being asked to make findings but to advise. It is the business of lawyers to identify issues, to gather and identify relevant evidence, and to arrive at conclusions. This exercise is often done in the context of predicting what a Court is likely to do in the resolution of a dispute. An example of just such a process is to be found in the advice obtained by the Commissioners from Mr H Dixon SC and Mr T Dixon: (1801CJB11). This advice is dealt with elsewhere in this Report.
97. At paragraph 3.4 the letter advised that if the CEO was successful in an action for damages for breach of contract a Court might award \$460,000.00 - \$540,000.00 in damages. It was suggested that legal costs may amount to “several hundreds of thousands of dollars”. The advice did not elaborate on the CEO’s likelihood of success or on the prospects of a compromise that might affect the quantum of damages and costs. In other words, the advice merely gave the worst-case scenario as Mr Burnett acknowledged at T2658 2/12/04.
98. In paragraph 3.5 the advice expressed the conclusion that the evidence available did not establish that the Council itself, on behalf of the City, had repudiated Mr Smith’s contract of employment. It went on, however, to indicate that the CEO might have grounds to claim constructive dismissal if there was conduct attributable to the City which destroyed the trust and confidence required to sustain the employment relationship making it impossible for the employee to do his job. The material considered included evidence that the Mayor had publicly criticised the CEO and questioned his qualifications and suitability, that the Mayor had exerted pressure on the CEO to resign or face the prospect of having his employment terminated, and that the Mayor conducted a Council meeting in a way that allowed public questions to denigrate the CEO. This evidence, it was said, could be used to support a claim for constructive dismissal that could lead to a liability for damages and costs as previously advised.
99. *Conway-Cook v. Town of Kwinana* was said to provide a very useful illustration of the risks to the City if it became involved in litigation. The facts were that the Town of Kwinana

terminated the contract of a senior employee on six grounds, one of which was that he had misrepresented his qualifications when applying for his position. None of the grounds, including the alleged misrepresentation of qualifications was held to be sufficient to justify his dismissal. In relation to the alleged misrepresentation, which the trial judge said was the most serious ground; it was held that the plaintiff's CV suggested that he had completed a course at the London School of Economics, when in fact he had studied a course at a different institution, albeit under the auspices of the LCE. The Court held that the employer had in the selection process considered other issues to be much more important, that the employer's representative, who was looking for reasons to dismiss the plaintiff, had made a far bigger issue of it than it had been during the plaintiff's employment, and that the misrepresentation was only marginally misleading. It was also of significance in the outcome of the case, though not the subject of comment in the advice, that the Town of Kwinana made the decision to employ the plaintiff in the knowledge that what he had equivocally described as "business management studies and economics (London School of Economics)" did not indicate completion of a degree, the plaintiff having made this known to the recruitment consultant, who conveyed it to the employer, before the plaintiff was employed.

100. The problem with the reference to *Conway-Cook v. Town of Kwinana*, is that whilst it may very well serve as an example of employment litigation which is resolved against the employer at considerable expense, and any number of cases can serve that purpose, the advice implied that a similar outcome could be expected in the case of Mr Smith. Of course, *Conway-Cook* turned on its own facts that were, in any event, quite different. The prominence given to the decision in the Minter Ellison advice, like Cr Baker's reference to it at the meeting on 27 May 2003, exaggerated its usefulness as a guide to the likely outcome. In any event, without a full exposition of the facts that were likely to be found in any dispute between Mr Smith and the City, it was impossible for Council to arrive at an informed view of the merits.
101. A risk of litigation is not something to be avoided by a local government at all costs. Many decisions and actions involve a risk of litigation. Planning decisions are but one example. They too can be costly and can have adverse outcomes. Avoidance of litigation by itself is not an indicator of good government. Good government also involves probity, prudence, and principled decision-making. Another useful indication which might be taken from *Conway-Cook* is that a Court would take misrepresentation very seriously.

102. Significantly, the legal advice did not explain:

- (a) why a direction to the CEO to release his qualifications might be found to be unlawful and the likelihood of such a finding; or
- (b) why the conduct of an investigation into the veracity of the CEO's investigations would be repudiatory.

103. The second point had been the subject of advice by Freehills (although not communicated to elected members) to the effect that an employer is entitled to investigate relevant allegations of misconduct by an employee, and that such an investigation is not, without more, a breach of the obligation of mutual good faith or the relationship of trust between employer and employee: 0112DSE14. Section 5.40 of the LGA provides a number of principles that apply to a local government in respect of its employees, including that employees are to be treated fairly and consistently. That provision adds little to the duties implied by the common law in a contract of employment. It was recognised in *Associated Dominion Assurance Society Pty Ltd v. Andrew* (1949) 49 SR (NSW) 351 at 357-358 by Herron J that:

*“A duty lies upon an employee in general terms to give information to his employer such as is within the scope of his employment and which relates to the mutual interest of the employer and employee. If an employee is requested at a proper time and in a reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee, provided these relate to the master's business, the employee is bound, generally speaking, to make such disclosure ... Most of these questions involve matters of degree. It could not be said that every act above described would, if it stood alone, of necessity justify instant dismissal ... Questions asked relating to the employee's activities could be so reasonable and fair that to refuse the information may well be disobedience justifying dismissal. Such conduct may be inconsistent with the duty and may impede the employer's legitimate business associations. It certainly could destroy all confidence between master and servant which is an essential feature of such contracts.”*

104. According to Halsbury's Laws of Australia:

*“The employee is under an implied duty of good faith and fidelity during the currency of his employment, the extent of that duty varying according to the nature of the contract. Although a contract of employment is not a contract uberrimae fidei and so an employee need not volunteer information about his own misdeeds, there may be a duty to disclose:*

- (1) *Matters within the employee's knowledge which affect the confidential interests of the employer.*
- (2) *The employee's own misconduct which has been fraudulently concealed.*

(3) *The misconduct of other employees, especially if the employee in question has responsibility for those others, even if that means the employee of necessity disclosing his own misconduct.*”

105. Authority is cited for the proposition that an employee must not place himself in a position where his acts or interests conflict with his duties as an employee. Fraud committed to obtain employment will usually be a fair ground for dismissal. If a prospective employee answers an employer dishonestly and the truth subsequently emerges, then he or she can be dismissed where the honesty was material to the making of the contract.

106. In *Blyth Chemicals v. Bushnell* (1933) 49 CLR 66, Dixon and McTiernan JJ described the duty of fidelity and good faith as follows:

*“Conduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal ... But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.”*

107. In *English and Australian Copper Co. Ltd v Johnson* (1911) 13 CLR 490 at 499 Griffith CJ said that in the case of a business in relation to which those to whom it provided a service necessarily imposed a trust in the business to be honest, employers could not keep in their employment an employee who engaged in acts of dishonesty.

108. There is a requirement of honesty in the CEO of a local authority which is sufficient for the principle in this case to assist in determining the issues arising from the circumstances under inquiry.

109. According to Macken, O’Grady, Sappiden and Warburton, The Law of Employment, Law Book Co, 2002, there is some debate as to whether the duty to answer questions extends to giving answers that may be self-incriminatory, but the issue in such a case would not be whether the question was lawful, but whether there was an obligation to answer.

110. The Minter Ellison advice emphasised the employer’s duty and the breach of trust and confidence that may be occasioned by unjustified verbal abuse and accusations of

dishonesty which may well afford remedy. However, the advice failed to address those obligations which the law recognises as being owed by an employee to an employer, such as have been cited above. Mr Smith and Mayor Carlos occupied statutory positions in which they were required to co-operate with each other in the interests of the good government of the City of Joondalup. Trust and confidence were necessary elements of that relationship. Those elements were missing because the CEO had failed to give a satisfactory account of discrepancies between his CV and his actual qualifications.

111. Although Mr Smith complained of harassment by Cr Carlos, it is clear on the evidence that prior to his election as Mayor, Cr Carlos had done no more than argue, in December 2002 and February 2003 for an investigation into issues that were attracting expressions of public concern and media attention. Upon his election, it was reasonable for Mayor Carlos to request Mr Smith to produce his qualifications in the interests of preserving the requisite working relationship. On a number of occasions he said that if the professed qualifications proved to be valid then he would apologise and be done with the matter. Mayor Carlos' concern reflected the interests of the City of Joondalup in ensuring that its CEO was a person of honesty and integrity.
112. A request of the CEO to produce his qualifications was not oppressive or unreasonable. Mr Smith had gathered his qualifications in order to present them to the Mayor and Mr Loader in December 2002, and showed them to Crs Prospero and Brewer in May 2003. Mr Smith gave no good reason for declining Mayor Carlos' request. Whilst it may be true that the Mayor had no power to direct Mr Smith, the Council did, and the advice of Minter Ellison contains no reason why any Court would conclude that it was not in the interests of the City that the issue be resolved in that manner.
113. The expressions of confidence in the CEO were made in different circumstances by a differently constituted Council. The previous Mayor undoubtedly had confidence in Mr Smith. Times had changed and there were new councillors and a new Mayor to deal with. Public concern and media attention had escalated. The issue was damaging the reputation of the City. There was a growing loss of public confidence. Importantly, there was the discovery in May of the CV given to MRA which showed that while it described diplomas in Environmental and Pollution Studies and Town and Country Planning, and Mr Smith had claimed diplomas in Environmental Science, "business in management" and "Land and Engineering, surveying and drafting" in evidence to the NSW District Court, the memorandum of 25 November 2002 spoke in more general terms of a "post-graduate

qualification course in Business Management” and a “post-graduate course...in Environmental and Pollution Studies”. All of these facts together with the statutory requirement of liaison between Mayor and CEO rendered the direction not only reasonable, but necessary. The same factors, and respect for the Mayor’s role of leadership and guidance of the community, imposed an obligation on Council to support the Mayor on this point. It was patently clear to the elected members, as it was to Mr Douglas and Mr Burnett, that there had been a misrepresentation. Accordingly, it was apparent that Mr Smith’s refusal to show Mayor Carlos his qualifications was based on his interests, not those of the City.

114. It was open to conclude from an inspection of Mr Smith’s documents that his qualifications were misrepresented in his CV provided to RAL and in the District Court and the memorandum of 25 November was in such general terms as to obscure the difference between those previous representations and what the certificates revealed. Negligent misrepresentation could be excluded to a significant extent (or at least become a matter which Mr Smith had the onus of establishing) by reference to the CVs, which he produced –
- (a) to the Coffs Harbour City Council, which referred to one Diploma in Environmental and Pollution Studies and Certificates in Town and Country Planning and “Land and Engineering Surveying Drafting” and a “Post-graduate qualification, Business Management”; and
  - (b) to the Warringah City Council which referred to a “Post-graduate Diploma, Environmental and Pollution Studies”, “Diploma in Town and Country Planning”, “Certified Town and Country Planner”, “Land and Engineering Surveying” (no certificate or Diploma specified) and “Post graduate qualification, *Bachelor of Business (Management)*” (emphasis added).
115. The report by the recruitment consultant RAL to the Council relied on those qualifications as a material factor in recommending Mr Smith as a candidate for interview by the Council. Mr Smith obtained the benefit of qualifying as an eligible candidate and enhancing his prospects of selection.
116. The evidence available in June 2003 was, therefore, sufficient to ground a prima facie case of criminal fraud, an election by the City to rescind the contract of employment for misrepresentation and dismissal for gross misconduct.

117. Minter Ellison submit that Mr Smith’s memorandum of 25 November 2002 revealed that he did not have a bachelor’s degree and therefore the Council had made an election to affirm, rather than repudiate, his contract, based on that knowledge, on 17 December 2002, and had no remaining capacity to consider a rescission for misrepresentation in June 2003. Firstly, it is by no means clear to the Council by 17 December 2002 that there was any misrepresentation in relation to a bachelor’s degree. In the memorandum of 25 November 2002 Mr Smith did not concede or suggest any misrepresentation. Mr Smith, when discussing it with Cr Prospero dismissed the reference to “Bachelor” in the report of RAL as an error by RAL. What the Council understood from Mayor Bombak’s understanding was that Mr Smith was adequately qualified, not that he was admitting a fraudulent misrepresentation which gave them a right of rescission, which they were electing not to exercise. Further, revelation that Mr Smith did not have a bachelor’s degree followed by confirmation of his employment does not comprise an election in relation to fraudulent misrepresentations in his CV that he held diplomas in Environmental and Pollution Studies and Town and Country Planning.
118. The ambiguous descriptions in the memorandum of a “Qualification in Land & Engineering Surveying”, “Qualification as a Certified Town & Country Planner” and “Post-graduate qualification course...in Environmental and Pollution Studies” and the showing of documents to Mayor Bombak and Mr Loader of documents in a context where they were not comparing them with his previous representations did not place the Council in a position where Mr Smith could rely on an argument that the Council knew the truth of his misrepresentations concerning those qualifications and was in a position to make an informed election on 17 December 2002.
119. Even if it can be said, as contended by Minter Ellison, that the Council had discovered an untruth in relation to the bachelor’s degree that is not an end to the matter. As Hale J said in ***Evans v Benson*** [1961] WAR. 12, at 15:
- If a Plaintiff, having discovered the untruth of one representation elects to affirm the contract, he may nevertheless rescind upon learning the untruth of the second misrepresentation if the latter is unconnected with the former..., but he may not do so if the two representations are closely interconnected...*
120. Further, as Rich ACJ, Dixon and McTiernan JJ. said in ***Elder's Trustee and Executor Company Limited -v- Commonwealth Homes and Investment Co Ltd*** [1941] HCA 31; (1941) 65 CLR 603 (7 November 1941);

*Where there are two independent grounds entitling a party to rescind or disaffirm, we do not think that, because a party having knowledge of the facts giving rise to one of them so conducts himself that he must be taken to have affirmed, he therefore is precluded on discovery of the other from rescinding or disaffirming. We are not dealing with a case where there is an actual decision taken to adopt or affirm the contract of membership by a person who knows that he may if he choose avoid it. The plaintiff did not actually know that an election was vested in him by reason of the fact of his failure to pay the full amount of allotment and application money in cash.*

*It is unnecessary to discuss the question what, if any, distinctions may exist in cases where the party, having in fact two grounds for rescission, but being ignorant of one and aware of the other, decides to affirm, knowing that he is entitled in point of law to elect. In such a case the question whether, notwithstanding his election to affirm, afterwards on discovering the second ground he may resile from his former election and rescind, may depend on the reasons for his decision and the influence which full knowledge might have had as a reason for deciding differently. It is enough to say that a party who is ignorant of his right to elect, although he knows of facts which would in law afford a ground for rescission, cannot, because he failed to avail himself in due time of the first ground, be precluded from relying on a second ground of rescission, which he was then unaware of but afterwards discovers. Nor in our opinion will he be precluded by laches or acquiescence. His conduct cannot affect his right to avail himself of the newly-discovered ground.*

121. It is, therefore, even on the facts as asserted by Minter Ellison (which I do not accept to be that case), an open question, as a matter of fact and law, whether the Council was sufficiently informed in December 2002 and February 2003 of a misrepresentation, so as to render its expression on confidence in the CEO an election to rescind.

### **The Decision of 24 June 2003**

122. In the result, the Council was led by the legal advice to pass the following recommended motion which was carried 12/3, Mayor Carlos and Crs Hart and Hollywood dissenting.

*Moved Cr Brewer, seconded Cr Kimber that Council:*

- (1) Notes and accepts the advice and recommendations of Minter Ellison contained in its report dated 24 June 2003 in response to the resolutions of Council on 27 May and 17 June 2003;*
- (2) Notes and accepts, in particular, the advice from Minter Ellison in relation to:*
  - (a) the nature and effect of legal professional privilege, its relevance for the City in this context, and the consequent need for confidentiality;*
  - (b) the nature of the claims made concerning the selection and appointment of the Chief Executive Officer (“CEO”);*

- (c) *the extent to which these matters were relied on by the Council in the selection and appointment process;*
  - (d) *the limitations of any non-judicial inquiry or investigation and the fact that only a Court, with powers to compel the production of evidence and to test the credibility of evidence by taking evidence on oath or affirmation, and through cross-examination, would be able to make definitive findings of fact about these matters;*
  - (e) *the potential legal significance and effect of these matters on the interests of the City, having regard to precedent;*
  - (f) *the costs, financial and otherwise, to the City of pursuing or defending legal proceedings in respect of these matters, the length of time that legal proceedings may take, and the alternative priorities for the City's use of its resources for the good governance of the City; and*
  - (g) *the conclusion that the Council would be acting lawfully and properly in deciding not to question or pursue any further issues relating to the selection and appointment of the CEO, including his qualifications;*
- (3) *Determines that it is in the interests of the City, including the good governance of the City, that:*
- (a) *issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;*
  - (b) *the Mayor and individual councillors should make no further public statements in relation to these issues;*
  - (c) *the Mayor and the CEO each act in a way that allows them to carry out, and facilitates them in carrying out, individually and jointly, their functions in the best interests of the City;*
  - (d) *a copy of these resolutions be provided to the Department of Local Government and Regional Development; and*
  - (e) *Minter Ellison with City officers, provide an oral briefing to senior officers of the Department of Local Government and Regional Development – to the extent that this can be done without affecting the City's legal professional privilege;*
- (4) *Reiterates its previously expressed strong support for and full confidence in Mr Denis Smith as the City's CEO (see resolutions of 17 December 2002 and 18 February 2002);*
- (5) *Agrees that, in the interests of the City and to ensure that the City's legal professional privilege that applies to it is retained, Minter Ellison's report of 24 June 2003 is to remain confidential and must not be disclosed except in the form of the confidential oral briefing to the Department of Local Government and Regional Development referred to in paragraph 3(e).*

123. There was an assumption inherent in much of the evidence of some councillors, and questions put on behalf of some councillors, that every oral or written communication or advice by a lawyer is legal advice and therefore beyond the expertise of a person who is not a lawyer, and incapable of being questioned by any person who is not a lawyer engaged to advise on the matter. It was evident that a number of councillors were concerned that if they

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did not act in accordance with legal advice then they would be at some personal risk. It was not apparent that Council understood the difference between legal advice and strategic advice.

124. Legal advice is about the law, and includes what the law is and how it is to be applied to the facts under consideration. Often, it includes predictions as to the facts to be found and the conclusions to be drawn by a Court or other decision-making body. Such advice would have assisted the Council. Strategic advice comprises advice as to what action to choose in order to achieve a particular result, based on the predictions provided by the legal advice as to potential results. Usually there will be more than one possible action or approach to take, with a variety of possible results. In this instance Minter Ellison advised on a particular approach without fully advising on the potential results of other possible approaches. Furthermore, there is no doubt that councillors would have been assisted and should have been informed, by the evidence made available to its solicitors but not to them.
125. After the Minter Ellison advice was discussed and the recommended motion passed, Cr Baker put up a motion without notice that “the councillors of the City of Joondalup hereby apologise to our City’s CEO for the manner in which this whole affair has been handled by the Mayor, Don Carlos”. (0111DSC68) Mr Douglas gave his opinion on this motion. He said that he framed the resolutions carefully so that they would not be directed at a particular individual, as it was best for Council to be united in making the resolution work. He also raised concern about possible prejudice against the City if there was to be a public apology such that if the CEO were to take action against the City the apology could be used in support of his action against the City. With this advice the seconder was withdrawn and the motion lapsed: 0111DSC68.
126. Directly after this lapsed motion Cr Baker attempted to raise another, that “the councillors of the City of Joondalup look forward to continuing to work with our CEO in making our City an even better region for our residents to live in, and in striving to achieve our City’s vision statement”. This motion also lapsed for want of a seconder: 0111DSC68. Cr Kimber then moved that “in the interests of good governance by this Council, that the CEO or the executive officer be instructed to inquire with (sic) the West Australian Police Service Fraud Squad who lodged a formal complaint regarding our CEO and ask that person to withdraw that complaint immediately, to hold up any further investigations (sic).” Cr Baker seconded this motion: 0111DSC68. Mr Douglas commented that the Fraud Squad would not be likely to stop their investigations because the complainant withdrew due to the public interest

factor. He believed that the only effect of passing a resolution of this kind would be to indicate what Council's view of the matter and/or who the complainant was: 0111DSC68. Cr Kimber's motion was put and lost: 0111DSC68.

127. Mr Carlos said that he did not agree with the letter of advice from Minter Ellison, as it did not give any advice in relation to whether the Council could request Mr Smith to produce his qualifications. Mr Carlos said that he wanted a second opinion on Minter Ellison's advice that "if the Council sought to direct the CEO to produce proof of his qualifications and to enforce that direction it would expose the City to a risk of liability". Mr Carlos did not agree with Minter Ellison's advice that action that he had taken could be used to support a claim by Mr Smith against the City for constructive dismissal, exposing the City to damages of up to \$500,000 plus legal costs. He also did not believe that an action for constructive dismissal would "stand up in Court": T1226-1230 21/10/04. For these reasons he did not agree with the motion and voted against it.
128. Given that a significant majority passed the motion, Mr Carlos said that he accepted that the resolution limited what could be done in the future. He also accepted that it was reasonable for councillors to accept the recommendations that had been made by Minter Ellison and accepted that the effect of the resolutions were that he could no longer make any public statements about the matter. He said that at the time he intended not to speak to the media until two other councillors (Baker and Kimber) who voted for the motion, broke the resolution: T1235 21/10/04.
129. Mr Carlos gave evidence that at this stage he would have preferred that Council instruct Mr Smith to produce the documents relating to his qualifications as they had been shown to some councillors, the previous Mayor and Mr Loader. It was apparent to Mr Carlos that these people could not accurately recall what they were shown, and it was patently clear to him from the information such as the 25 November 2002 memorandum, Mr Smith's admission in *Jones v Sutton* and letters from relevant tertiary institutions, that Mr Smith misrepresented his qualifications in his CV, but not to other councillors: T1235-1236 21/10/04.
130. Mr Brewer saw the CEO issue as one that needed to be resolved. He said he may not have liked the advice but in the best interests of the City he felt that he had to follow it. He agreed with Mayor Carlos that it was a major issue, and a trust issue, but in the best interests of the City he followed the advice given: T1689-1690 17/11/04. Mr Brewer said that he was not

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concerned that the legal advice did not deal with the issue of Mr Smith's misrepresentation of his qualifications as he believed that was dealt with prior to him coming onto Council: T1690 17/11/04. The issue of qualifications should have been looked at if it had not been so resolved: T1701 17/11/04.

131. Ms Hart gave evidence that she believed that Minter Ellison were not dealing with the real issue and thought that the advice dealt with protecting Mr Smith: T1774 18/11/04. She voted against the motion as she did not think that Council would be acting lawfully and properly in not pursuing the matter any further. She felt that ratepayers wanted the issue solved, not ignored, and nobody had proved to her that Mr Smith was doing a good job as CEO. She felt that it was a matter of honesty on Mr Smith's part and he could have put an end to the issue: T1778-1779 18/11/04. She did not think it was a valid option for the City to decide not to question and pursue the matter, as she could not conceive how it was not lawful and proper to pursue the truth. Ms Hart also said that she knew that *Conway-Cook v Town Kwinana* was not a persuasive precedent as she had researched the case after the meeting on 17 June: T1780 18/11/04. Ms Hart believed that being in the minority on this issue alienated her but did not think that it had any impact on her capacity to perform her duties as a councillor: T1782 18/11/04.
132. Mr Caiacob said that he voted in favour of this motion as he was relying on Minter Ellison's advice, and he had no information that led him to believe he should vote otherwise. Mr Caiacob questioned how he could endorse a vote of confidence in the CEO due to the uncertainty as to whether there had been an honest or a dishonest representation. He also felt that Mr Smith had something to hide by getting legal advice on not showing his qualifications. Mr Caiacob said that he did not have full confidence in Mr Smith and it had been broken for him when Mr Smith would not show him his qualifications, when he had shown other councillors: T1901-1902 22/11/04. Even though he had these doubts, Mr Caiacob said he voted for the motion on the basis of the information he received from the lawyers on the night, taking into account what they had said, how they had said it, and the potential impact on the city in the future. Mr Caiacob explained it that his decision was based "more on the advice we had received from the lawyers than my own personal expectations or wants and beliefs": T1904 22/11/04.
133. Mrs Walker gave evidence that the Minter Ellison letter of advice was lengthy and she only had a chance to scan it in the meeting: T2219 25/11/04. It did not occur to her to ask for the item to be postponed to consider the written advice and oral advice in more depth: T2225 25/11/04. Mrs Walker said she supported this motion on the advice given to Council from

Minter Ellison, and as she had no other advice at her disposal at that time she voted according to the advice she had received: T2242 25/11/04. Mrs Walker said that on reflection she did not read the motion adequately, and if she had read it properly and understood it fully, then she would not have voted in favour. Mrs Walker believed her confusion, the lateness of the hour and the advice to Council all contributed to her decision: T2248 25/11/04.

134. Mr Hollywood gave evidence that he read the *Conway-Cook v Town of Kwinana* decision and believed that the situation at the City of Joondalup was very different to the one at the Town of Kwinana. Mr Hollywood said this made him change his position to support Cr Carlos: T2436-2437 29/11/04. Mr Hollywood said that he did not support this motion, as he believed that the Council still had a duty to investigate the CEO and he could not accept the advice that Council could not investigate the issue. At the time he voted against it, Mr Hollywood was concerned that he was going against legal advice that the Council had received but he thought it was appropriate to investigate as Council still did not know what qualifications Mr Smith possessed: T2462-2463 29/11/04.
135. Mr Nixon said that it was a major consideration for him that the legal advice said that findings of fact could not be definitively made except by going to Court, and *Conway-Cook v Town of Kwinana* presented a similar example and indicated to Council why they could not just sack Mr Smith: T3802 16/12/04.
136. Mrs Mackintosh gave evidence that at this stage she thought that there were no grounds for dismissing Mr Smith and she gave no significance to the fact that Mr Smith appeared not to have the qualifications he said he had: T4505 28/1/05. She voted in favour of the motion in reliance on Minter Ellison's advice on what was the appropriate course for the Council to take. She did not think there was an alternative course that could be followed. She did not consider it was in the best interests of the City for an investigation to be carried out to resolve any remaining questions about the CEO: T4506 28/1/05. When she voted for the matter of Mr Smith's employment and qualifications not to be pursued she hoped it would be the end of the matter, but knowing Mayor Carlos did not think it would be. Mrs Mackintosh thought that the media interest was drummed up by a handful of ratepayers who were Mayor Carlos' supporters: T9086 18/4/04.
137. Mrs Mackintosh said that Mayor Carlos had made the allegations, but had not produced anything to substantiate them: T5968 22/2/05. When it was put to Mrs Mackintosh that he had in fact supplied a list of newspaper articles, references to Court transcripts and reasons

for decision and also letters from universities, she said that Mayor Bombak had investigated the issue and assured Council that the CEO was fine: T5969 22/2/05. Mrs Mackintosh took the view that Carlos was a ‘lone ranger’ who was out to be destructive of the City of Joondalup: T5971 22/2/05. She said that she was sceptical of anything he said because she had never seen him contribute anything positive to the City of Joondalup and she was critical of the way that he dealt with people: T5973 22/2/05. In this regard, Mrs Mackintosh referred to the budget meeting in 2000. She said that if another councillor had raised the issue of the Mr Smith’s qualifications she would have responded differently: T5974 22/2/05.

138. Mr Kimber confirmed that he seconded the motion. He understood the purpose of it was to put an end to the CEO issue and the allegations that had been levelled against him and for the City to get on with its business. He believed this set of motions would put an end to the issue as Council would be acting lawfully by not pursuing any further the production of Mr Smith’s qualifications, and having conducted the issue in accordance with due process. Mr Kimber said that he was aware that there may have been some evidence that Mr Smith had misrepresented his qualifications and believed that Mr Douglas had said that this misrepresentation was material and the question was whether it warranted any response by the City: T5619 15/2/05. Mr Kimber thought that the matters raised in the allegations, if they were true, indicated dishonesty on the part of Mr Smith, but he took the view that they were merely allegations as he had no evidence of them. He also did not view it as important as he believed that Mr Smith did not use those qualifications to gain the position: T5620 – 5621 15/2/05.
139. Mr Kenworthy said he based his decision on legal advice received from Minter Ellison: T6716 - 6717 3/3/05. He said that significant in his decision was the fact that Minter Ellison had given advice that they could not make any findings of fact, only a Court could do that, and based on their advice, voting in favour of the motion would mean that questions would remain unanswered: T6720 3/3/05.
140. Mr Prospero gave evidence that he did not get an opportunity to read the letter of advice during the meeting and objected to receiving it at the meeting. He said that it was a very detailed letter and to try and read it and comprehend it was very difficult: T6756 4/3/05. Mr Prospero said that the Council were advised that it was lawful and proper to deal with the issue in the way that they did, and he did not want to do anything illegal or contrary to the LGA. He said that he followed his understanding that councillors should follow legal advice, unless there is a strong feeling that the legal advice is incorrect. He felt that the choice he had was to follow legal advice or seek out further independent advice from another firm. He also said he was concerned about personal liability and thought that if anything was done

contrary to the LGA then councillors could be personally liable as he was advised at a WALGA course that all decisions made should be lawful: T6767 4/3/05.

141. Mr Baker gave evidence that he believed that the thrust of Minter Ellison's advice was that Mr Smith could not be compelled to produce his qualifications and that it would be difficult to prove that a misrepresentation induced his contract: T9193 21/4/05. Mr Baker said that he thought that *Conway-Cook v Town of Kwinana* was a good example in terms of the issue of reliance. He agreed that Minter Ellison advised the worst-case scenario: T9225 21/4/05.
142. A motion was passed that elected members hand back the letter of advice, but Mayor Carlos and Crs Hart and O'Brien declined to do so.
143. Councillors were not given the legal advice before the meeting, nor given a chance to peruse it at their own leisure or do their own research on it. councillors were not even given a chance to read the written advice, as they were "walked through" the advice during the meeting and then expected to make a decision. Councillors could have asked for the item to be postponed to consider the advice before making a decision. It is evident that most councillors were surprised that Minter Ellison recommended that the issue not be pursued. They did not consider any alternative as none was offered. The risks of the recommended course of action, ie. not to investigate, were not considered. No one considered or suggested mutual separation at this point despite BDW's offers. Proper attention was not given to the significance of these overtures. Council resolved not to pursue the matter without knowing the outcome of the Fraud Squad investigation. In this case it would have made no difference, but it indicates undue haste in arriving at a decision.
144. Councillors failed to recognise that there was no advice given as to the merits of the City's position in the event of litigation, or the reasons why a direction to the CEO might be viewed as unlawful. Few councillors recognised the difference between strategic, as opposed to legal advice. The debate reveals that little, if any, attention was given to the reasonableness or otherwise of the CEO's position, and as to whether he was acting in accordance with his statutory, contractual and ethical obligations. There was no mention in the advice or the debate of the Mayor's statutory role of providing leadership and guidance to the community or of the City's interest in ensuring that he enjoyed a relationship of trust and confidence with the CEO.

## Conclusions

- A. It was open to conclude from an inspection of Mr Smith's documents that his qualifications were misrepresented in his CV. Negligent misrepresentation could be excluded to a significant extent by reference to the CVs, which he produced to the Coffs Harbour City Council and Warringah City Council, which were in similar terms. The report by the recruitment consultant to the Council relied on those qualifications as a material factor in recommending Mr Smith as a candidate for interview by the Council. Mr Smith obtained the benefit of qualifying as an eligible candidate and enhancing his prospects of selection.
- B. The evidence available in June 2003 was, therefore, sufficient to ground a prima facie case of criminal fraud, an election by the City to rescind the contract of employment for misrepresentation and dismissal for gross misconduct.
- C. The decision on 17 June 2003 by all elected members other than Mayor Carlos to pay Mr Smith's legal fees was irresponsible. It was based upon insufficient information from the Administration and should not have been made. It could not be justified as being in the interests of good government of the City when Mr Smith's solicitors had, by this time, given clear and unequivocal notice of Mr Smith's reservation of his right to sue the City for damages for repudiation of his contract.

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## Part 7

### The Pressure Increases

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#### Council Meeting: 8 July 2003

1. At the meeting of Council on 8 July 2003 Mayor Carlos made the following statement, recorded in the minutes:

*“Councillors, since the last Council meeting I have been approached by the talkback radio, by all the print media and by all the television stations wanting me to comment on this. I have endeavoured not to make statements and advised that I have no comment, however, two councillors within this group have gone on camera.*

*I have also had time to read the transcript of Cr Baker’s talkback radio, and also received a copy of the press release that Cr Kimber released last Friday and also sent to The Sunday Times and Wanneroo Community News on Sunday. Both of these papers asked me to comment on Cr Kimber’s press release. I have decided that no one in this organisation, after those things have happened, really wants to gag this Council and I have decided that I will not be gagged and I am going to speak out on this subject.*

*I will continue to speak out on this subject until the matter is resolved ...”*

2. Mr Darryl Schorer, an officer of DLGRD, was directed by Mr Cole to attend and observe a number of Council meetings upon which he reported: 0702SJC1. In relation to those meetings he observed: “The Mayor appeared to have only a limited knowledge of the City’s Standing Orders, does not have the respect of the majority of members and is unable to control unruly and disrespectful behaviour”.
3. Mr Schorer suggested that where points of order were made which were clearly not points of order the Mayor should have ruled them out of order. He pointed to other instances where people would stand up and interject contrary to Standing Orders. He recommended that the Mayor be offered a Mayor’s and President’s Support Programme, which is a mentoring scheme.

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4. Mr Schorer was asked about the statement in his report that, “Elected members who are on the opposite faction to the Mayor have no respect for the position of the Chair or the Mayor”. He gave evidence about what he meant by this at T5382 10/2/05:

*PRESIDING MEMBER: The word “faction” has taken on a significance in this Inquiry. When you were using that word what did you have in mind? --- To me it was an identified group, the same people, the same councillors all the time. Identified, what, in – by you in the course of the meeting or - ? --- That’s correct. Alright, and is that all you used to identify them in – with that word? --- Well, rather than the “faction” may be – obviously I’m aware that people are talking about what a faction means.*

*Yeah? --- But I would just say a group of likeminded people.*

*And why did you think that – what drew you to that conclusion, that they were likeminded people? --- Well, they were the same people raising – on issues dealing with, say, the CEO, the same people would always be of a similar mind in objecting to what other people had raised.*

5. When questioned by Cr Carlos (T10321 10/5/05) Mr Schorer identified Crs Baker and Kimber as making continual interjections and being disrespectful to the Chair.
6. Mr Cole attended the meeting on 8 July 2003 with Mr Schorer and reported as follows (0702SMC9):

*“The first part of the meeting covering the agenda items of public question time, confirmation of the minutes and announcements by the Mayor without discussion, was a shambles and a disgrace to local government. It was characterised by poor chairmanship, constant interjections from a specific faction or group, lack of respect for the Chair, grandstanding and factionalism. There was regular interjection from the public gallery. The Mayor called two adjournments during the meeting because of unruly behaviour within the Council.”*

7. The report noted that when Council advanced to the main business items appropriate behaviour and decision-making were restored. It was also noted that after 30 minutes Council, against the wishes of the Mayor, closed public question time because all but two of the questions related to Mr Smith’s qualifications. He noted that the Mayor tried to make a statement on the matter under the agenda item “announcements by the Mayor without discussion”, but was silenced by a questionable Council resolution. Mr Cole noted that he had been informed by Mr Higham that staff morale was low and the City was rapidly becoming dysfunctional. He recommended urgent training in meeting procedures and the

establishment of a peer support group to mediate on interpersonal conflicts between elected members.

8. Cr Baker gave notice of his intention to move a motion at the meeting on 29 July 2003 which read:

*“That in view of the appalling manner in which Mayor Carlos chaired the ordinary Council meeting on Tuesday 8 July 2003, the Mayor be stood down from chairing all future ordinary Council meetings until such time as he has had the benefit of tuition in respect of his role as a chairperson by either an officer of the Director General of Local Government or a representative from the Local Government Association.”*

9. A report was provided to Council with an officer’s comment that according to the LGA in order for the Mayor to no longer preside at Council meetings he would have to be unavailable, unwilling or unable to do so and if so then the Deputy Mayor should preside. It was also said that the Council may not have authority to make such a decision. This item was deferred until the next meeting of Council on 19 August 2003:0111DSC74.
10. Although the Minutes of the meeting of 8 July 2003 do not reveal any defect in the manner in which Mayor Carlos chaired that meeting, tape recordings of other meetings have been heard which evidence histrionics in the course of debates. Having regard to the inevitably controversial nature of the 24 June resolution, it is not surprising that the meeting was observed to be tempestuous. All of the observations of Mr Schorer and Mr Cole have been corroborated by the evidence of tapes and transcripts of other meetings which clearly demonstrate the inappropriate raising of repetitive groundless points of order to interrupt debate, discourteous interjections and blatant disrespect to the Mayor. Such evidence confirms Mr Schorer’s identification of Crs Kimber and Baker in this regard. Such fractious behaviour was evident during the chairmanship of Mayor Bombak, viz, the meetings of 17 December 2002 and 18 February 2003. The meeting contained two periods of public question time and the questions asked were extensive and on a variety of topics. An approach to chairing a meeting which allows for a full participation of members of the public by way of public questions is consistent with the objects of “greater community participation in the decisions and affairs of local governments” and “greater accountability of local governments to their communities” set out in Section 1.3 of the LGA.

## Media Attention Increases

11. On 27 June 2003 *The West Australian* published an article headed “Probe on Civic Chief called off” which quoted Cr Kimber as saying that the issue of the CEO’s employment had distracted councillors from other important projects: 3005CMH39. He said that Mr Smith was an excellent chief executive and had saved the cost of his contract through restructuring and good management. Mr Smith was quoted from a media statement in which he said the issue was the most stressful he had experienced. He said he was prepared to work with Mayor Carlos but that it was up to him to accept the umpire’s decision. Mitch Sideris, President of the Mullaloo Progress Association, was quoted as saying that he had support for a special elector’s meeting and would approach the State Government: 3005CMH39.
12. On 1 July 2003 Ms Ricki Burgess, Chief Executive Officer of the WA Local Government Association was interviewed by Liam Bartlett who commented that the situation at Joondalup was “about basic honesty, basic accountability, and basic transparency”. He suggested that the Minister should intervene: 1804LRB6. Ms Burgess said:

*“It really concerns me when local government cops such a battering in the media about things like this. I mean, councillors are like everyone else, and employees the same, they stumble, you know, and when that happens what we need to do is jump in and find ways to help them, rather than getting in there and criticising and providing judgment.”*
13. On the following day Mr Bartlett interviewed the Minister, the Hon Tom Stephens, who said that his Department had obtained legal advice that he could not intervene: 1804LRB6. The Minister described the majority on Council as “the dominant Liberal faction ... led by Chris Baker”. Later that same day Cr Baker telephoned Mr Bartlett and was interviewed on air. Challenged about the Council’s decision not to investigate the CEO’s qualifications, Cr Baker said that the Council was acting on legal advice. He accused anti-Smith callers to Mr Bartlett’s programme of being “stage-managed”. He said the issue of qualifications was a red herring.
14. Mr Baker said that he went on Mr Bartlett’s radio program after he had spoken to a legal colleague who told him to call in and defend himself as the Minister was being critical of him. He knew that by doing so he would breach the Council resolution: T9214 21/4/2005.
15. The Inquiry received evidence of a press release dated 4 July 2003 by Cr Kimber (3101DIS51) which stated his opinion that the Minister should deal with other matters in

priority to the issue of the CEO's qualifications. The news release stated that the State Government had an "obsessive interest" in Joondalup Council. The "more pressing issues" identified by Cr Kimber were said to involve Mayor Carlos' involvement in the non-renewal of Mr Delahaunty's contract, his proposal to appoint Mr Baker as the CEO to replace Mr Delahaunty, the involvement of the CFMEU, the Premier and the ALP in the nomination and election of Mayor Carlos, the alleged involvement of the Minister, Mayor Carlos, State Labour MPs and the Director-General in dealing with complaints about the conduct of Mayor Carlos, the manner of Mayor Carlos' handling of an investigation of a complaint against Cr Hollywood, the Minister's involvement in "forcing unwilling Fraud Squad officers to investigate the CEO's qualifications" and the alleged secret meetings between Cr Carlos, the Minister, Mr O'Gorman MLA and Mr Travers MLC. Mr Kimber was unable to give any evidence substantiating these allegations and none has been disclosed to the Inquiry. Mr Baker said that he was the author of Cr Kimber's press release. He believed that if he had released it in his own name it would have been dismissed as party political: T9226 – 9227 21/4/2005. The conduct of Cr Kimber and Cr Baker in respect of the news release was in breach of the Code of Conduct's ethical standards of respect for persons, justice, and beneficence and breached the requirement that elected members deal with all sections of the community in an open, honest and forthright manner, make no allegations which are improper or derogatory, and refrain from any improper conduct which may cause a reasonable person unwarranted offence or embarrassment. The new release was also defamatory of a number of persons.

16. On 10 July 2003, Mr Cole was interviewed on ABC Radio (0702SMC10) and commented on the Council meeting of 8 July. He said that Council had "done all the right things legally". He was asked whether a statutory inquiry should be conducted and responded by saying that the Minister was awaiting the outcome of the Standing Committee inquiry. The interviewer, Mr Adshead, put to Mr Cole that if the matter was allowed to "tick on" the damage could be great. Mr Cole said he favoured a mediation process.
17. On 27 July 2003 *The Sunday Times* reported ("Joondalup CEO Debacle: Truth at last, Smith's academic history revealed") that it had obtained a copy of the CEO's memorandum of 25 November 2002: 1901CJB14. The article stated:

*"The list differs radically from the qualifications cited on his CV that was considered by the Council before his appointment in October 2001. Most significantly, the memo does not mention any degree or diplomas."*

18. The article reported that Mr Smith was yet to explain why the qualifications described in the memo did not match up with his CV, observing that they were also inconsistent with other CV's submitted in applications for previous positions which specified a requirement for tertiary qualifications.
19. *The Sunday Times* editorial of the same date ("CEO can end row") stated:

*"Councillors who support Mr Smith say his accusers, led by Mayor Don Carlos, have hidden political motives. That may or may not be the case. By describing the issue of Mr Smith's qualifications as a furphy or red herring, they reveal that their own vision is fogged by political interests. They cannot see that, to the rest of the community, it is a black-and-white honesty issue.*

*To suggest, as some have done, that Mr Smith's qualifications are irrelevant, is insulting to the thousands of people who have flogged their guts out, or are currently studying, to earn degrees and post graduate qualifications. And Joondalup is trying to promote itself as a learning city.*

*Mr Smith might be a good CEO, he might even be the best in the whole of Australia, but did he misrepresent his academic achievements? Mayor Carlos is right to seek the truth." (1901CJB14)*

20. An opinion article by Mr Bartlett was very critical of the Joondalup Council for what he saw as unwillingness on the part of Council to be accountable and transparent in governing the City of Joondalup. He also criticised Council for paying Mr Smith's legal fees.
21. In an article in the *Wanneroo Times* of 5 – 11 August 2003 ("Carlos told actions were out of order: Mayor's bitter pill") Cr Baker was quoted as saying, of Mayor Carlos, "his dictatorial attitude and his obsessive pursuit of the chief executive is clouding his judgment": 2104MDM1. Mayor Carlos was reported as saying he was disappointed that he did not have the backing of Council.

### **Mayor Carlos' Dissent**

22. Mr Carlos was examined during the Inquiry on his position after the Council's resolution on 24 June not to question the CEO's qualifications any further.
23. At T1336 1/11/04:

*COUNSEL ASSISTING: What did you think at that stage, Mr Carlos, that if you couldn't accept what your Council had decided, that you shouldn't continue in your role? --- I didn't accept that.*

*What did you think you could achieve by staying on as Mayor in the face of that opposition to your proposal for an inquiry into Mr Smith? --- Oh well, I was elected by the ratepayers and I believed that I owed the ratepayers the – my time and effort to have the truth published, not to be swept under the carpet. My view was if I stood down, the City would not benefit by having Smith and – remaining there because he had got the job under false pretences, and that’s what most of the ratepayers was – were telling me. ... And as the Council wasn’t prepared to have a full investigation and nothings coming to fruition, I felt that I couldn’t stand out. Because the ratepayers – after each Council meeting, the ratepayers would let myself and colleagues know they were unhappy with what was going on.*

24. At T1338 Mr Carlos was asked about a letter sent from BDW to Minter Ellison dated 9 September 2003 relating to an article published in *The West Australian* on the previous day and comments reportedly made by Mr Carlos which were described as “a quite extraordinary indication that the Mayor will continue intentionally and publicly to undermine our client’s reputation”. Then at T1340:

*COUNSEL ASSISTING: Were you concerned in view of the advice that had been received by (sic) Minter Ellison as regards to the constructive dismissal and the likelihood of an action for damages if that eventuated that what you were doing might precipitate Mr Smith’s resignation? --- Of course I was concerned about it but, as I’ve said to you, I didn’t see that – I didn’t see that letter. I did see the motion that was written but I didn’t see the letter, but I was concerned about this getting out of hand. I was also concerned that while they continued to pass motions of full confidence in Smith it would be very difficult not to make a payout with him but the ratepayers didn’t want him paid out.*

*The suggestion in BDW’s letter is that you were trying to engineer – or you intentionally were putting pressure on the CEO so that his position became untenable. Is that a fair reading of the letter? --- No, I think Mr Smith could have ended it all the way through there if I – if I had seen the documents that you and who are in here have access to. At least I would have known that – because right up – right up until now I’ve not had access to the real truth.*

*All he could show you is what certificates and the like he had? --- Yes. Well, that’s all I was interested in.*

*What he showed Mayor Bombak the previous year? --- And what he showed Cr Prospero and Cr Brewer.*

*Yes? --- And then refused to show other councillors.*

*If he had shown you these documents would that have helped at all? --- Of course it would have. Well, we would have then known the truth.*

*And how would that have helped you given the position which the Council had taken by that stage? --- Well, it would have helped that we – the councillors didn’t know the truth. None of the councillors knew what it was.*

*Weren't the councillors saying, in effect, "it doesn't matter"? --- Oh yeah, but the ratepayers weren't.*

*But from the councillors' point of view, I'm just asking about the councillors, didn't their motions duly passed indicate that whatever was in the certificates didn't matter? -- That's the motion. However, the ratepayers, these ratepayers, wanted something done and the ratepayers were the people that were putting pressure on me not to back down, and I just felt that I couldn't back down.*

*Well, given that you were at odds with the Council, did you not consider that your position as Mayor had become untenable? You couldn't do the job required of you under the Act? --- Oh well, I was doing the job as far as I was concerned over there. I dispute that.*

*Well, by this stage there was legal advice being received by the Council that your actions were putting the Council at risk of an expensive law suit? --- Yes.*

*But there was earlier – we've heard the evidence given by Mr Douglas earlier – in June, and its all to the same effect, that the City needed to take care to act not in a – other than in a way which would allow Mr Smith to claim constructive dismissal? --- Oh well, I didn't believe that there was sufficient evidence there to do that.*

*But your position put you at odds, didn't it, with the majority of councillors? --- Yes, it did.*

*And did you not think that the Council was entitled to come to the decision it did? --- No, because –*

*For whatever reasons it might have had? --- Because the Council – the councillors were never, ever given all the information.*

*But they'd received legal advice, hadn't they? --- Oh, we got legal advice that we couldn't ask to see his qualifications.*

25. At T1343:

*COUNSEL ASSISTING: So the lawyers had as much information as you had? --- Yes. Wouldn't that be the case? --- But it still wasn't conclusive.*

*No, but they came to a view and advised Council that it was lawful and proper for Council to take certain action - ? --- Oh Scott Ellis didn't.*

*But Minter Ellison? --- That's right.*

*....*

*But you knew you couldn't get the support of the majority of councillors to proceed in the way that you wanted, and that not only were councillors against you, as they'd been in December and February, for their own reasons, but they now were fortified by*

*legal advice from Minter Ellison that they should leave the matter alone. You couldn't have expected to change their minds, could you? --- No I couldn't. I didn't believe that – I felt that some of the new councillors that came on in May 2002, if they had all the information and we could give it to them, then we may have had a – but they were led by other councillors.*

*Well, how could you then proceed without reflecting adversely on the decisions of Council by what you did in relation to Mr Smith's employment? --- Well, until the matter was all out on the table, I felt that I couldn't stop.*

*Well, you couldn't comply with the obligations under the Code of Conduct, could you? --- No.*

*And do what you were doing, so wasn't it – wouldn't it have been a proper option to resign as Mayor? --- No. Never.*

*Why are you so sure about that? --- Because the ratepayers wanted to know. The ratepayers of the City of Joondalup. Hundreds and hundreds of people. I think you should have a look at the – the Council meeting – the annual general meeting where the ratepayers passed motions and the ratepayers were so irate with –*

*But weren't the other elected members also representative of the ratepayers? --- Oh yeah, but they didn't agree with what the ratepayers were doing.*

26. The actions of the Mayor in relation to the issue of the CEO's employment were strongly criticised by the City's lawyers in advice from time to time from June to December 2003. Mr Carlos was also heavily criticised by Mr Douglas in his evidence before the Inquiry. Mr Douglas' view was that the Mayor had to speak on behalf of the City and could not therefore publicly express dissent from Council decisions. Mayor Carlos was a minority of one in the decision expressing confidence in the CEO in December 2002. That minority increased to two in February 2003. In May 2003 all seven wards had expressed preference for Mr Carlos as Mayor notwithstanding the censure he received from Council in February. When the decision was made on the motions recommended by Minter Ellison on 24 June 2003 the minority increased to three. Within a short time it increased to five, one-third of the elected body, a significant number in that it was enough to support a rescission motion under the Standing Orders.
27. Mayor Carlos' problem was not with the lawfulness of the decision of Council of 24 June but its propriety. Mayor Carlos and those councillors who then, and subsequently, supported his view on the matter took a principled position in opposition to a decision which they considered to be not in the best interests of the City of Joondalup. The Standing Orders Clause 4.1.9 provides that "A member shall not reflect adversely upon a decision of the Council or a committee, except on a motion that the resolution be rescinded". Mr Carlos

conceded that he could not pursue the issue of Mr Smith's employment without reflecting adversely on the decisions of Council: T1343. He did not consider it was appropriate or necessary that he resign because he considered he had the support of the electors. Nevertheless the majority had made a decision informed by legal advice that it was lawful and proper which the Mayor could not abide. At T1347:

*COUNSEL ASSISTING: But for the fact that there was by this stage some form of Parliamentary inquiry appointed you couldn't have hoped to continue operating as, or functioning as Mayor with Mr Smith indefinitely, could you? --- No. No. It was becoming a farce.*

*Heading for a train wreck of some kind or other? --- That's right.*

28. It was suggested to Mr Douglas in evidence that it might have been in the City's interests for the Mayor and those who shared his view to be separately represented and have access to their own legal advice. Mr Douglas' response was that it was not the City's task to fund legal advice for the minority: T3645 15/12/04. He said he had never considered that the Mayor should be separately represented. Whilst it may be said that legal advice and representation of the Mayor was a matter for himself, the same could also be said, and probably with more force, about Mr Smith, whose funding was never questioned by the City's legal advisers. In any event, however, it was not just Mayor Carlos, but a group of five, one-third of the elected members, whose opposition had to be dealt with. That group sought, unsuccessfully, a second opinion. The Council itself may have benefited from such an opinion as it was never offered an alternative strategy.
29. The recommended strategy assumed that if the Mayor did not answer questions by the media the issue of the CEO's employment would go away. The evidence to the Inquiry of the keen interest of the media in the issue and of the strength of public disapproval of the Council's decision suggests that this desired outcome was optimistic and unlikely to be achieved. A group of five minority councillors would still have been influential. Questions would still have been raised in public question time.
30. Mayor Carlos was only ever the subject of censure. There was never an expression of no confidence amounting to a call for him to resign. Renton, (*Guide for Meetings and Organisations*, 6th edition, Law Book Company, 1994, Vol 2 at 12.71) suggests that if the alleged offence of an office-bearer is –

*“considered serious enough and the resignation of the office-bearer or office-bearers concerned is desired, a want of confidence motion (often called a “no confidence*

*motion) can be moved...If the motion is carried, the persons named should resign from their offices... They are, of course, free to recontest in the resultant election.”*

31. Perhaps the conduct was not considered serious enough or an election was not regarded as desirable by the other councillors, or perhaps they were never advised of the potential consequences of such a motion.
32. Resignation is an ethical response to an untenable situation. Mayor Carlos was not justified in causing a “train wreck”. As Mayor he had statutory and ethical duties to his fellow councillors and the City. He was bound to respect the processes by which the City was governed, for better or worse. The Code of Conduct obliged him to –

*“act in accordance with an obligation of fidelity to the Council and not publicly adversely reflect upon any decision of the Council or the executive management group.”*

33. He conceded that he was not able to do that. The decisions of the Council were beyond his control to change, other than by the processes of Council. If he could not abide those decisions as a matter of conscience then he should have resigned. As Abe Fortas wrote in “The Limits of Civil Disobedience” (New York Times Magazine, May 12, 1968):

*“Dissent and dissenters have no monopoly on freedom. They must tolerate opposition. They must accept dissent from their dissent. And they must give it the respect and the latitude which they claim for themselves.”*

34. Had Mayor Carlos resigned an extraordinary election would have been called pursuant to Part 4, Division 4 of the LGA. Mr Carlos would have been eligible to offer himself for re-election. The electoral process would inevitably have focused attention on the cause of his resignation and the result of the poll, if it favoured Mr Carlos, would have sent a powerful message to Council, such that a fresh mayoral election would have amounted to a de facto plebiscite on the issue. The other four minority councillors might have followed suit and added to the weight of such an approach.
35. Mr Carlos contends that resigning was not an appropriate option because of the short time since he had been elected and the considerable cost of an election was an unnecessary expense. The cost of a by-election pales into insignificance when measured against the cost of the process of the Council descending into suspension, a Panel Inquiry and the potential for a full Council election.

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36. Alternatively, Mayor Carlos could have lobbied Council from without to achieve the level of accountability he sought. From all the circumstances it may be concluded that both the Mayor and the majority were intransigent, neither possessing any alternative strategy to resolution. Both positions were likely to lead, if unaltered, to a breakdown of good government.
37. The Code of Conduct reflects values and ethical standards. With respect to the Mayor it provides that, “as the appointed leader of the community of Joondalup, the Mayor shall demonstrate the highest level of civic conscience, impartiality and personal conduct. The Code of Conduct also enjoins all elected members and employees to observe “the highest standards of honesty and integrity ” and show each other “mutual respect and co-operation”. It might be said that Mayor Carlos was showing the “highest level of civic conscience” in insisting on a proper investigation into the honesty and integrity of the CEO. At the same time the Code required him to “always act in accordance with [his] obligations of fidelity to the Council and not publicly reflect adversely upon any decision of the Council or the executive management group” and to “[r]efrain from publicly criticising employees in a way that casts aspersions on their professional competence and credibility”. He was not able to do that. In the circumstances the level of “mutual respect and co-operation” between elected members and employees was particularly low.
38. It was suggested against Mayor Carlos that he lacked “impartiality” with respect to the issue of the CEO, a quality which is required of a Mayor. The mere fact that he formed a view based upon a reasonable level of inquiry and adhered to it over a period of time does not properly found an allegation of lack of impartiality.
39. It can be readily seen that in circumstances such as these, conflict can arise between the various duties under the Code of Conduct, so none can be read absolutely. Good judgment and discretion cannot be prescribed by regulation. As Justice Owen wrote in his Report of the HHH Royal Commission 2003:

*“From time to time as I listened to the evidence about specific transactions or decisions, I found myself asking rhetorically: did anyone stand back and ask themselves the simple question – is this right? This was by no means the first time I have been prone to similar musings. But I think the question gives rise to serious thoughts.*

*We live in a dirigiste age. Each year there is a dramatic increase in the size of the statute books. Almost every facet of life is governed by rules, regulations,*

*proclamations, orders, guidance notes, codes of conduct, and so on, prescribed by governments or recognised agencies. The courts, through the common law, add to the plethora of rules to which we must have regard.*

*There is no doubt that regulation is necessary: peace, order and good government could not be achieved without it. But it would be a shame if the prescription of corporate governance models and standards of conduct for corporate officers became the beginning, the middle and the end of the decision-making process.*

*Right and wrong are moral concepts, and morality does not exist in a vacuum. I think all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply these tenets in the decision-making process. The education system – particularly at tertiary level – should take seriously the responsibility it has to inculcate in students a sense of ethical method.*

*In an ideal world the protagonists would begin the process by asking: is this right? That would be the first question, rather than: how far can the prescriptive dictates be stretched? The end of the process must, of course, be in accord with the prescriptive dictates, but it will have been informed by a consideration of whether it is morally right. In corporate decision making, as elsewhere, we should at least aim for an ideal world.*

*As I have said: “corporate governance” is becoming something of a mantra. Unless care is taken, the word “ethics” will follow suit.”*

40. The resolution to the ethical dilemma in which Mayor Carlos found himself was to submit to the electors and have them express a view as to whether they endorsed his position. To do otherwise was to seek to lead the Council in an ethical maelstrom when true leadership was no longer possible.

## **DLGRD Involvement**

41. The role of the Department of Local Government and Regional Development (“the DLGRD”) is significant to this Inquiry insofar as it could be said that any action or inaction by the DLGRD contributed to or might have prevented or ameliorated any failure of the Council of the City of Joondalup to provide good government. In that regard it is relevant to understand the role which the DLGRD plays in assisting or regulating the activities of the Council of any local authority and how it performed that role in relation to the City of Joondalup at the relevant time. The DLGRD is required to scrutinise local governments, not merely to ensure statutory compliance in terms of process, but to ensure the provision of

good government, and therefore to be interested in the propriety as well as the lawfulness of local government actions and decisions.

42. In evidence to the Inquiry, the Director-General, Ms Cheryl Gwilliam stated that, in relation to the monitoring and regulation of local government in Western Australia, the DLGRD has four separate Divisions: T5165 8/2/04. They are Strategies and Legislation, Capacity Building, Governance and Statutory Support and Corporate Services. Strategies and Legislation primarily deals with policy and legislation, Capacity Building works with local government bodies to improve their performance and Governance and Statutory Support has responsibility for advice and compliance with the LGA. Corporate Business Services has, amongst other things, responsibility for activities such as induction of new staff and record keeping: T5162-3.
43. Ms Gwilliam further explained to the Inquiry that the Capacity Building Division (“CBD”), headed by Mr Stephen Cole, worked with and supported local government bodies in Western Australia: T5165. The Governance and Statutory Support Division (“GSSD”), headed by Mr Quentin Harrington, had, amongst its other duties, a regulatory role to ensure compliance with the Act by local governments.
44. In response to a question regarding whether the roles of both the CBD and the GSSD were required by relevant legislation Ms Gwilliam said (T5168):

*“Yes, it does in the sense that the advisory, I suppose, recognises the intent of the legislation in terms of autonomy and empowerment, so it’s working with local governments, but the governance side recognises the measures available in the legislation to ensure that good governance is delivered. So that’s reflected in, certainly, the issue of authorised inquiries is dealt with by the governance division.”*

45. Ms Gwilliam explained how the DLGRD approached its statutory task of assessing whether good government was being delivered (T5169-5170 9/2/05):

*“COUNSEL ASSISTING: And do you understand that your Department is required from time to time to assess for itself whether good government is being delivered for the purpose of advising the minister, for example?---Yes. And what principles do you apply in coming to a view as to whether good government is being provided?---Well, I think the principles we apply are really ones about largely procedural matters in terms of how the local government authority is conducting itself but also, of course, there is also a focus not to the*

*same degree but on the policy calls that local governments make, but in general successive governments have been more open in terms of not challenging the policy calls of government if it's within their powers of the local government authority.*

*Yes. You would look on the governance side at whether the actions or decisions of the local government were lawful in the sense that they were in accordance with the Act?---Yes. In terms of in accordance with the principles of the Act and the intent of the Act.*

*And is it a further step to look at whether actions or decisions are proper as well as being lawful?---Yes, but proper can be a challenge in the sense that it can be a value judgment as to what is proper, and so you'll often see Ministers have referred to local governments making legal decisions but whether it's a good decision is another matter.*

*Yes. Does your Department have a duty to carry out that evaluation from time to time?---Yes. And I think that evaluation is carried out in terms of the intent of the Act.*

*What would bring to your attention a question as to whether any action or decision by local government was not proper?*

*How would you expect to be informed of that?---How would I expect to be informed or how would I - -*

*How are you informed if that's what occurs?---Well, I think you're informed of that in terms of the advice that comes to the agency via members of the public, via councillors themselves, and then of course we'd get legal advice on that as well from State Solicitor's Office."*

46. The Inquiry was told that GSSD approaches complaints by initially conducting an assessment. Depending on the outcome of the assessment process, the GSSD might then conduct an investigation and in certain circumstances the DLGRD might conduct an authorised person's inquiry under Section 8.3: T5166, T5221.
47. Mr Harrington stated in evidence that his division had responsibility for regulation of local government bodies in Western Australia and also provided support to the Local Government Advisory Board and the Australian Local Government Grants Commission: T5128. He said the division comprised about 20 people; three of whom were involved in providing support and the remainder in the compliance and advice area, which is managed by Mr Duncan Watson.

48. On 20 November 2002 Cr Walker had e-mailed a letter (2511AAW4) to the Director-General, Ms Gwilliam, advising of serious concerns regarding the functioning of the Council. Cr Walker alleged breaches of the Act in relation to the formation of the CEO's performance review committee. Cr Walker was concerned that Council did not play its proper, lawful part in the process of selecting members of the review committee.

Mr Harrington allocated Cr Walker's complaint to Mr Duncan Watson's section (Compliance and Advice) for attention. Mr Harrington explained the process of assessing a complaint: T5220-21.

*The - - the first stage is an assessment, right, where the issue is looked at, and that can vary from an in-depth assessment where you call for a lot of documents or the issue is so apparent that it can be dismissed relatively - - relatively easily, but the initial assessment, if it - - if it is serious, then it can go into - - into an inquiry phase and then an authorised officer inquiry phase.*

*Yes. And - -*

*PRESIDING MEMBER: Is there an inquiry phase before the authorised officer phase?---Sorry. The - - the assessment - - yeah. We've - - we've recently done one with respect to a council down south. We did - - we did an assessment which indicated that certain issues needed further examination which needed - needed more documentation, so we made requests - - sorry, we identified what documents were needed. We drew up an authorised officer inquiry plan which details what documents are needed. It sets time lines what sort of questions should be asked, and then we presented that to the director general and the director general then authorised myself and another officer to become authorised officers.*

*PRESIDING MEMBER: Yes. There's no - - there's no inquiry process which precedes the authorised - - ?---No.*

*- officer inquiry process?---No. Well, there's an inquiry process in the sense of examining further documentation. Well, that might be the investigation process?---Yeah. (T5220-21 9/2/05)*

49. Mr Harrington also explained how his section might liaise with Mr Cole's Capacity Building section:

*COUNSEL ASSISTING: From time to time do you - - when a matter comes to you - - your section, do you assess it and send it off to - - - and send it off to the director of capacity development?---We may discuss the issue in general terms with the capacity - - with the director of capacity building simply because he is an experienced officer. He's been in local government a lot longer than a lot of us so it's worthwhile getting his views as to how we should approach this issue. There is also another way. In fact the director of capacity building may also raise an issue with us as a result of some of the work they have been doing which needs an investigation. (T5221 9/2/05)*

50. On 22 November 2002, Mr Watson sought advice from the Deputy Crown Solicitor, Mr John Lyon: T5257 9/2/05, 0902QNH1. Mr Lyon noted:

*“Cr Walker’s concern relates to the provisions of Clause 4 of the contract between the City and Mr Smith which provides for a performance review by “a committee” comprised of the Mayor and two other councillors. One of the councillors is to be “nominated by the CEO and agreed upon by the Mayor”. The “Mayor and the CEO shall agree on the third member”. It can be seen that the effect of Clause 4 is that the CEO has a power of nomination of one of the members and in effect the Mayor has a power of veto in that respect. Correspondingly, the CEO has a power to veto the choice of the third member. Cr Walker’s concern relates to the apparent exclusion of the Council as a whole from the relevant process. In this respect she points to the provisions of the Local Government Act which contains specific requirements concerning the establishment of committees and the powers which may be delegated to them.”*

51. Mr Lyon agreed with the advice of Freehills dated 19 November 2002 that the “committee” referred to in Clause 4 of the contract did not refer to a committee established under Sub-division 2 of Division 2 of Part 5 of the LGA. However, he expressed concerns about aspects of the contract. It was Mr Lyon’s view that Section 5.38 which requires that the performance of the CEO (*inter alia*) to be reviewed at least annually did not provide that the Council itself was to carry out the review but that Council should at least be the recipient of a report. He considered that Clause 4.2 was deficient in failing to provide for input by the Council following the finalisation of the report. He also considered that Council had the power to instruct the Mayor with respect to the selection of the two other councillors comprising the Performance Review Committee. He also thought that Clause 6(b)(v) of the employment contract dealing with the annual review of remuneration contemplated a role for Council in that respect. On the question whether the Clause 4 committee should be established under Section 5.10 of the LGA Mr Lyon advised:

*“In contractual terms there is no necessity that the committee be so established. The provisions of Clause 4.2 would not seem to allow for establishment under Section 5.10. It would seem, however, that it would have been preferable for the contract to have provided for the involvement of a panel having the status of a committee under Section 5.10. It would then have been possible and appropriate, if need be, for the Council as a whole to delegate its relevant powers to that committee.”*

52. A different, and preferred, construction of Clause 4.2 is that it provides for a committee comprising:

(1) the Mayor;

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- (2) a councillor whose nomination and appointment is not provided for; and
- (3) a councillor nominated by the CEO and agreed upon by the Mayor and the CEO.

53. The contract did not, therefore, provide the means for the nomination and appointment of the Deputy Mayor, and Cr Hurst as a member.
54. Mr Lyon provided advice regarding the performance review committee in response to the question “*what action can or should the Department take?*” A section of Mr Lyon’s letter was in the form of a comment on a “draft briefing note directed to the Director General prepared by Mr Forrest” as follows:

*“Mr Forrest indicates that an informal committee (or panel) would not have any authority would not have any authority to “sign off” any issue concerning the performance review. I agree with this remark....[H]e indicates that the Mayor is in the same position. This remark also appears correct. The draft concludes that there would be a breach of the Local Government Act 1995 if the contractual process was implemented. I am not sure that the position should be expressed in this way. However, I would agree that there are real difficulties with the contract.”*

He then elaborated upon those difficulties of interpretation and implementation of the contract and the manner in which it ought to have been more readily integrated with the *Local Government Act 1995*, Sections 5.38 and 5.10.

55. Mr Lyon advised that, amongst other things, it “...*would not seem to be particularly appropriate*” to institute an inquiry under Section 8.3 of the Act, although he acknowledged that it could be done if the Director General thought otherwise. He advised that the most appropriate response of the Director General would be –

*“to express concern that the provisions of the contract do not appear to properly accord with and reflect the provisions of the Local Government Act 1995. It may be that the Director General could suggest that an endeavour be made to amend the contract to make it more suitable.”*

56. On 27 November 2002, Mr Smith wrote to the DLGRD advising that the City was investigating whether Cr Walker, by providing certain documents to the DLGRD in the course of making the abovementioned complaint, had breached Section 5.93 of the Act, Clause 7.2 of the City’s Standing Orders and/or the City’s Code of Conduct.

57. Cr Carlos wrote to the Minister on 20 December 2002 seeking his intervention and requesting that he consider sacking the entire Council and appointing commissioners: 0905DSC130. Cr Carlos told the Minister that there was considerable disquiet amongst ratepayers regarding the CEO's suspect qualifications. He complained of questions regarding the qualifications being ruled out of order during public question time and said that ratepayers had been denied their right to ask questions. Cr Carlos also stated:

*"I was on the Council selection committee, which evaluated all applicants for the position of CEO. Mr Smith's CV stated he had three professional qualifications. It is my contention that Mr Smith would not have been selected for the interview if the professional qualifications had not been included on his CV. I specifically asked each applicant about his professional qualifications during the interview process."*

58. Cr Carlos went on to deal with the reasons of Judge Gibson in *Jones v. Sutton*, the question raised in the Upper House by the Hon Giz Watson MLC and petitions presented by the Hon Cheryl Edwards MLC and the Hon Tony O'Gorman MLA requesting an inquiry into the City of Joondalup, and the motion of confidence passed on 17 December 2002. Cr Carlos requested that the Minister intervene by initiating an independent investigation into Mr Smith's alleged deception. This, he said, was the only way in which the allegations could be resolved given that all attempts to ascertain the truth of the matter had been unsuccessful.

59. The DLGRD commenced an informal investigation described as an "assessment" relating to the selection and appointment of the CEO, but not extending to the issue of his qualifications. Mr Ataman Atlas, an investigations officer employed by the Department, wrote to the CEO on 23 January 2003 requesting a copy of the employment contract, relevant agendas and minutes, copies of relevant reports and any other information relating to the "processes adopted by the City and the management of the selection process", the processes involved in the negotiation for the terms of the contract for the appointment of the CEO and the execution of the contract: 0902QNH4.

60. The type of information required was set out in four separate classes of documentation:

1. *A copy of the full employment contract (signed and executed) which the City entered into with the CEO Mr Denis Smith;*
2. *A copy of the agenda and confirmed minutes of the relevant meeting/s showing the item, recommendation and Council's decision in all matters relating to the recruitment process, contractual negotiations and execution of the contractual arrangements;*

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3. *Copies of the internal and external reports in relation to No.2 above; and*
4. *Any other relevant information concerning this issue.*

61. Mr Atlas recalled that he sent this letter after receiving at least two telephone calls from Cr Walker who alleged that the process used by the Council to recruit Mr Smith was flawed: T8573 12/4/05. He stated that, in relation to the appointment of Mr Smith, Cr Walker believed that, "... the proper regulations and guidelines weren't followed by the Council in his appointment": T8574 12/4/05. Mr Atlas stated that his action arose after receiving instructions from his supervisors and that sending the letter was a preliminary step in the assessment of Ms Walker's complaint: T8574.
62. Mr David Morris, an investigating officer employed by the DLGRD in the Governance and Statutory Support Division, stated that he was made aware of the complaints made by Cr Walker: T5299 9/2/05. He assessed her allegations and identified at least one alleged breach of the Act:

*COUNSEL ASSISTING: And what action were you required to take in respect to those complaints?---It was referred to me for assessment as to whether any further action would be required. In order to do that I would have to obtain further information to assess the matter. It did deal with alleged breaches of the Act, or at least one alleged breach of the Act in this matter - that the contract was allegedly not presented to council before the appointment of Mr Smith - so it was a fairly serious matter in my view. I initially wrote to the City requesting a number of documents; informed them of the concerns, the allegations that had been made, and took it from there.*

*And was - - did you arrive at any conclusion in relation to that assessment?---No. The documents that were presented by the City were, although they were helpful in the assessment process, wouldn't allow the assessment to be completed. A number of the documents were altered in several ways. Pages were whited out. Names were whited out. Different issues were - - some documents weren't provided - there was a claim that they were confidential - so there wasn't enough that I would complete a formal assessment on.*

63. Evidence received by the Inquiry shows that this was the first letter sent to the City of Joondalup requesting information regarding the CEO recruitment process and the CEO's contract. Whilst Mr Morris initially claimed to have sent the letter of 23 January 2003 he later clarified his evidence by stating that he had actually supervised Mr Atlas' drafting of the letter.

64. On 7 February 2003, Mr Smith wrote to Ms Gwilliam providing copies of relevant Council Minutes and other similar material as requested by Mr Atlas: 0902DLM1. He advised that the City of Joondalup had received legal advice that the City did not have to provide information that was not publicly available, but indicated that the City's position might change if the DLGRD used its legal powers to request documents. Mr Smith advised that, despite the advice, he would allow DLGRD officers to inspect a copy of the CEO's contract. According to Mr Harrington, Ms Gwilliam directed Mr Smith's letter of 7 February 2003 to Mr Watson for attention: T5228.
65. On or about 8 February 2003 Mr Peyton prepared a briefing note for the Minister advising that: "It is anticipated that should this matter come to the attention of the public it has the capacity to generate both public and interstate media attention". Ms Gwilliam signed this document and it was sent to the Minister: T0802CMG1. On 24 February 2003 Ms Gwilliam wrote to Mr Smith asking whether certain documents, which were the subject of the previous request by Mr Atlas and had not been provided, existed: 0902QNH5. This letter pointed out the DLGRD's desire to proceed with as little inconvenience as possible. The DLGRD submits that it is a matter of good administrative process to collect information with the minimum of inconvenience to a local government.
66. On 7 May 2003 Mr Smith had written to the DLGRD alleging that the then Cr Carlos breached the LGA at a Council Meeting on 8 February 2003: 0902QNH15. It is not clear why the alleged breach was not reported earlier, although it is noteworthy that it was the day after Mayor Carlos requested proof of his qualifications.
67. On 9 May 2003, Mr Peyton and Mr Morris attended at the City of Joondalup offices, met with Mr Smith and viewed his contract. Mr Smith refused to provide a copy of the contract.
68. On 15 May 2003 Mr Quentin Harrington, Director, Governance and Statutory Support, DLGRD, wrote to the CEO requesting documents relating to his employment enumerating 16 categories of documents which had not been produced: 0902QNH8.
69. On 21 May 2003 Ms Gwilliam wrote to Mr Smith advising that the Department was assessing available information regarding the CEO appointment process: 0802CMG5. The letter also reminded Mr Smith that the City had been asked to provide documents to assist the Department's assessment process. Ms Gwilliam also referred to the letter sent to Mr Smith by Mr Harrington on 15 May 2003 in which specific documents were requested.

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70. Mr Harrington was asked about the DLGRD's position at this time. He stated that the DLGRD was still attempting to obtain information from Joondalup. He acknowledged that the City had advised the DLGRD that, if the documents were to be provided, the DLGRD must use its section 8.2 powers: T5232. Mr Harrington described the approach of the DLGRD in the following exchange:

*COUNSEL ASSISTING: I take you now to page 6770. This is a letter from Ms Gwilliam to Mr Smith of the 21st of May 2003 in which she states that she had asked you to arrange a meeting time with Mr Smith. What was the position regarding the assessment at that stage? Can you recall?---Well, it was - - Just after the May elections?---Yeah. We were still - - we were still obviously pursuing them and I think at that time we still had problems with the amount of information which was being supplied by the City so that we could do the proper assessment.*

*Yes. Did you understand that the City had an objection to - -?---Yes, they did. - issuing documents - -?---Yes. The was - - - on a voluntary basis?---Yes. Yes. Their legal advice which was conveyed to us was that if we wanted these documents then we had to use authorised powers of section 8.2. Yes.*

*PRESIDING MEMBER: If you were serious about the investigation why didn't you do that?---Why didn't we do it?*

*Yeah?---At that stage what I was trying to do was do it in a co-operative manner without seeming to be heavy handed about it. I mean, at that time we really had no reasons to believe as to why they shouldn't provide the documentation to us. Except that they had had legal advice - -?---Yeah. - that suggested they were exposing themselves to some risk.*

*One would have thought that if you were going to pursue the inquiry then you'd respond to that by providing them with the protection under 8.2?---Well, ultimately we did draft a letter to the City which requested the documents be supplied under section 8.2 but it never - - was never sent because of other issues or other actions taking place when we came to that point.*

71. Mr Morris, on 10 June 2003, prepared a draft report to the Director-General headed "Options to Address Joondalup Issue": 0902QNH10. The report identified the following issues as being relevant to an assessment of the selection and appointment process:

- *The terms of the CEO contract and in particular the clauses which relate to the "Committee" who carry out the annual performance review of the CEO.*
- *The manner in which the City entered into agreement with Mr Smith regarding the terms of the contract and whether these terms were formally approved by Council prior to the contract being executed between the parties.*

- *The qualifications held by Mr Smith and whether qualifications claimed by him in the process for his selection, were not actually awarded to him.*
- *The appropriateness of the selection process and the management of this process.*
- *The manner in which the appointment of the recruitment consultants was conducted.*

72. The report noted that it had not been considered appropriate to investigate the qualifications held by Mr Smith as the Minister did not have any power under the LGA to act on any findings of an inquiry into this issue, and if there had been any deception of the Council or any councillor, it would be a matter for the police to investigate. Mr Morris noted that some relevant documents had not been provided to the Department by the City. Mr Morris reported the “Current Status” of the matter as follows:

*“Given the circumstances as detailed above and taking into consideration the time and resources expended on this matter to date, it would be beneficial to embark on a course of action which would bring this matter to a speedy conclusion.*

*After discussion between senior officers of the Governance and Statutory Support and Capacity Building divisions, the following options have been identified.”*

73. The options were described as follows:

*Option 1: Conclude the assessment of the matter on the documentation provided.*

*Option 2: Direct the City to provide the documentation requested under Section 8.2 of the Act.*

*Option 3: Instigate an authorised inquiry into the matter.*

*Option 4: Propose that the City instigate an investigation of the issues identified by way of an independent investigation panel.*

*Option 5: Refer the matter back to the City for investigation under their complaints handling procedure.*

74. He observed that each of the options proposed had merits and disadvantages, but he concluded with a recommendation that the City be directed to provide the documentation requested under Section 8.2 (Option 2).

75. Mr Harrington gave evidence that, at that stage of the assessment, this matter was not ranked as highly as an outright breach. He stated that it was a process issue and that it dropped down in priority: T5234. At the time the Morris memo was submitted, the DLGRD had

made at least five separate requests to the City of Joondalup for the provision of documents since 22 January 2003. Mr Morris stated in his memo that these requests had not been satisfactorily complied with. The correspondence in evidence reveals that the City was responding to the requests, with the assistance of legal advice, putting concerns about providing documents to the DLGRD which might not be properly protected from Freedom of Information requests and the attraction of liability to the City unless the DLGRD used its coercive power to require the documents under Section 8.2(1) of the *Local Government Act 1995*.

76. In his discussion on Option 3 (authorised person's inquiry), Mr Morris referred to the benefits that could be obtained from settling the controversy arising out of the CEO recruitment process. Mr Morris suggested that the inaction (as he saw it) of the City in response to repeated requests for information was further evidence of the need for an authorised inquiry. There was evidence from Mr Morris' supervisor, Mr Peyton, and his manager, Mr Watson, that they also supported the conclusions contained within the memo and agreed with the recommendations: T1089 10/5/05, T5261 9/2/05.
77. On the following day Mr Harrington wrote to the CEO referring to documents which had been provided with relevant material blanked out and requesting that such documents be provided without deletions on a confidential basis: 0902QNH11. On 17 June 2003 Minter Ellison responded on behalf of the City to Mr Harrington's letter pointing out the City's concerns about its ethical and legal obligations in disclosing confidential information, otherwise than pursuant to a Section 8.2 notice, stating that the City should be concerned to guard against unnecessarily wide disclosure of confidential information and the weakening of any claim for exemption under the *Freedom of Information Act 1992* occasioned by the voluntary provision of documents to the Department: 0902QNH13. Subsequently, legal advice was obtained from the Crown Solicitor's Office in relation to the operation of Section 8.2 and a draft notice was prepared.
78. On 1 July 2003 Mr Cole sent a fax to the Crown Solicitor's Office, as it then was, requesting urgent advice in relation to the situation at Joondalup: T4994, 0702 SMC2. Part of the fax reads as follows:

*"I request your urgent advice on the matter contained in this draft advice to the Minister.*

*The Minister has requested CSO advice that he had no right to intervene in this matter on the basis that the City of Joondalup had followed an appropriate process and has not breached the Local Government Act.*

*Can you please provide advice this afternoon?"*

79. The content of the fax cover sheet is self-explanatory and it refers to 12 other documents being sent to CSO. Mr Cole made notes on the fax cover sheet that read (T4995):

*Note: Verbal advice received from Helen Cogan on 1/7/03. That advice incorporated into advice sent to Minister.*

*PS Ms Cogan said she would make file note but would not provide written advice.*

80. After receiving this advice from Ms Cogan, Mr Cole sent a five-page briefing note to the Minister: 0702SMC3. This briefing note indicates the Minister originally sought advice from the Department about two newspaper articles, one being *The Sunday Times* column written by Mr Bartlett (29 June 2003) and the other Stuart McKinnon's story in the *Wanneroo Times* of 26 June 2003.

81. In relation to ministerial involvement, Mr Cole wrote:

*“Crown Solicitor’s Office (CSO) (Helen Cogan) has advised there is no power in the Local Government Act for you to intervene in the normal process of Council. Council has followed proper process in reaching the decision it has.*

*Whilst there may be some concerns amongst a minority of residents in Joondalup regarding the continued employment of the CEO, the City has re-endorsed his appointment and this should be the end of the matter”.*

82. Mr Cole advised that the Crown Solicitor's advice was that there was no power to intervene in the normal process of Council. He stated:

*“Whilst there may be some concerns amongst a minority of residents in Joondalup regarding the continued employment of the CEO, the City has re-endorsed his appointment and this should be the end of the matter. It is probably a timely reminder to all councils that they learn from the lessons at Joondalup in the processes undertaken during the appointment of key staff.”*

83. Mr Cole stated to the Inquiry that in the second sentence of the above paragraph he was referring to the “appointment process, checking up on the bona fides of qualifications, submitting contracts to Council and some of the other errors that seem to have been made during the appointment of Mr Smith.”: T5014. He was asked whether probity was a consideration:

*COUNSEL ASSISTING: You didn't consider that, the nature of the issue being a question of probity, it ought to have been dealt with in a particular way?---Well, it*

*seemed to me it was up to the Council to consider those issues. I mean, the Act is quite clear that the employment of the CEO is the council's responsibility. Now, if they had looked at all of those issues - - and whether probity was considered as part of the legal advice I didn't know but it seemed to me that they had tried to do the right thing and so I didn't think there was any room for us to challenge it or question it. (T5016)*

84. Evidence to the Inquiry shows that, at the time Mr Cole submitted this briefing note, documents requested by the DLGRD had not been provided. Mr Cole did not indicate that the Department had commenced an assessment on the employment issues. There is no reason to suggest that Mr Cole intended to mislead the Minister but the absence of any reference to the assessment was a material omission. A reasonable response to the situation would have taken it into account as a relevant consideration.
85. Mr Cole also addressed the issue of the City paying Mr Smith's legal fees. He observed that Council's decision to pay Mr Smith's legal expenses might not have been in accord with its own policy. He questioned also whether the payment was "for the good government of persons in its district" and said that the Crown Solicitor's advice confirmed that it was a poor decision, but not illegal.
86. The briefing note concluded with the following recommendations:
- (1) *No action be taken with respect to the Council's decision of 24 June 2003 not to pursue any of the issues relating to the appointment of the CEO and his academic qualifications on the basis that the Council has followed due process and made a proper decision.*
  - (2) *Recognise that the Council made a poor decision with regard to paying the CEO's legal expenses but accept that no direct intervention on this matter is feasible. A poor decision is not an illegal decision.*
  - (3) *You agree with the spirit of the Council resolution that councillors make no further public statements on this issue while recognising that they have a right to make personal statements if they wish.*
  - (4) *Note the forthcoming briefing by Council officers to senior officers of the Department.*
87. On 3 July 2003 Mr Bartlett interviewed the Hon Barry House MLC, Chairman of the Standing Committee on Public Administration and Finance: 1804LRB5. Mr Bartlett repeated the Minister's comments regarding his inability to directly intervene and sought

comments from Mr House. Mr House confirmed that he had received the same information from the Minister.

88. On 3 July 2003 Mr Lyon was asked for advice regarding the use of Section 8.2 of the Act to require the City to provide certain information: 0902BMP1. Mr Lyon wrote back on 10 July 2003 advising that the Department could use Section 8.2 of the Act and he made slight alterations to the proposed draft letter to the City: 0902BMP2.
89. On 4 July 2003 Ms Gwilliam, Mr Cole and Mr Schorer attended a meeting with Joondalup officers and lawyers from Minter Ellison: T5016. Mr Cole made notes during this meeting: 0702 SMC6. The notes reveal that the DLGRD representatives were given the advice that Council received on 24 June 2003.
90. On 6 July 2003 Mr Cole e-mailed Ms Gwilliam advising her that Council knew that Mr Smith had given misleading information and had decided not to do anything about it: 0702 SMC7. He concluded that this was interesting but not of any relevance in resolving the issue. This e-mail was in response to Mayor Carlos' e-mail to Ms Gwilliam complaining that Mr Smith had misrepresented his qualifications: 0702SMC8.
91. Mr Cole stated that the DLGRD intervened in local government matters because it was for the benefit of the State that public confidence be maintained: T5032. Mr Cole gave evidence about the Department's interest in the merits of Council decisions:

*COUNSEL ASSISTING: Have you reported on the merits of the decision?---Yes. Inasmuch as the media attention might be directed towards the merits of council decisions, would that warrant your interest?---It would warrant our initial interest, and if we then found that the media coverage was about the merits of a decision but we were satisfied that that decision had been fair and reasonable, then we would back off. And there's often publicity about, say, planning decisions that somebody might disagree with, and we will make inquiries about that, but if we are then satisfied that the council has made the proper decision then we will, as I said, back off and just let the Council get on with its business. (T5033)*

*What constitutes a proper decision?---A proper decision is where council is, as much as [it] can [be] happy, fully informed about process. That they have taken every avenue to become fully informed. In other words, they're subject to senior officer advice or they're subject to outside expert advice. And having considered all those issues they vote accordingly. Oh, and having, of course, considered the issue within the council chambers had an appropriate debate, and voted on the matter. (T5033)*

## CHAPTER 3

### PART 7

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92. During her evidence the Director-General, Ms Gwilliam, stated that in July of 2003 she received advice from Mr Cole and Mr Schorer regarding poor conduct at Council meetings: T5193-94. She understood that the meetings were characterized by two main problems: chairmanship and the working relationships between the councillors.
93. Ms Gwilliam stated that, in accordance with Mr Cole's recommendation, the DLGRD responded to the first problem by arranging for Mayor Carlos to receive training from two experienced Mayors from other local government bodies: T5194. In relation to the second problem she said that the DLGRD recognised the problem and felt that they needed to work to assist the Council, but focused on "recognizing local government as an independent sphere": T5194. This led to the decision to form a body to strategically review the Council's meeting problems. This ultimately became known as the Governance Review: T5195.
94. The view of Ms Gwilliam during July 2003 is summarised in the following evidence:

*COUNSEL ASSISTING: So it would be fair to summarise your position as being one which would have seen the department assist the Council to whatever extent it could - - ?---To make its decision. Offering - - providing support to the Council to work its way out of the difficulty that it found itself in?---Yes, because it was a council decision and so it was about trying to get the council to continue to make its decision in relation to the employment of the CEO, and whether that was with the minority accepting the majority or whether it required the majority to start accepting the minority's view.*

*Yes. I take it then that no analysis was ever done of the series of council decisions relating to the CEO's employment with a view to demonstrating whether or not the council's decisions had been proper or not?---I mean, my sense was that Steve Cole may have done that, but I'd need to confirm that with him. But, he - - I mean, I had him off line from his job for about 4 months focusing, you know, dedicated to Joondalup in the sense of being able to resolve the matter. So, you know, the department had allocated a significant experienced senior officer to attempt to assist the Council to resolve the matter. (T5197)*

95. Ms Gwilliam gave evidence that, in the future, although the DLGRD might respond to a similar issue in a different manner, any response would still focus more on the need for autonomy rather than allowing all of the aims of the legislation to be considered equally:

*COUNSEL ASSISTING: Would the experience of this case - the Joondalup case - indicate to you that in future issues relating to the probity of a CEO to require special attention from the department's point of view, as to how they're dealt with by a council?---Yes. I think the - - what we've seen is changes to legislation, so they haven't yet been proclaimed, but certainly Amendment Bill 3 has passed through Parliament,*

*and the intention is to have those sections proclaimed in March 2005. We've also developed enhanced guidelines for local government which have been worked up with the relevant industry bodies - WALGA and LGMA - and also with input from the State Solicitor's Office. I think also in terms of the whole induction process for councillors it's an important issue, and - - but certainly it will still not be one of direction and control by the State government. It will still be one of decision making by Council but with enhanced guidelines to support them. (T5197-98)*

96. Ms Gwilliam observed that decisions made by Council at that time were not well made: T5200. She also stated that the experience of Joondalup indicated that there was a need for good induction for councillors and more information and advice to Council to assist key decisions.

97. Ms Gwilliam went on to say:

*“The approach that's been taken over 10 years by respective governments – and you would have seen in relation to the Hon Tom Stephens. His comments were certainly that maximum autonomy for local governments. Its within an environment that you do let them learn from their experiences. And, you know, if I look at – I mean, we've done a lot of work in relation to where we sit nationally because, I mean, I've certainly – if I say myself, have been quoted as being unduly conservative in the administration of the Act. If I look at the administration of this Act vis-à-vis the other jurisdictions, we are not conservative at all. We are highly interventionist compared to the other jurisdictions.*

*So we're about recognising the Act we have and its focus on autonomy and accountability, but the premise was, and certainly in the principles of the Act and in the statements to the House at the time - - was a liberal approach, an autonomous approach with local government. So we largely don't then regulate as a result of poor experience. We're certainly about learning from poor experience, and we're certainly about ensuring that ultimately we can do something, so when the City of Joondalup was unable to ultimately resolve, we suspended.” (T5201)*

98. On 11 July 2003 Ms Gwilliam wrote to the CEO offering the Council the opportunity to participate in a strategic review “concentrating on operations within the Council, relationships between elected members and the interaction with senior staff”. This followed the briefing given by Mr Douglas on 4 July 2003.

99. Cr Hart e-mailed Mr Cole on 25 July 2003 expressing “grave concerns regarding the approval of lawyer's fees for our CEO”: 0702SMC11. She was concerned that a considerable amount of work had been done by Mr Smith's lawyers in preparation of letters

to newspapers and to Mayor Carlos. She asked him to explain what obligations Council had and complained that reports were being presented when the Council meetings commenced. She said:

*“Had I ... more experience I would have moved for a deferral, to investigate policy and the validity of the request. I felt emotionally blackmailed by the lawyers and some councillors present. The lawyer’s terms of reference were not satisfactory to me and others, we did try and have them broadened, to no avail. Ratepayers in the South Ward that have contacted me, and there have been many, are incensed at this situation at the City.”*

100. Mr Cole’s response (0702SMC12) e-mailed on 28 July 2003 indicated his opinion that the City’s policy would not apply as Mr Smith was in the position of a plaintiff. He noted that the minutes of various meetings did not give an explanation for the necessity for the legal advice or why the costs should be met by the City. He doubted that payment was in the interests of “good government” and said, “It appears that the only person who was provided with anything in the situation is the CEO”.
101. Cr Hart replied, “This concerns me greatly. If Council is sacked, as I believe Warringah was this week, commissioners will replace us and Smith will still be there”.
102. On 30 July 2003 Mr Morris prepared an assessment report regarding the selection and appointment process used by the City of Joondalup. This assessment was a review of the Department’s progress to that date. Documents in the files indicate that provision of regular updates is standard operating procedure within Mr Morris’ section. The assessment included the legal advice received regarding the use of Section 8.2 and included a draft document request, in the form of a letter to the CEO, for the City to provide documents.
103. Mr Cole wrote to Mr Smith on 7 August 2003 enclosing terms of reference for the governance review and proposing that the panel consist of himself, Cr Ian Mickel, President of the Shire of Esperance and former President of WALGA and Mr Cliff Frewing, Director of Financial and Corporate Services, City of Swan and current President of LGMA. He also proposed Mr Bruce Wittber, a consultant with WALGA, to undertake research and provide administrative support. Council resolved on 9 September 2003 to advise the Director General of the DLGRD that it agreed to the governance review being undertaken at a cost of up to \$30,000.00, the process being by way of an internal review.

104. On 11 August 2003, the Director General forwarded a briefing note to the Chief of Staff at the Minister's office for the information of the Premier, Dr Geoff Gallop, relating to issues at Joondalup. The briefing note provided detailed background information and concluded by stating that the Department was waiting for the Standing Committee to advise of its terms of reference.
105. On 26 August 2003, Mr Morris sent a memo to the Director General providing an update of the assessment of the processes used by the City in the selection and appointment of the CEO: 0902DLM3. It mentioned that this matter was not a term of reference for the Standing Committee for Public Administration and Finance.
106. In a letter dated 28 July 2003 to the Chairman of the Standing Committee on Public Administration and Finance of the Legislative Council providing an explanation as to why he had not established an inquiry into the matter of the qualifications of the CEO of Joondalup the Minister wrote:

*"In considering application of the sections of the Act that provide for me inquiring into a local government I have to give consideration to my basis for ordering an inquiry. I must have reason to suspect that there has been a breach of the Act or a council has acted improperly. Crown Solicitor's Office has advised there is no power in the Local Government Act for me to intervene in the normal process of Council." (2206MISC23)*

107. A suspicion that a Council had acted in breach of the LGA, or improperly, affords a basis for inquiry. The notion of what is proper, however, is a broad one and in the present context would embrace the goals set out in Section 1.3(2) and the requirement of Section 3.1(1) of the provision of good government.
108. The advice of the Crown Solicitor's Office, as it then was, is undoubtedly correct, that the Minister has no power to intervene in the normal process of Council. However, the Minister may act pursuant to Section 8.15 or Section 8.24 to give effect to an Authorised Person's recommendation or an Inquiry Panel's recommendation. The Executive Director has power under Section 8.3(1) to commence, through the agency of officers of the DLGRD, such investigations as the Executive Director may regard as appropriate.
109. As was discussed in the Report of the Inquiry into the City of South Perth, the question whether a Council is providing good government involves broader questions than illegality. It includes questions as to whether the Council's decision-making is ethical and whether the relevant decision is one which ought to have been made in the interests of the City. Upon a

broader view of the statutory role of the Executive Director, the assessment undertaken would have included consideration of whether the Council's decisions were sound. That would necessarily have included consideration of whether the CEO's professional qualifications were legitimate in order to assess how the Council had dealt with that issue, including whether its members had adequately informed themselves as to the facts before making the relevant decisions.

110. If the DLGRD had accepted and acted on the suggestion in the memorandum of Mr Morris of 10 June 2003 (0902DLM3) that a notice be issued under Section 8.2(1), then it might have been more fully apprised of the situation and some pressure might have been taken from the officers from the City who had been delegated with authority by the CEO to assist the Council in dealing with the matter. Whether, if a more assertive approach had been taken by the DLGRD in exercising the Executive Director's powers under Sections 8.2 and 8.3(1), matters would have been resolved in a different way is an open question, but it is arguable that it may have allowed for an earlier and less drastic solution than suspension and a Panel Inquiry.
111. It follows from the views expressed above and with the benefit of hindsight, that there was no reason why an Authorised Person's Inquiry might not have been conducted. That, too, might have avoided or at least assisted in shortening the process of a Panel Inquiry.
112. It also appears that it was the narrowness of the advice which the Minister was receiving as to the power of the Executive Director to inquire into the issue of Mr Smith's qualifications which prompted him to refer that matter to the Standing Committee on Public Administration and Finance: Report of the Standing Committee on Public Administration and Finance in Relation to the *Local Government Act 1995*, Report 6, December 2003, para 1.2 and 1.3. It is arguable that there was no necessity to make that reference for the reasons which the Minister expressed.
113. The DLGRD, in its submission to the Inquiry, rejects the suggestion that it should have exercised its powers under Section 8.2 and 8.3(1), citing the following reasons:
  - *The Local Government Act gives a council the autonomy to appoint its own CEO;*
  - *The Act does not require a CEO to have any particular qualifications;*
  - *Questions about the qualifications of the CEO at Joondalup were raised publicly and widely;*

- *Councillors were aware of the public concerns about qualifications and had the power to seek verification of these qualifications;*
- *Council satisfied itself as to the suitability of the CEO for the role. (By endorsing the appointment, the council created the situation, identified at paragraph 58 on page 9:23 which would mean that any subsequent summary termination would render the City liable to a damages claim.);*
- *The CEO's failure to produce his qualifications reinforced the public perception that the CEO did not have the qualifications claimed. The Department took the view that any reasonable person would reach this conclusion based on the fact that producing the qualifications would immediately dissipate the public furor in relation to the qualifications. It is the Department's view that the production of qualifications is a relatively easy task;*
- *As the report notes on page 7:23 paragraph 42, Mr John Lyon advised in November 2002 that "it would not seem to be particularly appropriate to institute an inquiry under section 8.3 of the Act";*
- *The Police then decided to conduct an inquiry. It is considered appropriate that the Department not duplicate inquiries being conducted by the Police;*
- *The Minister then referred the matter to an Upper House committee with inquiry powers. Again the Department took the view that is not appropriate for the Department to duplicate inquiries being conducted by other relevant bodies;*
- *The Police inquiry found that the CEO had not acted fraudulently. This reinforced the Department's view that it was inappropriate to act at this point in time (although it is noted that the Police inquiry received some negative comment in the submission);*
- *The Upper House Inquiry did not make a recommendation that the Department should pursue an investigation;*
- *If an authorised inquiry had been conducted and found the truth about the CEO's qualifications, the potential for a substantial termination payment following the council's public endorsement of the appointments remained a significant issue. However, with the council still supporting the CEO, such a finding or suggestion would have been irrelevant unless a decision was made to direct the council on this matter. Such a direction is considered inappropriate as it is for the council to make decisions about the person it wishes to employ as the CEO. The Department takes the view that it is philosophically difficult to justify an external agency intervening in the employer-employee arrangement. Moreover, it also takes the view that, in practice, it is almost impossible to intervene to change an arrangement which is deemed to be satisfactory by the employer and employee and achieve future harmony.*

That submission reinforces the need for a recognition that –

- (a) the relationship between a CEO appointed to perform a statutory role and have sole executive power in a local authority is not that of an ordinary employer/employee relationship with an elected Council;
- (b) an elected Council does not have the executive power to supervise a CEO independently of the CEO;
- (c) the DLGRD's role is not structured in such a way, nor is its relationship, as a State Government department, with local authorities such that it can or should perform the role of supervising a CEO of a local authority; and
- (d) there is a necessity to create a statutory corporation with executive power which has the role of recruiting and supervising the CEO's of local authorities within the State.

### **Fourth Decision of Council to Pay CEO's Legal Expenses**

114. At the meeting of Council on 29 July 2003 a report was received on a request by the CEO for reimbursement of further legal expenses in the sum of \$11,408.06 (excluding GST) being the sum of two fees for services provided in the periods 25 May to 25 June and 26 June to 17 July respectively: 1811SAH6. The CEO's request iterated the reasons previously given and noted that the second invoice (\$7,080.85 excluding GST) was in respect of the police investigation. No details were given of the first invoice. The report stated that the 2003/04 draft budget legal expenses for the CEO's office had been increased to \$70,000.00. The combined budget for the previous year had been significantly over expended (\$93,338.00).
115. A motion authorising the expenditure was carried 8/3 (For: Crs Baker, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero and Rowlands. Against: Crs Caiacob, Hart, and Walker). A rescission motion was subsequently lodged by Cr Walker, citing DLGRD advice that the payment was not appropriate: 2311MPC9.
116. On 5 August 2003 Mr Schorer wrote to Mr Higham regarding the motion lodged by Cr Walker: 1412NFAD16. Mr Schorer did not express a view as to whether the payment was appropriate, but said, *inter alia*:

*“It would be highly advisable before the making of any decision by Council, members are satisfied that they have had the opportunity to adequately consider the matter, have*

*all the relevant facts before them, understand what they are voting on, and that it complies with any relevant written law.”*

117. The letter was the subject of comment by Mr Douglas: 1412NFAD16. Responding to Mr Higham in relation to Mr Schorer’s letter, Mr Cole, on 12 August 2003, said that it would be presumptuous for the Department to say that the expenditure was an improper use of municipal funds given the paucity of information available to the Department: 3003CMH23. He said that if Council decided to make a payment it needed to be clear that it was in accordance with the Council policy (which to him appeared doubtful) or that there was a justification to depart from the policy. In the interest of transparency and accountability the reasons for the decision had to be evident in the minutes. He thought that the issue would become a concern to the community if it was introduced as a late item and/or not supported by an appropriate report. Mr Cole did not mention in his letter the misgivings which he had expressed in his briefing note to the Minister on 1 July 2003 in which he described the legality of such payments as “questionable” and the previous decision as “poor”.
118. In evidence, Mr Schorer said that he was approached by Cr Walker to give advice on the City’s liability for the CEO’s legal expenses and had advised her that the Department’s publications indicated to local governments generally that matters coming before Council should be detailed with a report from the Administration on the subject and be given in a timely manner so that councillors may make enquiries, do research and if necessary, discuss the matter with the Administration. He did not keep a note of the conversation. He indicated that he also spoke with Cr Hart and he gathered from both conversations that the Council’s decision to pay the CEO’s legal expenses was not in accordance with the Council’s policy. The Department had put out circulars indicating that it would be appropriate for a Council to pay legal expenses of a member or officer to defend an action taken against them, but not to bring proceedings: T5389. He said the Department did not believe that it was appropriate for a councillor or an officer to take action for defamation and expect the costs to be paid by the local government. His advice was based on information which was contained in DLGRD, although the Department’s circulars which are made available to local authorities were not mentioned in the letter to Mr Higham. A letter from Mr Schorer annexing the two circulars numbered 11 and 32 of 2000 respectively was tendered: 1005DSC1). Mr Schorer said that a further guideline was in the course of preparation by the Department but would not be finished until this Inquiry’s report was published. Circular 32 of 2000 provided:

*“Legal advice to the Department states that there could be no justification for local governments funding legal action such as defamation that is initiated by members or*

*employees. If members and employees wished to take such action then they must finance it themselves.”*

119. In answer to questions from Mr Carlos, Mr Schorer admitted that he had originally given oral advice to Mayor Carlos that the Council should not pay the CEO’s legal expenses, but he later “clarified” this advice, rather than “withdrew” it, as suggested by Mr Carlos. He conceded that his letter to Mr Higham modified the oral advice he had given initially to Mr Carlos. He said:

*“Its like everything, it depends on the nature of the – the full amount of what you – you know, what’s being asked. I mean, to say, “should the CEO not get legal advice?” Is – is it in the – was it on the basis of before he became an employee of the Council or not? I mean, they’re the questions that you, the elected members, need to be satisfied on. That’s how I saw it at that point.” (T10321 10/5/05)*

120. It is clear from Mr Schorer’s evidence that Cr Walker was correct, and did not mislead Council when she adverted to Mr Schorer’s advice in her Notice of Motion. Cr Hart’s advice from Mr Cole was to similar effect (para 86 above). It may be observed that this Departmental advice was never provided to Council in respect of any of the decisions it was called upon to make in respect of Mr Smith’s request for payment of his legal expenses. Mr Cole’s advice to the City was not frank, being quite different from his advice to the Minister and Cr Hart.
121. On behalf of DLGRD and Mr Cole it is submitted that there was no inconsistency between the advice given to the Minister and the advice given to Mr Higham and moreover that if he had repeated his comments to the Minister to the local government it would have become part of the public record and to have made the issue “much more difficult to handle”.
122. The submission apparently seeks to justify why Mr Cole was not frank when speaking to the City. This submission does not justify or adequately explain the material differences in the respective advices. The advice given to Council did not assist it to identify that it may have engaged in a decision which was “questionable” or “poor” in the opinion of Mr Cole.
123. To fail to advise the local authority of the actual views of an officer of the DLGRD, when his advice is sought, makes its own contribution to the provision of something less than good government. Mr Cole submits that because the decision was not illegal he was justified in not informing the City that he regarded it as a poor decision and that he could not go so far as to inform them of that because he was “fully cognizant of how far [he ] could go without

causing public anxiety, elected member uncertainty, challenges from qualified lawyers and a consequent call for an inquiry”.

124. Mr Cole apparently has a particular view about the manner in which he should perform his role of capacity building in relation to local authorities and negative impacts which intervention of the DLGRD may have on local authorities. It is difficult to understand how frank advice as to the quality of the decision in the particular circumstances would not have been the more appropriate contribution to make towards good government in the City.
125. The issue was the subject of legal advice from Minter Ellison on 13 August 2003 (1412NFAD13) following a question by Cr Caiacob as to whether the City was entitled to see the advice for which it had paid. Mr Douglas advised that the City had no right, based simply on its payment of the CEO’s legal costs, to obtain a copy of any advice to which those costs related. Minter Ellison gave further advice in relation to the payment of the CEO’s legal expenses (1412NFAD15) a draft of which was incorporated in a report to Council on Cr Walker’s rescission motion by memorandum dated 18 August 2003 by Mr Higham and Mr Robinson: 0111DSC88.
126. On 18 August 2003 Mr Smith had, in a memo to Mr Robinson (3101DIS57), referring to the rescission motion and stating that the legal costs had been incurred by him as a direct result of the conduct of others, given the following reasons for his request:
- “(1) A complaint was made to the West Australian Police by an elected member of Council. I was required to defend the complaint. I was put to the expense of doing so. The complaint was dismissed and therefore I should not be required to bear the costs of defending the complaint.*
  - (2) The Council re-affirmed my employment as long ago as November last year in relation to the matter of my qualifications. I have been put to the ongoing cost of dealing with a number of other issues within Council (and externally, eg. the Department of Local Government) which, having regard to the confirmation by Council of my role (twice – ie. November 2002 and February 2003) that, regardless of this, I ought not to have had to deal with the contract employment matters that I have been confronted with.*
  - (3) Public comments have been made which, in the circumstances, ought not to have been made – very properly, these comments should have been made confidentially, particularly in respect of any matters that are the subject of ongoing consideration.*

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*Again, I point out that the Council has a duty of care to protect all staff, which includes the CEO and to give them the right to be able to seek proper and independent advice on matters pertaining to their contract of employment, where issues have been directly raised by the Mayor or an elected member of Council.”*

127. Minter Ellison noted that Policy 2.2.8 enabled Council to pay legal costs incurred by an elected member or employee as a result “of being involved in defending legal proceedings arising from the carrying out of the official responsibilities or terms of employment”. The advice was that costs incurred by the CEO in dealing with the police investigation could be approved under the policy as the term “legal proceedings” was defined in the policy to include investigations, as well as civil and criminal proceedings. Nevertheless, a review of the policy was recommended.
128. Minter Ellison’s advice was that the policy probably enabled payment of the legal costs, but in any event it was open to Council as a lawful and proper exercise of its discretion to pay for the legal representation of the CEO on the basis that it was for the “good governance” of the City. The advice recommended that Council should be given sufficient details of the nature of the legal services to enable it to determine the connection between those services and the elected member’s or employee’s statutory or contractual functions, and whether it was for the good governance of the City for those costs to be paid. The advice otherwise expressed no view as to whether it was appropriate for Council to authorise the payment and did not suggest how the payment would be in the interests of ‘good governance’.
129. The police investigation, in respect of which Mr Smith incurred substantial costs, was into matters that occurred prior to, and not in the course of, his employment. The advice of Minter Ellison that:

*“On the basis of information provided to the Council for its meeting on 29 July 2003, it was open to the Council, as a lawful and proper exercise of its discretion ... to approve the payment of [the CEO’s] costs under the Legal Representation Policy”,*

was doubtful for the reason that, as the advice pointed out, the test of good governance:

*“would not normally be met unless the legal representation for which the funding is sought related to an activity of ... an employee that was carried out in the course of the ... employee’s functions under the Act”,*

and it gave as an example, the funding of an employee to sue the City for defamation or breach of contract. In the circumstances, the unqualified approbation of the Council's decision in the summary of advice did not reflect a proper assessment of the merits of the decision.

130. Consequently, the officer's report, which was not circulated before the day of the Council meeting at which the rescission motion was to be considered, contained no recommendation other than that a comprehensive report be prepared on the appropriateness of the Council's current policy. Mr Cole had pointed out in his letter that:

*“In terms of transparency and accountability, the Council has every right to make the decision, but reasons need to be evident in the minutes through either the staff report to Council or reasons given as to why Council varies from staff recommendation. An issue of this type would become a concern to the community and department when it is introduced as a late item and or it is not supported by an appropriate staff report”.*

131. The officer's report expressed no reasons or recommendation and the Administration's advice to Council was, accordingly, deficient.
132. On 19 August 2003 the rescission motion in relation to payment of the CEO's legal expenses was lost (5/10).

## **FBT Liability**

133. Mr Mitch Sideris gave evidence that he raised in Public Question Time on 29 July 2003 a question whether the payment of the CEO's legal expenses attracted liability on the part of the City for fringe benefits tax. The question was asked in relation to the agenda item dealing with the CEO's legal expenses.
134. In debate on this motion Councillor Baker asked of Mr Robinson: “[I]f the deferral option is pursued, will that in any way prejudice the due and timely payment of the account in question and the consequential future rendering of legal advice to the CEO in respect of the situation?”: 1403KBR28. Mr Robinson advised that he could not comment on the future rendering of advice, but had been advised that the accounts were past due. Mr Robinson also gave verbal advice that the Administration had been struggling with the FBT issue and was recommending that they needed more time to come back to the Council: 1403KBR28. Despite this Cr Baker said:

*“I can’t see why we still can’t pay the funds requested and deal with the FBT issue later in conjunction with Smith’s lawyers, the City’s lawyers and if they agree (subject to whatever conditions they agree to maintain solicitor/client confidentiality) an independent auditor as well. My understanding is it is a complex issue. It’s not as if we are facing an assessment that has to be paid within 14 days, but I would like to think that Mr Smith’s accounts are being paid in a prompt and timely manner. I’d hate to in any way prejudice his relationship with the lawyers he has engaged. I can understand it is a very complex issue, but I can’t see why we can’t simply pay tonight and then resolve the associated complexities later quite frankly.” (1403KBR28)*

135. Mr Robinson advised that it was an option to pay the account and deal with the FBT liability later but was concerned that the account would be paid without knowing the quantum of the FBT liability. Mr Higham also outlined that the only person possessing the information was Mr Smith and his lawyers and a detailed look at the accounts was necessary to determine if each matter in the accounts was of a revenue or capital nature. Cr Prospero, later in debate, raised the point that on speaking to the Department he was told that although paying for the CEO’s legal expenses was not against the rules, it was considered improper: 1403KBR28. Mr Robinson suggested the wording of the amendment of the original motion, which was in effect to include part 2 into the motion that additional advice be sought in relation to the FBT liability and expenditure of up to \$5,000 be approved: 1403KBR28. The motion as amended was passed.
136. It would appear that notice of the question had been given because an officer’s report dated 29 July 2003 signed by Mr Robinson, Mr Higham and Mr Schneider, Director, Corporate Services and Resource Management (1403KBR27), stated that advice had been sought from Minter Ellison which was quoted as follows:

*“For the reasons set out in that advice, and based on the information we have at this stage:*

- (1) The City’s payment of the CEO’s legal expenses would attract an FBT liability.*
- (2) The City’s FBT liability would be reduced to “nil” if the CEO is entitled to claim a deduction in his own personal income tax return for those legal expenses.*
- (3) The CEO would be entitled to claim a reduction if the expenditure is of a revenue nature.*
- (4) Our preliminary view is that the expenditure is likely to be of a revenue nature – but there are complex legal and factual questions involved in determining that issue. There may also be confidentiality reasons why the City could not, or should not, have access to the information from the CEO and his legal advisers that it would need to determine that issue. One option may be for the CEO to*

*provide the City with advice from his accountants or lawyers, or both, about his entitlement to claim a deduction.”*

137. The Minter Ellison advice recommended that the Council be informed of the issue. The officer’s report recommended that consideration of the item be deferred so that further advice and information could be obtained.
138. It would appear that Mr Smith was privy to Minter Ellison’s advice because on the same day his solicitors, BDW, wrote to him confirming that invoices rendered to date for work done “in relation to your employment with the City of Joondalup and matters relating to your employment including concerning defamation and criminal allegations which have been made and arise as a consequence of your employment with the City of Joondalup”. The letter advised:
- “If the City of Joondalup wishes to have details of the work to which the invoices relate assessed by an auditor (again on a strictly confidential basis) we can discuss this with you. Of course, consideration of such arrangement would be on the basis that it is agreed the information is disclosed only for the purpose of considering fees actually paid/potential tax liability on the part of the City of Joondalup.”*
139. Subsequently, the proposed motion to authorise payment of legal expenses was amended to authorise the obtaining of additional advice in relation to FBT liability. Advice was subsequently received from Deloitte Touche Tohmatsu (“Deloitte”) dated 24 September 2003: 1404PBS16. The letter was addressed to Mr Schnieder. Essentially the advice confirmed that payment of the expenses would be a fringe benefit, the taxable value of which was the value of the expense less any amount that would have been tax deductible if the employee had incurred the expense.
140. Deloitte advised that deductibility was a very complex area. The nature or character of the legal expenses would be determined by the advantage that was sought to be gained by the expenditure. If the advantage was of a capital nature, then the expenses incurred would be of such a nature. The question was whether the CEO’s expenses were of a revenue nature. The case of *Federal Commissioner of Taxation v. Rowe* (1995) 60 FCR 99 was cited in support of the proposition that legal expenses incurred in defending the manner in which a taxpayer performed his employment duties were allowable.
141. Deloitte advised that to determine whether the CEO’s expenses were deductible they had to consider what the CEO was protecting by the taking of legal action. If the action was related to personal reputation then no deduction would be allowed. The advice was that *Rowe*

provided sufficient support to conclude that the legal expenses of the CEO were deductible. The case involved expenses incurred by a shire engineer who was suspended from employment and required to show cause why he should not be dismissed. Accordingly, Deloitte advised:

*“We believe that a similar conclusion can be reached in the CEO’s case. The legal expenses (sic) have been taken by the CEO in order to protect his employment and, thus his future income stream. This analogy can apply equally to the defamation action, as the investigation into the validity of his employment contract (sic). We do not believe that it is his reputation that is being defamed but it is an alleged attack against his abilities to properly perform his duties.”*

142. In support of the argument another decision was cited, **Case X42**, 90 ATC 352 which involved a taxpayer who incurred legal expenses in negotiating an extension of his employment contract. These expenses were not considered to be of a private or domestic nature, nor of a capital nature, and were deductible because they were incurred in gaining or producing assessable income. The advice concluded:

*“Irrespective of the fact that we believe the Council will have no FBT to pay in relation to the reimbursement of the legal expenses of the CEO, we would recommend that the Council seek to have the invoices characterised into each activity that is being undertaken. This will allow the Council to clearly determine the costs associated with defending each action.”*

143. It would appear that, on the basis of this advice, the Administration arrived at the view that FBT was not payable. Mr Schneider said at T8852 14/4/05:

*“I guess, if he didn’t get that advice and protect his position, could end up with the CEO leaving the organisation, so he was protecting his income source, I guess.”*

144. The issue of the City’s FBT liability was first considered by the Administration of the City around July 2003, when Mr Schneider did a desk-top assessment of liability using the Master Tax Guide (T8848-9). A ratepayer, Mr Sideris, later raised the issue in Public Question Time, five months after the first decision to authorise payment of the CEO’s legal expenses was made. Deloitte’s advice appears predicated on factual assumptions that the CEO had incurred expense for a defamation action for “an alleged attack against his abilities to properly perform his duties”, and that the legal expenses were otherwise incurred in order to protect his employment. The Inquiry has not fully explored how those assumptions may have been arrived at. On the evidence available to the Inquiry, however, it is arguable that those assumptions may be mistaken. The imputations of Cr Carlos, in respect of which

Council offered to pay Mr Smith's legal expenses, did not go to his capacity to perform his duties, but to his honesty in representing his qualifications in the selection process.

145. If Deloitte had, instead, proceeded on the basis that the legal advice for which the City paid was not to protect Mr Smith's employment, they would have been likely to advise that such expenses would not be deductible in the hands of Mr Smith. After all, Council had repeatedly affirmed its confidence in Mr Smith. Rather, Mr Smith's legal advisers were engaged to advise and represent him in dealing with his detractors.
146. In light of all the evidence, the question of the City's liability to pay FBT for the CEO's legal expenses remains doubtful, and should be the subject of further advice based on the facts now established. The incurring of liability for FBT would greatly increase the cost of Council's decisions to subsidise Mr Smith and would constitute yet another basis upon which it might be concluded that a reasonable Council, accurately advised and informed as to the legal position, would not have made those decisions. It is not appropriate to draw any adverse inference against Mr Schneider or any other member of the Administration or adviser to the City in relation to the way this matter was dealt with at the time, because a full opportunity has not been given to explain all the facts and circumstances in which the Minter Ellison and Deloitte Touche Thomastu advice was obtained. That aspect of the matter was not fully explored in the evidence given to the Inquiry as a result of certain indications given to parties interested in the matter during the course of the Inquiry as to the manner in which the issue would be treated.
147. An incidental issue, which was not addressed in the evidence, is whether the GST on the CEO's legal expenses was, or could have been, claimed as an input credit by the City. It is noted that all reports on the payment of the CEO's legal expenses expressed the sum involved to be net of GST. The legal services of BDW were a taxable supply to Mr Smith. As an individual not engaged in business, he was not registered for GST and could not claim any input tax credit personally. The legal services of BDW were not a taxable supply to the City. Council appears to have authorised the expenditure on the basis that the City would obtain an input tax credit. Under the *A New Tax System (Goods and Services Tax) Act 1999*, relevantly, an input tax credit may only be claimed for a creditable acquisition: Section 11 – 20. The term "creditable acquisition" is defined by Section 11 – 5 of the Act according to the notion of a "creditable purpose". An entity acquires something for a creditable purpose to the extent that the entity acquires the thing in carrying on its enterprise. As there was no taxable supply to the City, it is doubtful that the payment of the legal expenses was for a

“credible purpose”. These observations are not intended to be conclusive of the issue, but suggest that the GST aspect was by no means clear and should have been a matter of advice to Council.

### **CEO’s Response to Media Statements by Mayor Carlos**

148. On 27 August 2003 BDW wrote to Mayor Carlos expressing concern at statements that had been made in an interview with Liam Bartlett on ABC radio on 25 August and a television interview broadcast on Channel 7 on 26 August 2003: 0111DSC80. The letter stated that Mayor Carlos’ statements were incomplete, contained incorrect information and lacked any objectivity. The letter concluded:

*“Under continuing duress, frustration, victimisation, and harassment, Mr Smith continues, to the extent permitted having regard to your conduct, to do what he can to carry out and facilitate the carrying out, individually and jointly, of your functions and his functions in the best interests of the City. You ought likewise comply with Council’s resolutions. We are instructed that Mr Smith is requesting Council to sanction your misbehaviour and non-compliance with Council’s directions.”*

149. The CEO also sent a memorandum to the Mayor and councillors on the same day (0111DSC81) complaining of inaccuracies in the interview and in particular to Mayor Carlos’ statement that the CEO did not attend a meeting with Mr David Davies from the Combined Residents Group. Mr Smith said he had indicated that he did not wish to attend unless the purpose of the meeting was known. In fact the purpose of the meeting was for Mr Davies to present a letter (0111DSC77) on behalf of his group setting out a motion of no confidence in the CEO passed unanimously on 20 August 2003 which called on him to stand aside pending a proper review. The letter said that it was not a personal attack, but a request that the CEO follow the practice that occurs in organisations, such as the Police Service, “to ease topical situations, and regain a sense of balance”.

150. On 1 September 2003 Cr Kimber e-mailed Mayor Carlos, calling on him to stand down and be held accountable for his actions: 0111DSC82. Mr Douglas wrote to Mr Higham on 5 September 2003 referring to the Mayor’s recent media statements: 1412NFAD18. Mr Douglas’ advice was that in the recorded media interviews the Mayor failed to speak on behalf of the City and in fact spoke contrary to the City’s position, thereby exceeding his statutory powers and breaching his statutory responsibilities. It was noted that by the resolutions of 24 June 2003 Council had determined that elected members should make no

further public statements in relation to issues relating to the CEO, including his qualifications.

151. The letter advised, in part, as follows:

*“In these circumstances, it would be open for the Council to conclude that the Mayor’s repeated failures to act in accordance with that decision appear to be deliberate refusals to accept the authority of the Council and the Mayor’s own responsibilities as a member of the Council. It would be open for the Council to conclude that the Mayor’s actions are undermining the lawful authority of the duly elected Council.*

*It is unacceptable and contrary to the interests of a local government for its Mayor to publicly promote his own personal views where they are directly and fundamentally opposed to the lawfully and properly expressed determinations of the local government’s decision-making body.”*

152. Mr Douglas advised that the Mayor’s actions had exposed the City to a risk of legal liability for damages as the Mayor’s statements or actions could be attributed to the City. He said it was imperative that the Council take prompt and decisive action to distance the City from the Mayor’s statements and actions so that any legal liability would fall on the Mayor personally, rather than on the City and its ratepayers. The advice concluded as follows:

*“In relation to the Mayor’s recent media statements concerning the selection and appointment of the CEO, including his academic qualifications, for the reasons we have given:*

- (a) the Mayor’s public statements and actions are clearly contrary to, and in breach of, the Council’s resolution of 24 June 2003;*
- (b) the Mayor has exceeded his statutory powers to make public statements only on behalf of the City;*
- (c) the Mayor is in breach of his duties of office that he undertook to fulfil in the formal declaration on being elected to the position;*
- (d) if the Mayor cannot accept and implement the City’s decisions and, instead, publicly opposes those decisions – on an issue that is of such critical importance to the City – it follows that he cannot fulfil the duties of his office and his proper response, in the City’s interest, is to resign;*
- (e) it is open to the Council to conclude that the Mayor’s repeated failures to act in accordance with the Council decision of 24 June 2003:*
  - (i) are deliberate refusals to accept the lawful and proper exercise of the Council’s decision-making powers;*
  - (ii) undermine the lawful authority of the City’s duly elected Council;*
  - (iii) have adversely affected the City’s reputation;*

- (iv) *have adversely affected, and continue to adversely affect, the functioning of the City; and*
- (v) *have exposed and, if repeated, will continue to expose the City to a risk of legal liability for damages to the extent that the Mayor's statements and actions can or might be attributed to the City;*
- (f) *it is imperative, in the interests of the City, that the Council takes prompt and decisive action to distance itself from the Mayor's statements and actions that are inconsistent with the Council resolution of 24 June 2003; and*
- (g) *this action should be by way of a formal resolution that may include:*
  - (i) *censuring the Mayor;*
  - (ii) *reaffirming the Council's resolution of 24 June 2003;*
  - (iii) *a formal direction to the Mayor and other councillors to comply with the Council's resolution; and*
  - (iv) *clarifying that any future public statements or actions of the Mayor, or a councillor, on this issue would be unauthorised, contrary to the interests of the City and in breach of the statutory duties and the duties of office of the Mayor, or the councillor."*

153. The advice included the following discussion:

*"Under the Local Government Act 1995, the Council – not the Mayor – is the 'governing body' of the City (Section 2.6(1)). The Council makes decisions for and on behalf of the City and its decisions bind the City. Under Section 2.7(1) of the Local Government Act, a Council:*

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

*The Mayor is a member of the Council. One of his statutory roles, like other councillors, is to "[participate] in the [City's] decision-making processes at Council' (Sections 2.8(2) and 2.10). In his role as Mayor, he has the power to make public statements, but only when he 'speaks on behalf of the [City]' (Section 2.8(d)).*

*In his recorded interviews last week, the Mayor failed to speak on behalf of the City. What he said was clearly contrary to, and in breach of, the City's position as determined by its decision-making body, the Council.*

*It follows that the Mayor has exceeded his statutory powers and is in breach of his statutory responsibilities."*

154. Unfortunately, the advice sought by Council was limited to legal advice on certain limited questions and did not, and was unlikely to, recommend a strategy for the Council which would have any substantial effect greater than that which had been implemented by the 24 June resolution. That had failed to quell expressions of disquiet about the integrity of the CEO by some ratepayers, members of the wider community, and sections of the media. It

seems unlikely by this stage that public debate on the issue would have abated even if Mayor Carlos had remained silent. A substantial change of approach and perhaps some expert public relations advice might have had more prospect of reversing the direction in which Council headed between then and 2 December 2003. A fundamental problem with the advice is that it failed to contain any alternative strategy for the Council, the strategy implemented by the 24 June resolution having failed to quell public disquiet about the integrity of the CEO. On the evidence available to the Inquiry, it may reasonably be concluded that ratepayer concerns, and those of the wider community, and media interest would not have abated even if Mayor Carlos had remained silent.

155. Crs Walker and Caiacob had defected from the position they took on 24 June 2003, increasing to four the number of councillors who supported the Mayor's position. Ratepayer outcry continued to be expressed at public question time and representatives of community groups such as the Combined Residents Group, the Mullaloo Progress Association and the South Ward Ratepayers and Electors Association had taken positions opposed to Council's decision: see the evidence of David Davies, Mitch Sideris and Vincent Cusack.
156. An officer's report to Council dated 5 September 2003 containing the Minter Ellison advice (0111DSC84) was leaked to *The West Australian* which published an article on 8 September 2003 quoting the advice: 3101DIS60A. On Sunday 7 September 2003 Mayor Carlos e-mailed Mr Higham and councillors advising that whilst he was at a function he was contacted by a journalist from *The West Australian* who advised that they had been given a copy of the confidential report in relation to the CEO. He admitted that he had commented in answer to questions put to him. He requested an investigation to determine who passed the document to the press. He recommended to councillors that since the matter was in the public domain the issue did not need to be discussed behind closed doors.
157. Mr Higham forwarded this e-mail to Mr Douglas, who advised that Mayor Carlos should be told that, apart from councillors, only a small number of officers had access to the report and that he was satisfied none had leaked the report. Mr Smith then advised Mayor Carlos by e-mail that he had no authority to give any instructions to any staff member: 0111DSC83. Mr Higham gave evidence that he sought legal advice as he was concerned about investigating the leak and concerned that a confidential document had been leaked: T7878 – 7879 30/3/2005.

158. Mr Higham gave evidence that on 8 September 2003 Cr Baker telephoned him asking that Minter Ellison provide advice that the comments made by Crs Baker and Kimber were in the spirit of the Council decision on 24 June. Mr Higham advised that Mr Douglas would be in attendance at the Council meeting and would answer such a question: 3003CMH31.
159. BDW wrote an open letter to Minter Ellison on 9 September 2003 (1412NFAD19), referring to the article and stating, *inter alia*:

*“The position taken by the Mayor indicates that he will continue regularly to bypass our client in the workplace, and avoid liaising with our client in relation to necessary and appropriate matters (contrary to local government legislation) and to interfere with our client’s performance of the role of CEO at the City of Joondalup.*

*The ongoing public comments directed at our client is (sic) clearly calculated to destroy or seriously damage his reputation and the necessary confidence and trust that is essential in an employment relationship (which it is incumbent on an employer to maintain with its employee).”*

160. On the same day BDW wrote a second letter to Minter Ellison, “without prejudice”, again indicating its client’s willingness to consider a resolution of matters relating to his employment on a negotiated basis: 1412NFAD20.

### **Council Meeting: 9 September 2003**

161. At its meeting on 9 September 2003 Council, behind closed doors, passed the following motion as recommended by Mr Douglas:

*“MOVED Cr Brewer, SECONDED Cr Baker that Council:*

- 1. NOTES that at its meeting on 24 June 2003, the Council, by majority of 12-3, resolved (in part) that it:*

*DETERMINES that it is in the interests of the City, including the good governance of the City, that:*  
*issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;*  
*the Mayor and individual Councillors should make no further public statements in relation to these issues;*

*REITERATES its previously expressed strong support for and full confidence in Mr Denis Smith as the City’s CEO (see resolutions of 17 December 2002 and 18 February 2003)’.*

2. *NOTES that on various occasions since then, contrary to the formal resolution of the Council:*
  - (a) *the Mayor has made public statements on issues relating to the selection and appointment of the CEO, including his academic qualifications; and*
  - (b) *the Mayor's public statement, in relation to these issues, promote his own personal views which are directly and fundamentally opposed to the lawfully and properly expressed determination of the Council, which is the City's decision making body.*
3. *NOTES AND ACCEPTS the City's legal advice that the Mayor, by making these public statements, has exceeded his statutory powers and is in breach of his duties of office that he undertook to fulfil in his formal declaration upon being elected to the position of Mayor.*
4. *NOTES AND ACCEPTS, on the basis of the City's legal advice, that the Mayor's repeated failures to act in accordance with the Council decision of 24 June 2003:*
  - (a) *are deliberate refusals to accept the lawful and proper exercise of the Council's decision-making powers;*
  - (b) *undermine the lawful authority of the City's duly elected Council;*
  - (c) *have adversely affected the City's reputation;*
  - (d) *have adversely affected, and continue to adversely affect, the functioning of the City; and*
  - (e) *have exposed and, if repeated, will continue to expose the City to a risk of legal liability for damages to the extent that the Mayor's statements and actions can or might be attributed to the City.*
5. *NOTES AND ACCEPTS the City's legal advice that it is imperative, in the interests of the City, that the Council takes prompt and decisive action to distance itself from the Mayor's statements and actions that are inconsistent with the Council resolution of 24 June 2003.*
6. *CENSURES the Mayor for his public statements that are in breach of the Council's resolution of 24 June 2003.*
7. *REAFFIRMS the terms of its resolution of 24 June 2003.*
8. *DIRECTS the Mayor and individual Councillors to comply with their statutory obligations and their duties of office and, therefore, to comply with the terms of this resolution and the Council's resolution of 24 June 2003.*
9. *NOTES that any future public statements or actions of the Mayor or a Councillor on this issue would be unauthorised, contrary to the interests of the City, and in breach of the statutory duties and duties of office of the Mayor or the Councillor*

10. *REQUESTS Minter Ellison to prepare a public statement outlining the reasons for Council's decision.*

*The Motion as Moved by Cr Brewer, Seconded by Cr Baker was Put and CARRIED (9/5).*

*In favour of the Motion: Crs Baker, Brewer, Gollant, Kenworthy, Mackintosh, Nixon, O'Brien, Prospero, Rowlands. Against the Motion: Mayor Carlos, Crs Caiacob, Hart, Hollywood, Walker."*

162. Mr Douglas was present and advised Council in relation to a query by Cr Hollywood regarding the applicability of **Conway-Cooke v. Town of Kwinana** as follows:

*"Where we are headed at the moment, as we indicated last time, is an action for constructive dismissal, where the CEO resigns and then takes action against the City for constructive dismissal, and that will lead to the same sort of litigation over the same period of time with the same consequences. My advice is to you, the best evidence we have at the moment is that the City would be very likely to lose such a case.*

*These public statements are made that put - - make the CEO's position so untenable have an effect not just on the CEO but on the City itself. And the question is, who is going to be responsible for that liability? Is the City going to be responsible for it, or is it going to be sheeted home to an individual personally?*

*And what do you do tonight, and other occasions, will determine that. If you distance yourself from the people who make these public statements, then those people may face personal risk of liability. If you don't distance yourself, then those statements will be attributable to the City, and the City and its ratepayers will bear the risk."*

163. In response to a question by Cr Hart as to whether the CEO was under any obligation as an employee, Mr Douglas said: "(T)he legal position is that on all the evidence that we have, is that the CEO has not done anything that would justify his dismissal, or his termination."
164. Following the resolution Cr Hart moved a motion without notice that the Council obtain a second opinion. This motion was lost, with no debate: 1901COJM1. The meeting also dealt with a motion by Cr O'Brien to censure Mayor Carlos and Crs Hollywood, Baker and Kimber for making comments to the media contrary to the resolution of 24 June. This motion was lost.
165. Mr Douglas subsequently wrote to Mr Higham on 11 September 2003 recommending a response to BDW's letter of 9 September 2003 regarding the Mayor's conduct:

1412NFAD22. The letter emphasised that it was necessary, in the City's interest, for the City to distance itself from statements and actions of the Mayor or other councillors that adversely affected the CEO's reputation and employment relationship with the City. It stated that the resolution passed by Council on legal advice would have that effect if recommended that a letter be sent to Mr Smith's solicitors communicating the resolution. There was also a letter of the same date addressed to Mr Higham in relation to BDW's invitation to discuss settlement, confirming that Mr Smith's solicitor, Mr Tony Davies, had asked Mr Douglas to obtain instructions as to whether the City would agree in principle to negotiate a mutual separation and for that purpose set up a negotiating committee to deal with the matter confidentially: 1412NFAD21.

166. Mr Douglas' response to Cr Hart's question reflects the emphasis given in the legal advice to the actions of Mayor Carlos, and the attribution to him of blame for the prolongation of the conflict with Mr Smith. No legal advice ever addressed the statutory, contractual and ethical duties of the CEO to act in good faith in the interests of the City. It remained manifestly clear that a resolution of the qualifications issue was the only way forward and that any risk of litigation, which had not eventuated despite the large sums allowed to the CEO for legal advice over a period of seven months, would have to be faced.

## Upper House Inquiry

167. On 28 July 2003 the Minister wrote to Mr House providing reasons why the Standing Committee should examine Mr Smith's qualifications and whether the LGA needed amendments regarding appointment of CEOs: 2206MISC23. Mr Stephens stated that he did not have power under the LGA to intervene "in the normal process of Council". The letter also detailed contentious issues that might become terms of reference for the Standing Committee. In the letter the Minister said:

*"The issue of the appointment process for the CEO and in particular the debate surrounding his qualifications is proving to be debilitating and distracting for the City, and one that needs to be cleared up as soon as possible.*

*As Minister for Local Government I am advised that there is no scope for me to directly intervene in this matter under the Local Government Act 1995.*

*Therefore, I seek your support in establishing an investigation into the matter, in order to ascertain the facts surrounding the appointment, assess what opportunities are available for the public release of appropriate information to the ratepayers and wider community of Western Australia, and to recommend any changes that need to be made*

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*to the Act to empower the Minister for Local Government to bring such matters to resolution.”*

168. A briefing session was provided to the Mayor and eight councillors by Mr Douglas and Mr Frank Van Der Kooy of Minter Ellison on 24 September 2003 in relation to the Inquiry of the Standing Committee on Public Administration and Finance: 0111DSC86.
169. At the meeting of Council on 30 September 2003 Council voted unanimously to appoint Minter Ellison to represent the City and any current or former elected members or employees, other than the CEO, who required representation before the Standing Committee. Council also authorised an amount up to \$5,000.00 for the CEO to engage BDW to represent him in connection with the Inquiry.
170. Mr Douglas wrote to the Chairman of the Standing Committee on 6 October 2003 offering to make a detailed submission to the Inquiry: 1512NFAD25. Mr Douglas argued that the City was concerned to ensure that the Standing Committee was properly informed about matters which had been the subject of allegations, criticisms or adverse comments against the City, the principles of natural justice requiring that the City be given a fair opportunity to respond.
171. Mr Smith gave evidence before the Standing Committee on 7 October 2003. In his opening statement he said that he was asked by MRA to provide details of his employment history and, with his wife’s assistance, set out a summary of his CV. He said the CV incorrectly referred to a Bachelor of Business from the University of Technology. He said that on his behalf the police were informed during the course of the fraud investigation that his wife typed the CV for him. He said:

*“I take full responsibility that I was required to read and ensure the details of my CV were correct. I accept that if there was any error or misunderstanding that is my responsibility.”*

172. He declined to produce his qualifications to the Committee. He did not address his other professed qualifications in his opening statement, but said in answer to a question from the Hon Dee Margetts:

*“It is my understanding I applied to the Institute of Technology to be admitted to undertake a post graduate course in business management. I had to use my qualifications as a town planner, and what I had previously obtained through the Faculty of Science for environmental and pollution studies. I made application at the*

*time. Also it was deemed that experience was relevant – my experience at GHD, my experience with the Baulkham Hills Council and also Campbelltown Council was deemed relevant, and I was permitted to undertake the course.”*

173. He confirmed that he had a post graduate diploma from the University of Technology in environmental and pollution studies.
174. The Standing Committee heard evidence from various parties, including the Minister, the Director-General, councillors and others, including Mr Bombak, Mr Turkington and Mr Delahaunty, and reported on the matter in December 2003.
175. In Chapter Five of the Report, the Committee outlined the results of its examination of the power of the Department and Minister to investigate or otherwise intervene in the activities of a local government. The Committee formed a view (at 5.6 of the Report) that the Minister and the Department had apparently adopted a restrictive interpretation of their respective powers. The Committee also noted (at 5.8) that advice to the Minister, regarding the scope of his powers, was apparently flawed.

### **Fifth Decision of Council to Pay CEO’s Legal Expenses**

176. At its 30 September 2003 meeting Council voted (8/5) to authorise payment of the CEO’s legal expenses to BDW in the amount of \$12,722.66 excluding GST. The officer’s report in respect of the CEO’s legal costs indicated that three invoices had been received for the periods 22 July – 23 August (\$5,372.40), 26 August – 3 September (\$1,333.37), and 4 September – 24 September (\$6,016.89): 0111DSC87. Up to that point Council had authorised payment of \$32,451.32 (excluding GST). For 2003/04 the sum of \$70,000.00 had been budgeted for legal expenses in the office of the CEO. As at 30 September 2003 \$35,859.00 had been expended.
177. The report referred to and annexed the written advice of Deloitte’s regarding FBT (1404PBS16), and also referred to a petition received at the meeting of Council on 29 July 2003 by 93 signatories requesting the Council to refuse further requests for payment of legal expenses, to seek reimbursement of monies previously expended, and to uphold the current legal representation Policy 2.2.8. The report was made with the benefit of advice from Minter Ellison provided on 13 August 2003 (1412NFAD13) that it was open as a proper and lawful exercise of the Council’s discretion to pay for the legal representation of the CEO on the basis that it was for the “good governance” of the City. The advice recommended an assessment of the connection between the services provided and the statutory function being

performed to determine whether it was for the good governance of the City that the legal costs be paid. Neither the legal advice nor the report provided the Council with any direct assistance in performing that process of assessment. On the evidence available to the Inquiry that assessment was not performed by the Council and there was no rational basis for the decision in terms of the provision of good government to the City.

### **Further Media Statements by Mayor Carlos**

178. On the following day (8 October 2003) Mayor Carlos was interviewed by Mr Bartlett on ABC radio: 1804LRB6. Subsequently, Minter Ellison was asked for further advice in relation to the Mayor's actions, including statements to Channel 7 that were broadcast on 7 and 8 October 2003. Mr Douglas advised on 16 October 2003 that Mayor Carlos may have committed a contempt of Parliament by "premature disclosure of public evidence" and that the Council might consider forwarding the transcripts to the Standing Committee: 1512NFAD27. He also advised that Mayor Carlos' comment, "its no use blaming your wife", was defamatory and that other statements were misleading and false. He thought the City was exposed to a risk of an action for defamation by virtue of the Mayor's comments. He also advised that they undermined the lawful authority of Council and as a result adversely affected both the reputation and functioning of the City to the detriment of it and its ratepayers.
179. Further resolutions were recommended. Mr Douglas also advised that steps should be taken to appoint one or more specified councillors to speak on behalf of the City in relation to the employment of the CEO. In relation to a comment attributed to the Premier that the Council was "resisting the Mayor in his efforts to bring about proper practice at their Council" (Channel 7 News: 8 October 2003 – 0104RRW1) Mr Douglas said he doubted the Premier would have made the statement if he had been properly informed of the relevant facts.
180. A series of e-mails (1512NFAD26) indicates that following Mayor Carlos' radio interview, Mr Smith e-mailed Mr Higham instructing him to obtain Mr Douglas' advice as a matter of urgency on issues arising from the Mayor's statements. Mr Higham responded by confirming with Mr Smith that he had already contacted Mr Douglas in relation to the matter. Mr Higham said:

*"Neil is anticipating coming back to the City today with a draft response which will include options for action if appropriate and draft resolutions for the Council for the special meeting. I will keep you posted once I receive that draft advice."*

181. This incident is but one example of the many occasions in which Mr Smith, whilst purporting to distance himself from the Administration in relation to matters concerning himself, nevertheless sought to direct his staff as to the action to be taken in response to various events. It is evident that Mr Smith directed Mr Higham, Mr Loader and Mr Robinson on numerous occasions to obtain legal advice on a range of issues that affected his position and that of the Mayor.
182. Mr Smith was also in frequent communication with Minter Ellison. Either directly, or through his officers, Mr Smith regularly arranged for the attendance of Mr Douglas at Council meetings and for Mr Douglas' advice on matters affecting him. This was clearly demonstrated in relation to comments made by Mayor Carlos which were reported in the various media. In this way Mr Smith often had, in effect, two firms working in his interests, both at the City's expense. Mr Smith also made inappropriate use of legal advice from Minter Ellison.
183. One example occurred in July 2003 when Mayor Carlos forwarded to Mr Smith for record-keeping purposes an e-mail which he received from a ratepayer, Mr Keith Chilvers. Mr Chilvers in an e-mail addressed only to Mayor Carlos expressed concern at Mr Smith's failure to provide evidence of his qualifications and made the comment that Mr Loader had either been "derelict in his duties" or involved in a "cover up". The e-mail expressed disapproval of the decision not to investigate the matter: 2110DSC67.
184. Mayor Carlos forwarded the e-mail to Mr Smith saying, "please record the undermentioned as inwards correspondence". Mr Smith then brought it to Mr Loader's attention and directed Mr Higham to get legal advice "on behalf of the City from Mr Douglas". Mr Smith's e-mail said, "I am of the opinion that these comments are defamatory and that the author should be asked to apologise". Mr Douglas' advice (at 1412NFAD9) was to the effect that "there would be a strong case for arguing that Mr Chilvers' comments ... are defamatory and actionable". There was no mention of qualified privilege. The letter said it would be unusual for a local government to fund defamation proceedings by an employee, but that it would be appropriate to express support for an employee against whom such allegations were made. The letter read:

*"The expression of support may, in appropriate cases, extend to a request for an apology. Generally a communication along these lines would best be made by the CEO as the person with the statutory responsibility for the employment of, and for employment related issues concerning a HR manager. In the present circumstances, however, that may not be appropriate."*

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185. The letter enclosed a draft of a suggested letter to Mr Chilvers from Minter Ellison which was eventually sent. The letter did not say on whose behalf the firm was acting, but stated that the words used were “clearly defamatory and actionable”. The letter sought an unqualified apology to Mr Loader and concluded with the statement:

*“Your response to this opportunity will determine what action is taken by or on behalf of Mr Loader. It will also determine the quantum of damages that will be claimed against you in the event that legal proceedings are commenced.”*

186. Not surprisingly, Mr Chilvers made the apology. The City incurred expenses of \$988.00 (excluding GST). There was no decision of Council pursuant to the City’s legal representation policy for such expenses to be incurred on behalf of Mr Loader.

187. Mr Loader, in evidence at T9611 27/4/05, said that he received a copy of the Chilvers’ ε-mail and then sent an ε-mail to Mr Smith: 2704ML78. The ε-mail asked Mr Smith to consider referring the matter to the City’s solicitors. He said it was possible, but he was not sure, whether he had spoken to Mr Smith about the matter before the ε-mail. Asked whether it was his idea to make the request or whether it was suggested to him, he said, “it may have been my request. I can’t recall exactly what transpired at that particular time”.

188. Mr Douglas said it was not apparent to him at any time that the CEO was giving directions inappropriately to Mr Higham, Mr Loader or Mr Robinson to obtain legal advice: T3577 14/12/04. He did not consider the CEO’s actions in obtaining legal advice on behalf of Mr Loader were inappropriate.

189. On 3 November 2003 Mr Smith sent an ε-mail (2704ML81) to Mr Loader saying:

*“I would suggest that the City needs to obtain advice as to the validity of the Notice of Motion [relating to the CEO’s performance review] and to the power of the Mayor to rule the matter out of order”.*

190. The itemised account of Minter Ellison for this period (0212ABB6) shows that numerous attendances were made by telephone and in person on Mr Smith. This invoice and others show that Mr Douglas met with Mr Smith before Council meetings and advised him in relation to variation of his employment contract and rescission motions relating to decisions affecting his contract of employment.

191. Following the incident involving Cr Hart on 6 November, Mr Smith instructed his executive assistant, Ms Hill, to “please ensure that Mark Loader, a minute clerk and Neil Douglas are all available”: 1511DSC98.
192. In relation to the approach by *A Current Affair* Mr Smith spoke to Mr Douglas on 4 November 2003 about Minter Ellison making a written statement on behalf of the City. Various other attendances are documented in the tax invoice for legal services rendered at that time.
193. On 23 November 2003 Mr Smith sent an e-mail to senior officers re “proposed Notices of Motion – Mayor Carlos” in which he said, “I have arranged for Mr Douglas to attend a conference at Council on Tuesday, from 1:00pm to 3:00pm with all directors, Mark and Kevin”. The letter went on:

*“I also request that we keep this matter confidential as Mr Douglas had indicated that these motions are dealing with contractual, and in many cases, personal and private information. Mr Douglas has also advised that he will be giving the City advice on this matter and to me, in my capacity as CEO of the City.”*

194. Mr Douglas gave the following evidence at T3577 14/12/04:

*COUNSEL ASSISTING: Did you recognise that there was a – the interests of the Council and the Administration didn’t necessarily coincide as far as the CEO was concerned? ---No, I didn’t. I didn’t –*

*The CEO was represented by lawyers who had indicated that conduct on behalf of the City by the Mayor was repudiatory? --- I’m sorry, you did say the CEO and the Administration?*

*Yes? – Well, the –*

*Well, no, between the Council and the Administration? --- No. I saw no conflict between the Council and the Administration. There was between the CEO, the Administration of the Council –*

*The CEO was in control of the Administration, wasn’t he? --- Well, not on these matters.*

*How did you know that? --- Because arrangements had been put in place where the CEO was not to deal with these matters.*

*What were the arrangements, as you understood them? --- My instructions came from Clayton Higham generally, or Mark Loader. Sometimes from Kevin Robinson, but generally not from the CEO.*

*Well, was it apparent to you from time to time that the CEO was giving directions to those personnel to obtain legal advice on certain matters? --- We – one matter before lunch in relation to a defamation issue which I didn’t see any conflict between the CEO’s role. I thought that was appropriate.*

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*Yes? --- I'm not aware of any other matter where the CEO inappropriately was involved in requesting legal advice.*

195. Mr Douglas was asked on whose behalf Mr Higham and Mr Loader instructed him in relation to statements by the Mayor in August 2003:

*COUNSEL ASSISTING: Did you understand that this advice was being sought by Mr Higham and Mr Loader on behalf of Council? --- No, on behalf of the City. Well, was it advice that you expected would go to the CEO? --- Certainly not.*

*PRESIDING MEMBER: Did you say "certainly not"?*

*COUNSEL ASSISTING: Well, that's the reason I make the distinction.*

*MR DOUGLAS: "Certainly not".*

*COUNSEL ASSISTING: Didn't you see a distinction between the Council and the City that was relevant to the advice? --- Yes, there's a distinction between the two.*

*PRESIDING MEMBER: But is there a relevant distinction in this instance? --- There's a distinction between Council and the Administration as well. The Administration was giving you the instruction and seeking the advice? --- That's right.*

*But when you say that you were giving the advice in relation to the City, is that inclusive of the Administration or the Council? --- Mr Inquirer, I said that Mr Higham and Mr Loader, in my view, were acting on behalf of the City.*

*Yes? --- Not on behalf of the Council in giving this advice.*

*Yes? --- The Council being the decision-making body. If the Council had made a resolution part of that resolution was to seek legal advice and in implementing that resolution officers would have been acting on behalf of the Council. In this instance, as I understand it, they were acting on behalf of the City as a body.*

*Yes, but they weren't acting on behalf of the Administration separately from the Council, were they? --- They are part of the Administration. (T3580 14/12/04)*

*COUNSEL ASSISTING: I suppose my point is whether it was for Council to decide what further advice it required in relation to the actions of the Mayor, not for the Administration, given the circumstances in which you had originally been advised, or been instructed, I should say? --- The senior officers of the City were clearly concerned about the impact this was having on the City, not just the Council as a body but the City. They have an obligation to do something about that. (3581)*

*COUNSEL ASSISTING: Well, were you concerned that those instructing you might be acting in the interests of the CEO in doing so? --- No, it didn't concern me at all. I expected there was elements of what was being done that coincided with the CEO's interests. That's quite a different question of acting on his behalf, to diminish if not eliminate the disputation and its effects. That may have been seen to be in the CEO's interests, but that wasn't – wouldn't be a reason for precluding the action being taken.*

196. In the context of the Upper House Inquiry Mr Douglas was asked about his communications with Mr Smith in relation to the rescission motions in November at T3689 15/12/04:

*COUNSEL ASSISTING: Now, do I understand that by this stage there was probably no purpose in trying to keep matters confidential of this kind. It had become opened up by virtue of the Parliamentary Inquiry and there was no need for any distance to be kept between Mr Smith and the rest of the Administration in terms of legal advice relating to him? --- This dealt with a technical aspect dealing with the rescission motion, doesn't it? I don't think – whether this had become an issue at any stage I don't think there would have been any reason not to have Mr Smith look at this. My – I only had a moment to look at it but it does seem to be simply what the powers under the Local Government Act are and the regulations of that rescission motion.*

*Yes? --- I wouldn't have thought there was any reason to withhold that from Mr Smith at any stage.*

*By this time, in any event, the rescission motion related to matters – to motions that were related to his issue, didn't it? --- But that's not the test.*

*No, but can I take it that there was no value or necessity for any confidentiality to be kept between you and the officers that were dealing with Mr Smith's matter by the 17 November? --- No, that's not my understanding at all.*

*Because the submission made to the Parliamentary Commission (sic) made the City's position fairly clear, didn't it, in terms of its support for Mr Smith? --- It put a position before the Parliamentary Inquiry. It didn't set out what the weaknesses in the City's case were. So that's why the submission was one that was written to go to the public, including Mr Smith. I don't see any evidence to support the proposition that you put.*

197. The Council of the City acted appropriately in May 2003 when it resolved to obtain legal advice in relation to matters affecting its CEO. Because the Administration of the City remained under the control and direction of the CEO, and all executive power in the City was vested in him it was necessary in circumstances where the CEO had a conflict of interest, that the Council be advised by solicitors who would act independently of the Administration. Despite the delegation of certain powers to Mr Higham and Mr Loader, the CEO did not keep himself at arm's length from matters affecting him, but continued to direct and influence the obtaining of legal advice which in turn influenced officer's reports and the decisions of Council. On many occasions the attendance of the City's solicitors at a Council meeting was arranged by Mr Smith directly or indirectly.
198. The City's solicitors should have appreciated that, although they were retained by the City, they were instructed upon a resolution of Council in relation to a dispute involving, as one party, the head of the Administration of the City. They owed a professional duty to the elected body. The Administration, in the circumstances, was merely a necessary conduit of the Council's instructions and the legal advice to Council. The actions of the solicitors in dealing directly with Mr Smith and his Administration otherwise than in accordance with a

resolution of Council, and advising the Administration to resist requests by elected members for copies of legal advices and instructions for legal advice (as discussed below), gave rise to a real perception on the part of minority members of a lack of independence on their part.

### **Council Meeting: 21 October 2003**

199. At the meeting on 21 October 2003 the motions recommended by Mr Douglas (moved Cr Kimber, seconded Cr Baker) were passed (9/6), Mayor Carlos and Crs Caiacob, Hart, Hollywood, Nixon and Walker voting against. Mayor Carlos lodged a rescission motion that evening. The resolution read:

1. *NOTES that at its meeting on 9 September 2003, the Council reaffirmed the terms of its resolution of 24 June 2003 which stated, in part, that it:*

*DETERMINES that it is in the interests of the City, including the good governance of the City, that:*

- (a) *issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;*
- (b) *the Mayor and individual Councillors should make no further public statements in relation to these issues;*

*REITERATES its previously expressed strong support for and full confidence in Mr Denis Smith as the City's CEO (see resolutions of 17 December 2002 and 18 February 2003).'*

2. *NOTES that, also at its meeting on 9 September 2003, the Council formally:*
  - (a) *directed the Mayor and individual Councillors to comply with their statutory obligations and the duties of their offices and, therefore, to comply with the terms of the Council's resolutions of 24 June 2003 and 9 September 2003; and*
  - (b) *noted that any future public statements or actions of the Mayor or a Councillor on this issue would be unauthorised, contrary to the interests of the City, and in breach of the statutory duties and the duties of office of the Mayor or the Councillor.*
3. *NOTES that, despite these clear directions by the Council, on behalf of the City:*
  - (a) *the Mayor has continued to make public statements on issues relating to the selection and appointment of the CEO, including his academic qualifications; and*
  - (b) *the Mayor's public statements, in relation to these issues, promote his own personal views which are directly and fundamentally opposed to the lawfully and properly expressed determination of the Council, which is the City's decision making body.*

4. *NOTES AND ACCEPTS the City's legal advice that the Mayor, by making these public statements, has exceeded his statutory powers and is in breach of his duties of office that he undertook to fulfil in his formal declaration on being elected to the position of Mayor.*
5. *NOTES AND ACCEPTS, on the basis of the City's legal advice, that the Mayor's repeated failures to act in accordance with the Council's resolutions of 24 June 2003 and 9 September 2003:*
  - (a) *are deliberate refusals to accept the lawful and proper exercise of the Council's decision-making powers;*
  - (b) *undermine the lawful authority of the City's duly elected Council;*
  - (c) *have adversely affected the City's reputation;*
  - (d) *have adversely affected the functioning of the City; and*
  - (e) *have exposed and, if repeated, will continue to expose the City to a risk of legal liability for damages to the extent that the Mayor's statements and actions can or might be attributed to the City.*
6. *NOTES AND ACCEPTS the City's legal advice that it is imperative, in the interests of the City and its ratepayers, that the Council takes prompt and decisive action to distance itself from the Mayor's statements and actions that are inconsistent with the Council resolutions of 24 June 2003 and 9 September 2003.*
7. *CENSURES the Mayor for his public statements that are in breach of the Council's resolutions of 24 June 2003 and 9 September 2003.*
8. *REAFFIRMS the terms of its resolution of 9 September 2003.*
9. *DIRECTS the Mayor and individual Councillors to comply with their statutory obligations and their duties of office and, therefore, to comply with the terms of this resolution and the Council's resolutions of 24 June 2003 and 9 September 2003.*
10. *APPOINTS and AUTHORISES Cr O'Brien:*
  - (a) *to speak on behalf of the City on all matters relating to the employment of the CEO; and*
  - (b) *to ensure that, on any future occasion on which Mayor Carlos, or a Councillor, makes a public statement relating to the employment of the CEO, the media is to be informed:*
    - (ii) *of the text or substance of the relevant Council resolutions; and*
    - (iii) *that the offending statement is made without authority, contrary to the interests of the City, and in breach of the statutory duties and the duties of office of the Mayor or the Councillor concerned.*
11. *APPOINTS AND AUTHORISES Cr O'Brien to constitute a delegation to the Premier and the Minister for Local Government and Regional Development to explain the City's position on these matters.*

*AUTHORISES City officers to forward to the Standing Committee on Public Administration and Finance a copy of the transcripts of the Mayor's media comments made on 7 and 8 October 2003, for the Committee's information and to enable it to take whatever action it considers to be necessary.*

200. In opposing the motion Cr Nixon commented somewhat presciently:

*"Its probably fair to say that in relation to the – some of the Council resolutions we've made in the past in regards to this matter it could be argued that the Mayor hasn't complied but I still in all conscience cannot support this motion. In the cold light of day in a few years time when all this is behind us when we've either been voted out of office, retired or sacked, we have to be comfortable with our conscience in regards to this matter.*

*Really, I would have thought by this stage if Denis Smith has any sort of case he would have sued Don Carlos by now, the Mayor and judging by some of the comments attributed to Katie Jackson, if he had a case he would have sued her and if he had any sort of case I am sure he would be preparing papers to sue Liam Bartlett as we speak, and what's the bet that he won't because he really doesn't have a case.*

*I am sure the public – it's starting to filter through to the public what the real truth behind this is. We all know what the truth is. We are jumping through legal hoops here. I am not comfortable supporting this motion and I think we all have to look beyond loyalties and be honest and vote in the best interests of the City, the best interests of the ratepayers, because when or if we are sacked or if we do run again there are enough people do take notice of what goes on in the City to actually hold us accountable for what we do." (2206MISC65)*

201. Cr Caiacob asked whether the gagging of the Mayor contravened the High Court's decision in **Theophanous v. Herald Weekly Times Ltd** (1994) 182 CLR 104, quoting the line "freedom of political discussion trumps the stricter common law of defamation". Mr Douglas responded:

*"This is a question of the Council speaking with one voice and the LGA provisions being upheld. It's not a question of freedom of speech. We have freedom of speech within the Council chamber and outside but once the Council has made a determination of a particular matter, the LGA requires that the Mayor speak on behalf of the local government. Now, if the Mayor doesn't do that, the Mayor is in breach of the statute and in breach of his declaration of office."*

202. Again, this advice probably overstates the effect of Section 2.8(1)(d). The interests of community participation and accountability recognised in Section 1.3 militate in favour of a less rigid construction of the section. It prescribes a role for the Mayor but does not prohibit him from speaking publicly as an elected member so as to derogate from the right to

freedom of speech. That any elected member may not “reflect adversely upon a resolution of Council”, as the Standing Orders and the Code of Conduct provide, does not prevent an expression of dissent. Accordingly, a Mayor may express dissent as an individual elected member, without reflecting adversely on a resolution and without necessarily compromising his role to speak on behalf of the local government. With due respect for Mr Douglas’ experience and expertise in the area of local government, and in the absence of judicial precedent, it is suggested that a broader construction should be preferred. At the very least, it is moot.

203. On 22 October 2002 Channel 7 reported the events of the meeting. They were also the subject of a news report in the *Joondalup Community* on 23 October 2003 (“Mayor rebuked”): 2104MDM1. Mayor Carlos and Cr Hollywood were reported as saying in Council that they had grave doubts about the validity of the legal report, did not agree with it, and would seek another legal opinion.

### **Sixth Decision of Council to Pay CEO’s Legal Expenses**

204. A further request was made by the CEO for payment of legal expenses in the sum of \$13,404.12 excluding GST, some \$8,404.12 in excess of the \$5,000.00 previously allowed by Council for legal representation at the Upper House Inquiry.
205. At the meeting on 21 October 2003 Cr Caiacob moved that the CEO be stood down on full pay and that the question of misapplication of funds for payment of legal expenses be referred to the Department and the Commissioner for Public Sector Management for determination. The motion was defeated. A motion to authorise the payment of Mr Smith’s further legal expenses of \$8,404.12 was passed 9/5 with Mayor Carlos and Crs Caiacob, Hart, Hollywood and Walker voting against.
206. A motion by Cr Caiacob, seconded Cr Hart, was put that the Council note:
- *“The CEO’s obligations under Section 5.41 to advise the Council in relation to its functions and ensure that advice and information is available to Council so that informed decisions can be made.*
  - *The provisions of Section 8.38 regarding misapplication of funds.*
  - *The provisions of the legal representation Policy 2.2.8 relating to Conflict of Interest and Repayment of Assistance in relation to the CEO’s legal expenses.*
  - *The possibility that the CEO had breached the terms and conditions of his contract.*
  - *The liability for repayment of misapplied funds under Section 8.38.*

*and authorise Freehills to recover the funds expended on behalf of Mr Smith and immediately stand down the CEO on full pay, with the matter being referred to “the Local Government authority and the Commissioner for Public Sector Management for determination”.*

This motion was lost.

207. A report of the motion appeared in the *Joondalup Community* on 23 October 2003 (“Smith beats Caiacob motion”): 2104MDM1. Cr Baker wrote that day to Mr Douglas (1512NFAD29) drawing his attention to the Mayor’s statements on Twin City’s FM radio and Channel 7 news on 22 October 2003 and in the articles in the *Wanneroo Times* (sic). He accused the Mayor of an ongoing campaign to bring the City into disrepute and attack the CEO and suggested that Minter Ellison consider issuing a press release to refute the statements of Mayor Carlos and Cr Hollywood regarding the firm’s advice to the City. The letter also requested preparation of a further motion of censure of the Mayor to be debated at the next meeting of Council. Mr Douglas acknowledged Cr Baker’s letter on 24 October 2003 stating that it was not in the City’s interests or those of his firm to respond by way of press release and indicating that Cr Baker’s letter had been forwarded to Mr Robinson: 1512NFAD30.
208. Mr Douglas provided a letter of advice to Mr Robinson on 7 November 2003 regarding a rescission motion by Cr Hollywood relating to the decision to authorise payment of the CEO’s legal expenses on 21 October 2003. Mr Douglas advised that there had been no misapplication of City funds as the City had power to make the payments for the City’s “good governance” and the costs were incurred for matters arising in the course of the CEO’s employment.

### **Request for Access to Legal Advice**

209. On 22 October 2003 Cr Walker requested Mr Higham to provide a copy of a letter to Minter Ellison which requested the advice which was given to Council at the meeting on 21 October. On the same day, following a meeting with Mr Higham, Mayor Carlos and Crs Hart and Walker signed a written request for an appointment to view all legal advice in terms of reference for that advice pertaining to the employment of the CEO: 3003CMH37.

210. Mr Robinson obtained the advice of Mr Douglas with respect to the disclosure of advice to elected members on 24 October 2003: 1512NFAD32A. Mr Douglas referred to Section 5.92 which provides that a councillor is legally entitled to “have access to any information held by [the City] that is relevant to the performance by the [councillor] of any of his or her functions under this Act or under any other written law”. Mr Douglas said that an elected member was therefore entitled to have access to legal advice, but only to the extent that it was relevant to the performance of the elected members statutory functions:

*“In the case of each legal advice, the councillor’s access entitlement depends on him or her establishing that the relevant connection exists – that is, that his or her access to the advice is relevant to the performance of his or her statutory functions. For this reason, based on the terms of Section 5.92 of the Act, the policy requiring all councillors to be given access to all the City’s legal advice would exceed, and be inconsistent with, the relevant legal entitlement of councillors under the Act.”*

211. Mr Douglas expressed concern that the request for advice was not clear as to what period of time was covered, noting that issues relating to the CEO’s employment would cover a period of two years. He also noted that “because of the various issues that have been raised in the Council, and elsewhere concerning the employment of the CEO, it may be difficult enough to identify the legal advice and relevant instructions, that could be regarded as ‘pertaining to the employment of the CEO’ ”. He commented on the resources that would be required to respond to a broad request and observed that unless the documents sought were more clearly identified it would not be possible to determine the entitlement of the elected member to be given access. Mr Douglas’ advice concluded:

*“The Mayor’s request for a copy of the written delegation by the CEO to Mr Higham must also be assessed by reference to the same test in Section 5.92 of the Local Government Act – that is, demonstrated relevance of performance of the Mayor’s functions. A delegation from the CEO to another officer is clearly a matter that comes within the statutory function of the CEO under Section 5.41(g) of the Local Government Act. We are not aware of any readily apparent reason why a copy of the document, or even access to it, would be relevant to the Mayor’s functions. It would be appropriate to inform the Mayor of the relevant test applying to access and to give him the opportunity to satisfy that test.”*

212. Mr Douglas’ advice was amended on the same day (1512NFAD32b) to include reference to the issue of confidentiality. He said it was in the City’s interests to minimise the risk of confidential information, including legal advice, being disclosed to third parties. This he said was an important consideration that strengthened the need to ensure that legal advice

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was not given to elected members unless they had a legitimate justification. He said it also strengthened the need to ensure that access, where it is justified, is given in a form that protects the City's interests. In many cases, he said, this may result in elected members being given access that did not include being given a copy of the advice. His amended advice contained a draft response to Mayor Carlos and Crs Hart and Walker which contained the following paragraph:

*“In considering the question of access by a particular elected member to legal advice, it is also important to take account of the conflict of interest provisions under both the Local Government Act and the City's Code of Conduct. For example, there would appear to be a clear conflict of interest in an elected member being provided with access to legal advice that dealt with the prospect of legal proceedings being taken against that member in his or her professional capacity.”*

213. Amendments to the legal advice coincided with Cr Baker sending an e-mail to Mr Smith on 24 October 2003, stating that in his view the information requested should not be available to the Mayor and councillors concerned because “these councillors and the Mayor have an interest which is adverse to the best interests of the City of Joondalup”. He expressed concern that, as with previous confidential legal advice, the documentation may be again leaked to the media as it clearly was after the last Council meeting. He also said “the Mayor continues not to represent the City's best interests on this issue as has been confirmed by the City's lawyers”: T2151.
214. Mr Robinson gave evidence that he endorsed a faxed copy of the advice (2705KBR65) with a note to Mr Higham stating that he agreed with the advice and sought an assurance that he had been delegated authority to deal with the matter. Mr Robinson explained that he understood Mr Smith to have withdrawn his delegation. Mr Higham was going on leave and he wished to be sure of his position: T11843 27/5/05. Thereafter, Mr Loader had carriage of the elected members' request.
215. There was no mention made in the advice of Section 5.46 which requires a CEO to keep the register of delegations made to the CEO and to employees. Nor was any mention made of Section 5.41 which imposes a duty on the CEO to advise the Council and to “ensure that advice and information is available to the Council so that informed decisions can be made”, as well as ensure that records and documents are kept.
216. This section had been relied upon by Mr Douglas in his advice to Mr Higham (1412NFAD10) regarding the question whether letters sent by the Commissioner of Police

to Mayor Carlos and Cr Walker, opened and processed by the City, should remain part of the City's records, notwithstanding advice from the Commissioner's office that the letters were forwarded on a confidential basis and intended for the addressees personally, and whether copies of those letters should be given to the CEO, the elected members and others. On this occasion Mr Douglas advised that the documents should be retained because they had been sent to each member at the City's offices, neither contained anything to indicate that it was sent in confidence or that it was sent to either member in a personal rather than official capacity. He also advised that the CEO had a statutory responsibility to ensure that records and documents were properly kept and would be entitled to have access to all records and documents unless there were compelling reasons to the contrary. In relation to councillors, Mr Douglas advised that the CEO had a duty to ensure that advice and information was available to Council and that councillors had a corresponding entitlement to be provided with relevant information. He said there were strong grounds to conclude that the CEO had an obligation to ensure that copies of the Police Commissioner's letters were provided to the Council: 1412NFAD10.

217. In the scheme of the LGA, and having regard to its stated intention of achieving better decision making, greater community participation, greater accountability and more efficient and effective local government, such a statutory register would constitute a record to which elected members and the public should have access as of right. As for access to legal advice generally, it was stated in the Report of the Inquiry into the City of South Perth that "It is a fundamental right of councillors to seek legal and other advice provided to the City on topics they are required to make decisions on". Given that the Council is the governing body of the local government (LGA Section 2.6(1)) and it is the role of the Council to direct and control the local government's affairs and be responsible for the performance of the local government's functions (LGA Section 2.7(1)(a)(b)), those providing administrative assistance to the Council would be expected to start with the proposition that members of the Council are entitled to all information they seek, unless there are exceptional circumstances.
218. Councillors of the City of Joondalup were required on a number of occasions to make decisions in relation to the CEO's employment. To do so they were entitled to be fully informed not only as to factual information – and evidence, about which comment has been made – but also legal advice which had been obtained by the Administration and the instructions given for that advice. Section 5.92 does not cast an onus on an elected member to prove to the satisfaction of the Administration that the information is relevant to their statutory function. Rather, the interests of good governance and the stated intent of the Act

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and statutory role of the Council indicate it is for the Administration, whose function and duty it is to inform and advise, to indicate the reasons for not providing requested information.

219. Furthermore, it is not a relevant consideration, in the discharge of the CEO's statutory duty to provide information to elected members that the information may be forwarded to others who may not be entitled to it. The LGA and the Code of Conduct to which elected members subscribe adequately delimit the use to which such information can be put by an elected member.
220. Mr Robinson then wrote to the Mayor and Crs Hart and Walker on 24 October 2003 referring to Section 5.92 and stating:

*“To enable me to respond to your request, would you please provide me with details of the basis on which you consider that the advice and other material you have sought is relevant to the performance of your functions.”*

221. On 28 October 2003 Cr Hart e-mailed Mr Loader requesting a time for councillors to see the terms of reference of legal advice previously requested. This request was referred to Mr Douglas who advised that Mr Loader was not obliged to arrange a meeting and that the councillors concerned should be asked to provide details of the basis on which they considered the legal advice and other information to be relevant to the performance of their functions. The cost in October 2003 of legal advice on the disclosure of legal advice to elected members was over \$2,800.00.
222. There were numerous e-mails between Mr Loader and Cr Hart in the first half of November 2003, but on the evidence available it appears that the requests of Mayor Carlos and Crs Hart and Walker were never satisfactorily answered. The tortuous process which was engaged in by way of response to the request of the councillors is not a cause for adverse reflection on the conduct of the officers involved. They were appropriately acting on legal advice: see *Inquiry into the City of Cockburn* and *Murcia Holdings Pty Ltd v City of Nedlands* [1999] wasc 241, per Anderson J. The legal advice, in the particular circumstances was reasonably sought, given the litigation which was on foot at the time.
223. It is also to be taken into account that the principal thrust of the communications from the administration was to clarify the breadth of the request being made. In addition, the officers

did not appear to have even got to the point of considering their obligation to take into account the provision in the Corporate Procedures Manual of the City, Clause 1.7 (p. 7) that

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“Legal opinions, or details of information contained therein, shall not be made available to members of the public or individual elected members without the prior approval of Council.”

224. One can readily understand why that clause might have been promulgated. The legal professional privilege attaching to legal advice reasonably requires a clear mechanism for its preservation. That designated procedure is probably not an unreasonable one in ordinary circumstances. If the matter had come to its proper finality, it ought to have been dealt with by way of an officer’s report to Council which recommended a resolution that legal advice be provided to the councillors requesting it which, in the judgment of the officers responsible they were able to identify as relevant to the performance of the elected members statutory functions and able to assemble with a reasonable amount of effort (with such assistance as they might have obtained in the meantime from any response received from the councillors as to the purpose and any other definition they might provide as to the request).
225. Officers might use as a guide the phrase the test for provision for inspection of information available to the public in Section 5.95 of the LGA. It refers to a process of inspection which “would divert a substantial and unreasonable portion of the local government’s resources away from its other functions”. That is not an infallible guide, however, because the role of councillor may, in the particular circumstances, dictate a different approach to that which would apply to the inspection of information generally.
226. The Code of Conduct, under the heading “Administrative and Management Practices” provides that – “Elected members, Committee Members and Employees shall ensure compliance with proper and reasonable administrative practices and conduct, and professional and reasonable management practices.”
227. There is no evidence that the councillors concerned were conscious of the provision in the Procedures Manual concerning the provision of legal advice, or that it was drawn to their attention by staff, or that they were otherwise deliberately requiring unreasonable administrative or management practices. If the matter had proceeded any further, it would have been the role of the Administration to point those matters out to them and advise how they might proceed in a manner which was in compliance with reasonable administrative and management practices.

## Conclusions

- A. Cr Kimber and Cr Baker acted improperly and in breach of the Code of Conduct by publishing the press release of Cr Kimber dated 4 July 2003.**
- B. Mayor Carlos should have resigned from office and subjected himself to the vote of the electorate at least by the time of the resolution of Council censuring him on 9 September 2002.**
- C. It was open to the Director-General of the DLGRD to have exercised the powers under Sections 8.2 and 8.3(1) of the LGA to obtain information and carry out an investigation of the process of appointment and affirmation of the employment of Mr Smith, including the veracity of his qualifications, at least from the time Mr Morris recommended use of Section 8.2 in his report of 10 June 2003, but it cannot be concluded that by taking this course the DLGRD would have avoided the circumstances leading to the suspension of the Council.**
- D. The exercise of statutory powers of investigation and inquiry by the DLGRD would have identified a serious probity issue which the Council would have been advised to address differently in the interests of maintaining public confidence in the administration of the local government.**
- E. The variations in the advice given by Mr Schorer and Mr Cole to Cr Walker and Cr Hart and the City's Administration respectively concerning the payment of the CEO's legal expenses served to confuse rather than assist the Council in making decisions on that issue. That, together with the failure of the advice of Minter Ellison and the Administration through officer's reports to directly address the issue, meant that the advice provided to the Council was seriously deficient.**
- F. The Administration of the City failed properly to instruct those whom it consulted and so failed to provide adequate advice on the liability of the City to pay FBT and GST in respect of payments by the City of legal fees to BDW for advice given to Mr Smith.**

- G. The advice of Minter Ellison failed to address the statutory, contractual and ethical duties of the CEO to act in good faith in the interests of the City.**
- H. There was no rational basis for the fifth decision of the Council to approve expenditure on legal advice to Mr Smith.**
- I. Mr Smith improperly directed Mr Higham, Mr Loader and Mr Robinson on numerous occasions to obtain legal advice on a range of issues that affected his position.**
- J. The actions of Minter Ellison in dealing directly with Mr Smith and his Administration otherwise than in accordance with a resolution of Council, and advising the Administration to resist requests by elected members for copies of legal advices and instructions for legal advice, gave rise to a real perception by minority members of Council (in respect of the CEO issue) of a lack of independence on their part.**



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## Part 8

### The Council in Turmoil

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#### Cr Hart Incident

1. On 6 November 2003 an incident occurred whereby Cr Hart, using her security access card which she, as a councillor was privileged to have, admitted a television journalist and cameraman into the Administration offices, facilitating a trespass to an area to which access by members of the public was restricted, and accompanied them to the CEO's office, entering the office, saying "I have some people here to see you". Mr Smith reacted strongly to the incident issuing an e-mail later that day which described Cr Hart's conduct as intimidation and harassment. He indicated that he intended to seek immediate legal advice in relation to a claim against Cr Hart.
2. The television journalist was Ms Roz Thomas of *A Current Affair*. Ms Thomas had sent an e-mail to Mr Brennan on 4 November 2003 stating "Sydney believes this is now a story of national importance hence we're running a six or seven minute piece next week":1512NFAD67. She said that she had interviewed the Mayor and the Minister and was arranging for interviews from former councillors from Warringah, Coffs Harbour and Campbelltown. She said she had also approached the managing director of MRA. She went on to say:

*"We have requested an interview with Denis Smith, as he has not yet been afforded the right of reply, and we believe this story cannot be told accurately without him. He is central to events concerning Council in recent times, and we will do whatever we can to ensure both sides of this tale are told, perhaps for the first time. We are also keen to interview Chris Baker, given no supporter of Denis Smith has yet been afforded the right to speak on his behalf. Laurie, the crew and I are available tomorrow and we hope Denis Smith will see the merit in having his story told fairly and without prejudice."*

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3. Mr Brennan referred the message to Mr Smith who sent it to Mr Loader who forwarded it to Mr Douglas. Mr Douglas sent an e-mail to Mr Loader on 5 November 2003 indicating that the matter could be discussed at a meeting that was planned with Mr Smith that morning. Minter Ellison's itemised account for the relevant period (1512NFAD49) shows that Mr Douglas was involved in advising Mr Smith, Mr Loader and Mr Brennan in relation to the approach by *A Current Affair* on 4 November 2003. On 5 November 2003 he was engaged in preparing advice on *A Current Affair's* proposal and he had a telephone conversation with Ms Thomas on 6 November 2003.
  
4. Ms Hart gave her account of the incident in evidence. A bus tour had been arranged on 6 November 2003 of culturally significant indigenous sites in the City. Ms Hart had a meeting arranged with a person in Administration. As she was driving to a meeting she received a call from Cr O'Brien who asked her to ensure that the bus tour did not commence without him. She detoured to Neil Hawkins Park to ask the bus to wait. She then had a meeting with Mr Brennan before speaking to the Mayor's personal assistant, Ms Yarranton. She then went down to the car park and opened the security door with her card. The security gate remained open. Whilst she was in the vicinity of the car park her attention was drawn by Mr Denis Cluning, a Council officer, who asked her, "Do you know who those kids are in the car park?" Ms Hart said that Ms Rhonda Hardy then turned up and she had a conversation with her. She also saw Mr Dave Djulbic, another officer. She ended up talking to a female who was in the car who she discovered was Ms Thomas of *A Current Affair*. She then spent some time sitting in her car during which she noticed that Ms Helen Hill, the CEO's executive assistant was driving Mr Smith's car into the car park. At one stage she was asked by Ms Thomas' crew, "Would you take us up to Denis Smith's office?" She agreed and escorted them upstairs. When she arrived at the CEO's office she knocked on the door, opened it, and said, "Denis, there's some people here to see you". She was shocked by Mr Smith's reaction. She said she had just completed media training a couple of weeks before and had been taught how to handle the media.
  
5. Ms Hart conceded that she used her security card to give the television crew access to the CEO's office. By way of explanation she said that she was concerned that she saw Council employees spending City time "protecting the CEO" and considered that he was bound under his contract to be available to the media. According to Ms Hart, Mr Smith's response was a "huge over-reaction". She said her intention was not to embarrass him. Whilst she could appreciate why her actions could be viewed as inappropriate, she did not regret what she did. Her concern was that when Council dealt with the matter by way of a censure

motion in December 2003 she was not able to give her account, even though Mr Smith was afforded this opportunity: T1843.

6. Mr Smith's account of the events was set out in a summary which he sent to Mr Douglas and his solicitor, Mr Davies, on 9 November 2003: 1512NFAD71. To Mr Douglas he said:

*“On behalf of the City, you may need to be able to give councillors some guidance as to how to handle the letter sent by Blake Dawson Waldron to your practice last Friday week and on 7 November 2003. You may also wish to consider drafting up some suggested motions pertaining to this matter.”*

7. Mr Douglas responded on the same day saying that he agreed with Mr Smith's suggestions about the BDW correspondence and had worked on the proposed draft resolutions which he had e-mailed to Mr Loader: 1512NFAD72. Mr Smith's summary indicated that Mr Brennan had responded to Ms Thomas on 5 November 2003 advising that Mr Douglas would be issuing a statement on the matter and that it was not appropriate for Mr Smith to be interviewed. Ms Thomas responded by saying she was still interested in interviewing Mr Smith and would attend the following day.
8. Whilst Mr Smith was travelling back to Joondalup from a function in Perth he was advised by telephone that a television crew had set up in the secure car park and were with Cr Hart. Mr Smith arranged to enter the building by a different route. On his return to his office he dictated a report to councillors. He was then advised by a City ranger that the media crew was still located in the secure car park. Mr Smith said he requested Mr Brennan to have them removed. He then closed the door of his office so that he could dictate a confidential report for the next meeting of Council. As he was doing so there was a knock on his door and Cr Hart opened it. He said “a number of reporters and cameramen entered his office”. He was asked by Ms Thomas to speak about his qualifications. He asked her to leave and attempted to walk past her at which time he advised her she had no authority to be in the offices of Council or his office. She continued with “a barrage of questions” and Mr Smith requested his staff to call security. Mr Smith said he noticed that his executive assistant Ms Hill was extremely distressed. He went back into his office and slammed and locked the door. He said he was physically ill and emotionally distraught. He contacted BDW and also Cr Brewer in his capacity as a chaplain. He also spoke to Crs O'Brien and Kimber. He then advised staff that Cr Hart was not entitled to meet them in the Administration building and he instructed staff to cancel her access card. He said he began to experience severe chest pain, breathlessness and a vibrating of his body. Ms Hill telephoned Mr Smith's wife, then

the Joondalup Medical Centre, and Mr Smith was subsequently taken to see a doctor. Mr Smith's account was confirmed in his evidence.

9. At 12.03pm Mr Smith sent an e-mail to all elected members and his solicitor (0302DIS83) stating that at 11.55am Cr Hart had admitted the Channel 9 personnel to his office without authority. He stated that he would cancel all elected members' security access to the Administration offices as a consequence. He also stated that he would report Cr Hart to the DLGRD and seek legal advice about bringing legal proceedings against her, personally and as a councillor, and against the Council.
10. On the day of the Hart incident the CEO's general practitioner, Dr John Crawford issued a letter to Mr Davies saying that Mr Smith had consulted him for pancreatitis and peptic ulcer pain thought to be due in part to the stress of his work and his stress "has been exacerbated by the recent invasion of his privacy by a Councillor and the media today, 6 November 2003". He certified him unfit for work for stress pain and anxiety: 1512NFAD69.
11. On 7 November 2003 BDW wrote to Minter Ellison complaining of the Hart incident and describing Cr Hart's actions as a clear breach of the City's duty of care to Mr Smith, as well as a breach of the City's obligations of trust and confidence: 1512NFAD69. The letter read, in part:

*"The constant harassment and defamatory conduct engaged in by the City's Mayor and Cr Hart (among others) is clearly causing an emotional and physical toll on Mr Smith in his current work environment. It is clear that the ongoing unwarranted and prohibited conduct directed at Mr Smith is physically affecting his health. Mr Smith is at risk of further injury if he continues to be placed under this level of pressure."*

The letter reiterated Mr Smith's desire for a speedy resolution of issues relating to his employment.

12. In response to the Hart incident a special meeting of Council was called for Sunday, 9 November 2003 at which all elected members were present together with 38 members of the public and 4 members of the press. The meeting had been called by Crs Mackintosh, Kimber, Gollant, Brewer and O'Brien. The agenda indicated that it was to discuss the "urgent and extraordinary situation that occurred on 6 November in the administration offices", and "the elected and administrative conflict that has developed, including the current contract of employment of the CEO". Mr Douglas attended at the meeting.

Questions were asked in public question time relating to the CEO and there was a motion discussed acknowledging the role of the media and encouraging the CEO and Mayor to maintain a good image for the City, but after being the subject of some amendments, it was left to lie on the table on a vote of 10/5. Council went behind closed doors and the minutes do not disclose any decisions being made.

13. On 12 November a report on the conflict between the Mayor and the CEO was broadcast nationally by Channel 9 on A Current Affair: 1811SAH9.
14. On 2 December 2003 Cr Hart was censured by Council for allowing media access to the Administration building. The item was not discussed behind closed doors. An officer's report was provided which said that it was up to the Council to decide what penalty should be imposed on a breach of the Code of Conduct. According to Ms Hart she left the Council chamber during debate as she was told she had a conflict of interest. Mr Smith also left the room after making a statement. When Ms Hart returned she was told the motion had been passed. She had not been given any opportunity to respond to the allegations. She did however make a personal statement. The minutes set out the officer's report which referred to the Code of Conduct, but did not indicate what provision of the Code was breached. It also noted that the CEO had removed elected members' access to the Administration building.
15. The motion censured Cr Hart for "a serious breach of [the] Code of Conduct, and the previous resolutions of Council concerning the CEO's contract of employment". It requested that she apologise to the CEO, the staff and her fellow councillors and warned that if she did not do so that her dining room privileges be revoked for six months. The motion was in terms that requested her to repeat her councillor induction programme and WALGA training, requested the CEO to give consideration to Cr Hart being excluded from the Administration building without express prior written consent, requested a full investigation be carried out to determine whether criminal charges could be laid relating to breach of security and misuse of Council property, nominating Minter Ellison for this purpose, and requested the Minister to consider whether Cr Hart's actions constituted contravention of the Act. The minutes note that Cr Hart left the chamber after declaring an interest that may affect her impartiality. The CEO declared a financial interest and also left. It was moved Mayor Carlos, seconded Cr Hollywood, that the motion lie on the table. That motion was lost. Discussion ensued during which Cr Hollywood was asked to withdraw inappropriate comments. The censure motion was carried 8/4.

16. The actions of Cr Hart were undoubtedly improper, but she was not given a fair opportunity to answer to the complaint made against her and was therefore denied natural justice by the Council. It is not clear from the officer's report or the decision of Council, on what basis it was considered that Cr Hart's conduct breached the Code of Conduct or was thought to have possibly breached any criminal law or the LGA. The Code of Conduct does, however, proscribe conduct which "may cause a reasonable person unwarranted offence or embarrassment".
17. The reaction described by Mr Smith struck Ms Hart as "over the top". There is no doubt that Mr Smith was labouring under some stress, but he was aware of Ms Thomas' desire to interview him and was informed of her presence in the secure car park that day. Whilst he may not have expected the television crew to confront him in the way they did, it was just such an encounter that he was at that time taking pains to avoid. The evidence before the Inquiry reveals that Mr Smith had attracted considerable media attention in his positions at Coffs Harbour and Warringah. He attracted further media attention in his capacity as CEO of Joondalup. In those circumstances, it is not unreasonable that Ms Hart (as she indicated in her evidence and her submission) did not foresee the apparently severe emotional and physiological reaction which he subsequently described. Ms Hart concedes that she made an error of judgment, but disclaims any malicious intent. There is no reason to doubt that disclaimer.
18. As for the reaction of Council, the censure motion, apart from being debated in circumstances which amounted to a breach of natural justice, appears not to have been considered with the objectivity and discretion which one would expect of a reasonable Council. The motion was non-specific as to the breach of the Code of Conduct of which Ms Hart was accused and did not specify in what manner the previous resolutions of Council concerning the CEO's contract of employment added cause for censure. Whilst Cr Hart's actions may reasonably be viewed as discourteous and disrespectful and calculated to embarrass the CEO, the terms of the motion overstated the gravity of her offence. The degree of seriousness of the impropriety of her action needs to be seen objectively on the basis of its impact on Mr Smith, and on the other councillors, who were thereafter denied access to the administration area. However, it is appropriate for her culpability to be regarded as mitigated by her lack of malice.

### **Working Group: Termination**

19. On 31 October 2003 BDW wrote to Minter Ellison "without prejudice" regarding the formation of a committee to consider and resolve issues between the City and Mr Smith:

1512NFAD63. The eight page letter set out a very detailed account of actions and statements by Mayor Carlos to which Mr Smith took exception. It contained lengthy submissions about the Mayor's obligations, the effect of his conduct towards Mr Smith and the City's obligations to Mr Smith, mostly echoing Mr Douglas' advice to Council. On 5 November 2003 Mr Douglas and Mr Loader met with Mr Tony Davies of BDW and Mr Smith. On 8 November 2003 Mr Douglas sent Mr Loader by e-mail a suggested motion to establish a working group to consider and assess the consequences to the City of the issues relating to Mr Smith and authorising the group to obtain legal advice: 1513NFAD70. On 9 November 2003 Mayor Carlos e-mailed Cr Baker expressing agreement with his proposal that a five person committee be formed to deal with the termination of the CEO's contract: 1704MCOB15.44. The Mayor stated that a "major" payout would not be acceptable to him. He said he wished to be part of the committee. He also proposed that the motion of censure against Cr Hart not be discussed further until the issue of the CEO's termination had been resolved. Subject to agreement being reached on these terms, he was prepared not to request the Minister to suspend the Council.

20. At the meeting of Council on 11 November 2003 the Council passed unanimously a motion drafted by Mr Douglas in the following terms:

*Moved Cr Kimber, seconded Cr Baker, that Council:*

1. *NOTES the oral report provided by Neil Douglas of Minter Ellison dealing with his communications with Blake Dawson Waldron, solicitors for Denis Smith.*
2. *EXPRESSES its concern and regret that:*
  - (a) *the responses by the Council and individual elected members to issues associated with the employment of the CEO have had, and are continuing to have, serious consequences for the City; and*
  - (b) *these consequences have adversely affected, and continue to adversely affect - to the detriment of the City, its ratepayers and residents:*
    - (i) *the ability of staff and elected members to perform their functions; and*
    - (ii) *the reputation and functioning of the City;*
    - (iii) *the City's legal liability.*
3. *ESTABLISHES a Working Group:*
  - (a) *to consider and assess these existing and potential consequences; and*
  - (b) *to report to the Council by the second Council meeting in December 2003, on options to avoid, or limit the impact of, these consequences.*
4. *DETERMINES that the Working Group is to comprise of Crs Walker Hollywood, Baker, Nixon, Caiacob, Kimber and Brewer and is to be assisted by Mark Loader, Manager Human Resources.*

5. *AUTHORISES Mark Loader, Manager Human Resources to obtain legal advice, including if he considers it necessary, the advice of Senior Counsel, in relation to the City's legal liability.*
  6. *RECOGNISES AND RESPECTS the confidentiality that must be maintained, in the interests of the City and the CEO, throughout this process.*
21. On 17 November 2003 Cr Baker lodged three notices of motion for rescission of resolutions passed on 11 November 2003. These were co-signed by Crs Gollant, Kenworthy, Mackintosh and O'Brien. The third sought the rescission of the decision to approve a variation of the CEO's contract of employment with respect to performance reviews and substitute it with a motion which (a) directed the CEO to produce his qualifications to Mr Loader, (b) directed Mr Loader to prepare a report on the status of the qualifications, to be given to the Mayor and the CEO and later to Mr Douglas for the preparation of a report detailing possible courses of action for the Council.
22. The reasons given for the motion were as follows:
- “Council as the employer of the CEO has a duty to ensure that it deals with this issue in good faith. This motion will commence the process to deal with the issue of the employment of the CEO in good faith and so restore public confidence in the ability of the Council to deliver good government to the electors of the City of Joondalup. All the facts in this issue must be established and suitable advice sought to enable Council to resolve this issue before the Minister for Local Government is forced to use his powers and take action under Sections 8.2 to 8.33 of the Local Government Act 1995.”*
23. On 28 November 2003 Mr Douglas gave written advice to Mr Loader in relation to comments by Mayor Carlos published in The West Australian on 27 November 2003: 1512NFAD82. The comments related to the special Council meeting (behind closed doors) on 25 November 2003. They were reported as follows:
- “Mr Carlos said he could not comment what went on at the meeting after he was asked to leave. But he said he objected about four times when Mr Douglas and several councillors requested he excuse himself.*
- “I was advised by Mr Douglas that I had a conflict of interest and I should not be there”, Mr Carlos said.*
- “He refused to brief the Council while I was in the room. He gave a partial report and said he would not go any further. I really had no choice.”*
- Mr Carlos said he finally agreed to leave and the meeting continued for about 90 minutes.”*

Mr Douglas was of the opinion that if the Mayor had made the comments attributed to him then he would have committed a breach of the Standing Orders by disclosing details of matters dealt with behind closed doors. Mr Douglas advised that the Mayor's alleged financial interest was "a matter dealt with by ... a meeting sitting behind closed doors" for the purposes of Clause 7.2 of the Standing Orders. Mr Douglas also advised that disclosure of such information may be in breach of Section 5.93 in that it was apparent that the disclosure of what occurred would be "improper use of information" for the purposes of this Section. He did not state what advantage to Mayor Carlos would be gained, or detriment to the City caused, by the disclosure. He recommended that the matter be brought to the attention of the Mayor and other elected members.

24. There was a meeting of the working group on 1 December 2003 at which no decisions were made: 2211MPC4. The presence of Mayor Carlos as an observer again caused difficulty.
25. On 2 December 2003 Mr Douglas provided a letter of advice to Mr Loader addressing Mayor Carlos' draft answers to questions on notice from an elector, Mr Sam Grech: 1512NFAD84. Mr Douglas advised that it would be improper and inappropriate for the Administration to publish statements from the Mayor in contravention of Council decisions, referring to those made on 24 June, 9 September and 21 October 2003.
26. The Inquiry heard evidence that one of the concerns of some of the elected members at this time was that a settlement of Mr Smith's contract of employment would cost the City up to \$1.3M. Mr Baker said at T8497 6/4/04 that, "advice we received in due course was that it could cost the City up to \$1.3M either plus or minus legal fees, but including interest". Mr Carlos said that a figure of \$1.3M was "bandied around" and was reported in the *Joondalup Community News*: T12271 2/6/05. It was his concern about the potential amount of any settlement that caused him to arrange for Cr Hart to fly back from Canberra for the special Council meeting. In her evidence at T1784 18/11/04 Ms Hart, when asked about whether there were informal meetings between councillors prior to meetings said:

*"No. We – there were occasions where we met and discussed because we were all very concerned, and I don't think Cr Nixon was included in this, but when the \$1.3M payout suggested, that was very concerning to all of us."*

27. Mr Caiacob mentioned the figure in his evidence at T1967 22/11/04 in relation to the working party meeting on 1 December 2003: T1967 222/11/04:

*"COUNSEL ASSISTING: Do you know where that figure came from of \$1.3? --- To the best of my recollection, I believe that's possibly the figure that Blake Dawson Waldron*

*had indicated was the figure that they, would see as acceptable to pay the CEO out, being the CEO's position, not the City's position, which would have been the lower end of the scale.*

*And Blake Dawson Waldron was represented at the working party meetings, or one of them? --- They came and made representation with the CEO as to the CEO's position. It was – and I believe it was this meeting where it was put forward that there could possibly be a mutual separation under agreement and, from there, that's where these figures started to appear.”*

28. BDW had been inviting negotiations for settlement on behalf of Mr Smith since April 2003 and it was at its suggestion that the working group was formed. There was a possibility that if the working group had been set up earlier and made more progress the suspension of the Council might have been avoided. Unfortunately, its formation appears to have occurred too late in the Council's process of disintegration to have been effective in terms of overcoming Council's governance difficulties.
29. Having regard to Freehills' advice in May 2003 that mediation should be pursued, and given the obvious difficulty, of which mention has previously been made, of the conflict of interest which existed between Council and the Administration, it would have been advisable for Council to establish, at an early juncture, a committee representative of the different views of elected members, to work with a senior officer to whom a delegation of power had been given, to give legal instructions, receive advice and address the resolution of the employment issue. Such a course is likely to have led to an earlier resolution of the matter.
30. Notwithstanding that the process undertaken by the working group appears to have been impeded to some extent by the disagreement between Mr Douglas and Mayor Carlos as to his right to sit as an observer, it is not possible to infer that a negotiated settlement with Mr Smith, if reached in late November to early December 2003, would have restored the elected members' trust and confidence in each other so as to enable them to function properly as a Council.

### **Mayor's Allegation of Breach of Contract by CEO**

31. Mayor Carlos e-mailed Mr Smith on 3 November 2003 stating that he had re-read the Report of an Investigation into the Warringah Council and was interested in the relatively high expenditure on legal fees incurred in relation to planning and development. He sought a break-down of all legal expenses incurred by the City from 1999. Mr Smith responded saying that the request was being investigated, a similar question having been asked by a member of the public. There were other matters requiring higher priority: 1511DSC97.

Mayor Carlos iterated his request by e-mail on 10 November 2003 and was advised that the matter was being attended to and the information would be available the following day: 1705MCOB15.50. Later the same day Mayor Carlos sent a further e-mail requesting the information and indicating that he would pass it to the Minister. Mr Smith advised that the matter had been delegated to Mr Higham and that Mr Loader was dealing with it in his absence: 1705MCOB15.47.

32. On 10 November 2003 Mayor Carlos e-mailed councillors stating that he had met with the Minister and discussed with him alternatives to suspension: 1705MCOB15.33. He said: “I made it clear to the Minister that it was not my wish to have the Council sacked and I hoped that councillors would come to their senses and realise that we had to make some hard decisions if we were to continue to govern the City of Joondalup”. In response to an e-mail circulated by Cr Mackintosh calling on him to resign he said he would not. He accused Mr Smith of being a fraud and of faking panic attacks at Warringah and Coffs Harbour.
33. On the same day Mayor Carlos sent an e-mail to Mr Smith, copied to councillors, in which he said that under his contract he was required to ensure effective and professional communication to councillors and external organisations and develop and manage effective working relationships with the media. Mayor Carlos cited the article “Civic chief lied: Lawyer” of 20 November 2002 and put to Mr Smith that, in his view, Mr Smith had failed to manage an effective working relationship with the media in that he had declined to be interviewed. He requested that Mr Smith evaluate the situation and advise councillors and the press how he intended to “rectify” it. Mr Smith acknowledged the e-mail stating that it had been forwarded to his lawyers for consideration and that advice was also being sought on the legality of the request: 1705MCOB15.49.
34. A few minutes later Mayor Carlos sent another e-mail to Mr Smith, as well as Mr Schneider, and copied to councillors and other officers, drawing attention to Clause 7.2 of the CEO’s contract of employment dealing with the provision of corporate credit cards: 1511DSC100. The e-mail stated that the Mayor had not approved any payment of corporate credit cards since being elected. He requested a monthly summary of all expenses incurred since the CEO’s commencement of employment. Mr Smith responded saying that the request was being considered by his and the Council’s lawyers: 1705MCOB15.48. Mayor Carlos replied that he could not see why legal advice would be necessary: 0712DIS24.
35. The matter was referred by Mr Loader to Mr Douglas who provided a letter of advice dated 10 November 2003: 1512NFAD73. He advised that he was not aware of any authority or

delegation given by the Council to the Mayor either to determine whether there had been a breach of contract or to request the CEO to take any action in relation to his contract of employment. He said a personal opinion by elected members had no bearing on whether there had actually been a breach. He noted that the matters raised by the Mayor's e-mail were "behavioural descriptors" contained in the performance indicators annexed to the contract. These had been addressed by the Performance Review Committee in November 2002 which found no performance deficiencies.

36. Mr Schneider enquired of Mr Smith whether he wanted him to do anything to comply with Mayor Carlos' request. Mr Smith e-mailed a response in the negative: 1404PBS2. A short time later, however, Mr Smith e-mailed Mr Schneider requesting a report of his credit card claims and those of the former CEO since 1999: 1404PBS3.
37. In a letter of advice dated 11 November 2003 to Mr Loader, Mr Douglas addressed the Mayor's request for a monthly summary of the CEO's corporate credit card expenditure: 1512NFAD74. Mr Douglas advised that the Mayor had no power to require the CEO to produce the information. Although Clause 7.2 of the contract required the CEO to submit to the Mayor documentary evidence of charged expenses, the Mayor had no enforcement role. However, he thought it was appropriate for the Mayor to raise with the CEO any concerns he had about contractual procedure and that, the matter having been brought to the CEO's attention, it would be appropriate for him to report to Council on the matter.
38. On 11 November 2003 Mr Smith wrote a memo to Mr Loader expressing concern that there may be a motion to summarily terminate his contract of employment: 0102DIS74. On the same day Mr Loader e-mailed Mr Douglas stating that he had spoken to Mr Smith about his attendance at the Council meeting that night. He proposed that Mr Douglas meet with him at 5:30, and then with him and Mr Smith at 6:00pm. He referred to the terms of his contract relating to termination and dispute resolution. He also stated that he was entitled to natural justice.
39. Also on 11 November 2003, BDW wrote to Mayor Carlos in relation to three e-mails which he had sent to Mr Smith and others on 10 November 2003 alleging that Mr Smith had breached his employment contract by failing to establish an effective working relationship with the media in breach of clause 9.2 of the contract and failing to provide him with evidence of credit card expenses in breach of clause 7.2: 1511DSC107. Issue was also taken with statements by Mayor Carlos that Mr Smith tried to mislead Council by informing the

special meeting on 9 November 2003 that he had no authority to close the meeting and that Mr Smith had faked panic attacks in the past. These matters were refuted.

40. In relation to media communications, Mr Smith's solicitors said he was not required contractually to liaise with the media in relation to personal attacks on his credibility. Reference was made to Council's decision of 24 June 2003 and it was observed that Council had not required Mr Smith to consent to be interviewed by the press about his appointment. In relation to the credit card issue it was said that Mr Smith had followed an existing protocol of submitting all invoices and evidence of expenses through the Administration. The protocol had not previously been raised as an issue. If it was to be changed from that point then Mr Smith would provide documentation to the Mayor.
41. An officer's report was circulated detailing a proposed variation to the CEO's contract to alter the terms of the performance review clause. The report indicated that an issue had arisen between the Mayor and the CEO regarding the Mayor's nomination of Cr Nixon, with which the CEO did not agree. The report addressed the problems that had arisen the previous year regarding the use of the word "committee" to describe the performance review group and it was recommended that the term "panel" be used. Amendments were proposed which had been the subject of advice from Minter Ellison who agreed with changes to the contract suggested by Mr Smith. Essentially, the amendment provided for a performance review panel comprising three councillors, one nominated by the CEO and the other two by Council and otherwise dealt with the procedure to be followed, which included the preparation of a report by the panel, but the amendment did not state by what means the Council would deal with such a report: 1511DSC105.
42. At the meeting, Council passed a motion (moved Cr Kimber, seconded Cr Baker) that it approve the cessation of any existing or pending performance review of the CEO, and approve the variation of the CEO's contract. Council also decided that Crs Kenworthy and Nixon would be its representatives on the panel.
43. As previously noted, the motion to establish the working party was carried unanimously. Two rescission motions of which notice had been given by Cr Hollywood were not moved.

### Mark Loader Incident: 13 November 2003

44. On 13 November 2003 Mr Loader sent an e-mail to Mr Smith setting out the circumstances of a meeting with the Mayor and Mr Robinson that day. He said:

*“The Mayor became extremely angry and began pointing his finger at both Kevin and I. He turned to us both and said that the officers were trying to “shield and protect” Denis. He paid particular attention to me and indicated that when he had gotten rid of Denis I would be the next to go. I found his behaviour, as a Mayor, quite unacceptable and abusive.” (1712DIS26)*

45. The purpose of the meeting was to inform the Mayor, on the advice of Mr Douglas, that the resolution on 11 November 2003 in relation to the CEO’s employment contract would be actioned. According to Mr Loader, the Mayor was intending to lodge a rescission motion and was waiting for a fifth signature from Cr Walker. Mr Carlos admitted that the incident occurred as Mr Loader described it but resisted his characterisation of him as “a bully and a tyrant”. He said he felt “stone-walled” at the time: T1446 15/11/04. He accepted that he had acted wrongly and said he had apologised to Mr Loader for his conduct.

46. This incident was the subject of legal advice to Mr Smith from Mr Burnett of Minter Ellison who recommended that Mr Smith send a letter to Mayor Carlos requesting that he give an undertaking to cease behaving in an intimidating or offensive manner towards Mr Loader, refrain from communicating with him unless authorised by the CEO, and refrain from attending his work place: 0212ABB3. The letter concluded:

*“If I do not receive your written undertaking as demanded, the City’s lawyers will be instructed to immediately prepare and lodge a misconduct restraining order against you on behalf of Loader and to consider applying for other urgent relief including a Supreme Court injunction.”*

47. Mr Burnett said that Mr Loader told him in a telephone conversation that he felt intimidated. Mr Burnett then said:

*“[W]e considered the City’s position and we felt that you couldn’t get a restraining order without providing a letter to the person who was allegedly causing the concern. And so we did that, and then Cr Carlos – Mayor Carlos immediately undertook that he wouldn’t act against – you know, act in a fashion which caused concern or intimidation. And I think then we told the City’s administrators that there was no further – you know, that they didn’t have a right to take the matter further.” (T2734 2/12/04)*

48. At 22738 Mr Burnett said he did not consider it was inappropriate to accept instructions from or give advice to the CEO or have direct communications with him. He said he understood that it was Mr Smith's suggestion to Mr Loader that he consider a restraining order and that the action taken was not on behalf of Mr Loader personally: T2740.
49. Mr Loader gave evidence that he asked Mr Smith whether the City could get some legal advice: T10777 13/5/05. There is no evidence that Mr Loader ever gave instructions to Minter Ellison to act on his behalf to give notice of possible legal proceedings against Mayor Carlos.
50. On 14 November 2003 the Mayor e-mailed Mr Smith advising that he would act in a manner to all staff that was not intimidating or offensive, would refrain from communicating with Mr Loader and from attending any work place beyond the Council chambers: 1511DSC112. Mr Burnett provided further advice to Mr Smith regarding a restraining order on 21 November 2003. Mr Smith had instructed Minter Ellison to make an application on behalf of Mr Loader on the basis that Mayor Carlos had entered the administration area in breach of his undertaking. Mr Burnett advised against taking action on the basis that Mr Loader was not directly affected.
51. It is clear that the behaviour of Mayor Carlos towards Mr Loader was in breach of the Code of Conduct: showing lack of respect for, and casting unwarranted aspersions on, an employee. It is conduct of a kind which ought never be visited upon an employee by an elected member of a local government. Mr Loader acted appropriately and in accordance with the Code of Conduct by reporting the matter to the CEO. When confronted with his breach, Mayor Carlos then responded appropriately by immediately undertaking that he would not act in that manner again. The Code of Conduct suggests that matters the subject of such reports shall be treated in confidence and investigated and that –

*“Any actions taken as a result of a breach will be made in accordance with the provisions of any applicable legislative requirements and the Council’s responsibilities as an employer.”*

### **Annual General Meeting of Electors**

52. On 17 November 2003 the Annual General Meeting of Electors was held in the Council chamber, chaired by the Mayor. Mr Smith was an apology due to a medical appointment. The minutes show 185 persons were in attendance: 2704ML85. A motion was carried unanimously to the effect that the ratepayers express appreciation of the actions of the

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### PART 8

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Mayor and those councillors who supported him. A motion was also carried, with three electors voting against, that the CEO stand aside until the controversy regarding his suitability for the position was resolved.

53. A motion by Mr Wayne Primrose (seconded Mr Vincent Cusack) that the CEO issue be referred for mediation, that the CEO stand aside on pay until the matter be resolved and that the CEO not receive any further legal funding was also passed.
54. The meeting also resolved on the motion of Mr Mitch Sideris, seconded Mr Steve Magyar, with one elector voting against, that the electors of the City refuse to accept the Annual Report “on the basis of its lack of professionalism and incompleteness”. A number of other motions relevant to the CEO issue were also passed.
55. Mr Baker was asked by an elector about factions and responded as follows:

*“Well, first of all there is only one faction that I am aware of on Council, and that is the faction that the Mayor has described as being his team, that is the only faction. In terms of party political factions, I don’t believe there are any party political factions on Council, as you would be aware. Its all very good, it all good spin, in terms of the factional issue, I am only aware of one faction as described as the Mayor’s team.”*

Mr Baker denied that he represented a political party in his role as councillor: 2911JFCH2.

56. The AGM was followed by a special meeting of Council called at the request of Mayor Carlos and Crs Hollywood, Walker, Hart and Caiacob to consider a motion to dismiss the CEO. The matter was dealt with behind closed doors. Mr Douglas and Mr Burnett were in attendance. The motion was defeated.
57. On 19 November 2003 Mr Douglas provided written advice to Mr Smith in relation to an e-mail from Mr Primrose to Cr Prospero requesting a special meeting of Council to rescind the decision establishing the working group, to refer the CEO issue to mediation, to appoint Jackson McDonald to act for the City, to stand the CEO aside on full pay and to appoint Mr Robinson as Acting CEO: 1512NFAD77.
58. A number of witnesses who attended the meeting commented in evidence on the presence of a number of people who wore CFMEU t-shirts, including one identified as Mr Kim Young

who was then the pre-selected ALP candidate for the Federal seat of Moore. These observations were made in the context of various suggestions along the lines that those who attended the meeting were not representative of the Joondalup community as a whole, that persons attended who had no legitimate interest and that the public gallery constituted “rent-a-crowd”.

59. A tape recording of the proceedings was played in evidence and a transcript tendered: 2911JFCH2, 3. In general business there were a number of matters raised for discussion and resolution which did not concern the Mayor or the CEO, such as the Kingsley Football Club club rooms, pedestrian access tracks to beaches at Ocean Reef, security patrols and lighting in Tom Simpson Park. There were also motions dealing with expenditure on ratepayer facilities such as the Whitfords Seniors Centre and recreational centres and the introduction of a Council committee system.
60. The Inquiry also heard evidence, as has been noted previously, from persons who moved, seconded or spoke to motions at this meeting such as Mr Primrose, Mr Zagrevsky, Mr Sideris, Ms Moon and Mr Cusack. By and large, and having regard to the limited information publicly available the motions, debates and questions demonstrated that the issues were well considered and reasonably articulated by such people. As well as allowing a ventilation of elector concerns the meeting also enabled elected members to respond to questions, a number of which were asked on behalf of various resident and ratepayer groups.
61. On all of the evidence the only reasonable conclusions to be drawn are that those persons who were concerned by the failure of the Council to resolve the issue of the CEO’s qualifications were individually, and as representatives of groups of which they were members, interested in Council affairs generally and motivated by what they perceived to be in the best interests of their community. There was overwhelming support expressed at the meeting for the Mayor with very little indication of any significant opposition to his position on the CEO issue, and by the same token little if any support for the position taken by the majority group of councillors on the issue.
62. The concerns expressed by the electors at the AGM were legitimate and reasonable.

### **Submission to Upper House Inquiry**

63. On 17 November 2003 Minter Ellison provided to the CEO the submission on behalf of the City of Joondalup to the Standing Committee on Public Administration and Finance Inquiry

into the LGA: 1512NFAD76. The submission argued that much of the public debate about issues relating to the CEO was based on misleading or wrong information as would be demonstrated by reference to relevant documents which were attached to the submission.

64. The submission was said to highlight several key propositions including:

- (1) *That the Council of the City is a democratically elected body.*
- (2) *That Parliament has given to the Council, not to the Mayor, individual councillors or any other person or body – the statutory power to decide on behalf of the City, who should be employed as the City’s CEO.*
- (3) *That the two key categories of decisions made by the Council have been:*
  - (a) *its decision to employ Mr Denis Smith as the City’s CEO, together with its decisions relating to and leading to that employment; and*
  - (b) *its decisions relating to the continuing employment of Mr Smith as the City’s CEO.*
- (4) *That all relevant decisions and actions of the Council and employees on behalf of the City have been made lawfully and properly.*
- (5) *Specifically, that the City’s decisions and actions have been made:*
  - (a) *in accordance with the Local Government Act 1995 and other relevant legislation;*
  - (b) *in good faith;*
  - (c) *with extensive consultation;*
  - (d) *on the basis of professional advice;*
  - (e) *with proper transparency; and*
  - (f) *in the interests of the City.*
- (6) *That it is essential, in the interests of good government, and, in this case, in the best interests of the City – that, whatever their personal views may be, individual members of the Council and other public officials should comply with their legal obligations and accept, not undermine, the lawful and proper exercise of the Council’s decision-making powers.*

65. The submission argued that Mr Smith provided full details of his professional qualifications to every councillor in November 2002 when the issue was raised publicly, and that when Council considered the matter at its meeting on 17 December 2002 it was fully and properly informed, in that it had details of Mr Smith’s qualifications as set out in his memorandum of 25 November 2002, the profile prepared by MRA which contained a description of qualifications that was then known to be inaccurate, and other related materials such as the various press articles and the transcript of and judgment in the New South Wales defamation case.

66. It was submitted that Council lawfully and properly took into account that professional qualifications were not an essential criterion for the position, that Mr Smith’s qualifications

had no material bearing on Council's decision to appoint him, and that, therefore, the inaccuracy in the qualifications did not mislead the Council. Council's overriding concern at the time was the performance of the candidates, not their professional qualifications and a year afterwards Council was entitled to attribute even less significance to Mr Smith's qualifications as it had proof of his actual performance in the job. On this basis it was said that the decision to declare full support for and confidence in Mr Smith "for his dedicated attitude, work ethic and values (sic) to the City of Joondalup" was made lawfully and properly and that that resolution should have been the end of the matter.

67. The submission went on to state that the City had been forced to devote much time and resources to the issue as a result of:

- "(a) the selective disclosure, often unlawful or improper, to representatives of the media and others, of the City's confidential information;*
- (b) the publication and repetition of misleading or false allegations and criticisms; and*
- (c) the refusal or failure of particular individuals to comply with their legal obligations, including their obligations under the Local Government Act, with the City's standing orders and its Code of Conduct."*

68. The submission concluded that the Council, as the City's decision-making body, had continued to act lawfully and properly in accordance with professional advice and in the interests of the City. The submission was given to the Standing Committee without being formally adopted or approved by Council. Later, however, at a special Council meeting on 25 November 2003 convened at the request of Crs O'Brien, Mackintosh, Gollant, Kimber and Baker the Council resolved (moved O'Brien, seconded Baker) as follows:

*"That the full submission made by Mr Neil Douglas of Minter Ellison and Mr Mark Loader on behalf of the City to the Standing Committee on Public Administration and Finance on Monday, 17 November 2003 becomes the basis of the deputation to the Minister to allow the Minister to be fully aware of the position of the Council, and that Council fully endorses the submission made on behalf of Council by Minter Ellison."*

69. The total cost of the legal representation of the City, its elected members and officers before the Upper House Inquiry was \$115,976.25, excluding GST: 1512NFAD45, 47, 49, 51, 55, 57. Those costs include fees for services provided after the report of the Inquiry was handed down.

70. It has already been observed that a Council has no executive power but may, by resolution, direct the CEO. The CEO has statutory duties to which reference has already been made.

These are set out in Section 5.41. Section 5.42 provides that a local government may delegate to the CEO the exercise of any of its powers or the discharge of any of its duties subject to certain restrictions and Section 5.44 provides that the CEO may delegate tasks and duties to other employees. Section 59(1) of the Interpretation Act 1984 provides that where a law confers a power upon a person to delegate the exercise of any power or the performance of any duty under a written law, such a delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated.

71. It was therefore the case that, although Mr Smith had purportedly delegated certain power to Mr Higham and Mr Loader, they remained under his direction, accountable to him and liable to obey his directions. Mr Smith, himself, retained the power which he had delegated. In the circumstances, a situation existed where the CEO was in open conflict with the City and yet retained his role, Council having declined to stand him aside, and the City's lawyers having advised against that course of action.
72. The submission to the Upper House Inquiry was prepared by Mr Douglas pursuant to a Council resolution on 30 September 2003 that Minter Ellison be appointed to represent "the City and any current or former elected members or employees other than the CEO, who require representation, appearing before the Standing Committee". The submission did not address the minority position of Mayor Carlos and Crs Hollywood, Walker, Hart and Caiacob who did not accept the legal and strategic advice given. The City's solicitors took instructions directly from the Administration on the CEO issue and other matters without a Council resolution detailing the scope of the instruction, such as the resolution of 24 June 2003.
73. Notwithstanding the delegation to Mr Higham and Mr Loader, the office of CEO remained responsible for the giving of instructions and the receipt of legal advice, as follows from the operation of the LGA, Section 5.41(d), in the absence of a specific resolution to the contrary; regardless of whether this involved any direct communications with the CEO. Mr Douglas' evidence was that the instructing officer was Mr Loader (T3469). Mr Loader contends that he was not responsible for instructing on the report and merely provided some notes of the historical events. Mr Loader and Mr Douglas appear to have had a different understanding in that regard, and there is no evidence to suggest that Mr Smith gave any direct instructions to Mr Douglas in relation to the preparation of the submission. However, not surprisingly, the potential for Mr Smith to be involved in such instructions caused disquiet amongst the minority councillors whose requests to see the Administration's communications with the solicitors were resisted on the advice of those solicitors.

71. In the circumstances, on the issue of the CEO's contract of employment it was simply not possible to reasonably advance a single submission on behalf of the City as a whole which reflected the differing points of view which prevailed among "current or former elected members or employees other than the CEO". Minter Ellison submit that the submission was on behalf of the City as a whole, in the sense that the purpose of the submission was to explain the decisions and actions of the Council acting in its role on behalf of the City to make decisions about the employment of the CEO. Mr Douglas in his evidence (T3470) drew an analogy with appearing in Court for the City on a wrongful dismissal case.

### Advice of Mr Ken Pettit SC

74. On 18 November 2003 Mr Loader requested Mr Douglas to brief Senior Counsel as a matter of urgency to provide advice to the working group. The working group met on that day and decided that a meeting should be held with the CEO and his legal representative, that Senior Counsel should be briefed on issues relating to the City's options and that all members be consulted for the purpose of identifying claims that the CEO had breached his contract of employment: 1511DSC114.
75. On 21 November 2003 Mr Burnett provided a letter of advice to Mr Loader on the City's power to stand down the CEO pending an investigation: 0212ABB5. Mr Burnett advised:

*"In the absence of a compelling reason to suspend, namely that the investigation into the CEO's conduct which the City reasonably requires would be significantly prejudiced unless the employee were absent from the work place, we suggest in the current circumstances, the City would be taking an unnecessary risk to suspend the CEO because this may provide to him a reason or a further reason for a successful breach of contract claim against the City."*

76. Mr Pettit SC provided a letter of advice to Mr Douglas on 1 December 2003: 1512NFAD83. His views were summarised as follows:

- *The City has no grounds upon which it could lawfully terminate Mr Smith's contract or his employment unilaterally and without compensation.*
- *The City may incur a liability under its duty of care to Mr Smith in respect of his continued exposure to the campaign against him in the work place.*
- *The City may properly agree to a termination of Mr Smith's employment in order to address the present administrative inefficiency caused by the conflict between the Mayor and the Chief Executive Officer and to address its duty of care.*

- *Discharge of the contract of employment for frustration should be pleaded as a defence to the suit by Mr Smith and should be raised in negotiations for a termination payment to him.*
- *The City is not otherwise likely to be at risk of liability either directly or vicariously for the action of the Mayor and others.*
- *The amount that the City could properly pay by way of compensation for the losses Mr Smith will suffer by termination of his employment is in the order of \$650,000.00 but with some flexibility arising from the City's interests in attempting to restore its efficiency and in avoiding legal costs.*

Counsel fees were \$10,850.00, including GST: 1512NFAD53. Mr Pettit's advice came only days before the Council's decision and had little opportunity to be influential upon the governance of the City. In the circumstances, it is unnecessary to elaborate upon the scope of his brief or the factual premises upon which his opinion is based.

## **Representations to the Minister**

77. On 3 November 2003 Mayor Carlos wrote to the Minister requesting immediate intervention by the dismissal of the Council and the appointment of Commissioners: 1005CMG10. Mayor Carlos submitted that the Council's decision to approve additional expenditure by the CEO on legal fees at its meeting on 21 October 2003 was unlawful. He also referred to a motion passed at the same meeting to "gag" him from speaking on the issue of the CEO. He drew the Minister's attention to the fact that councillors who were not part of what he called the "Smith faction" were finding it difficult to obtain information. He contended that Mr Smith remained involved in the obtaining of legal advice when he should not have been. He recommended that the Council be sacked and that Commissioners be appointed including himself, three of the councillors who were elected on 3 May 2003 and a lawyer. He recommended Mr Ataman Atlas.
78. It appears from the evidence of Mr Atlas and Mr Carlos that they did not know each other and that Mr Atlas was not consulted about his nomination. Mr Atlas, who had practised as a solicitor in NSW, worked for a short period with the DLGRD before being admitted in Western Australia. He has a law practice in the Perth CBD and resides in the City of Joondalup. It is evident that there were no other reasons for his nomination.
79. Mayor Carlos' complaint to the Minister about the misapplication of funds was dealt with by the Department and Ms Gwilliam advised Mr Carlos by letter of 21 January 2004 that on

advice from the Crown Solicitor's Office it was unlikely that a Council could be accused of misapplying funds within the meaning of Section 8.35 of the LGA when it had resolved to approve the expenditure from an account that had already been authorised by a lawful decision for that purpose: 1005QNH29.

80. In relation to Mayor Carlos' concerns, the Minister sought advice from the Department. Ms Gwilliam advised the Minister by memorandum dated 7 November 2003 that in her opinion there were no grounds for suspension of the Council: 1005CMG14. She said:

*"The disharmony within the Council is well known but apart from the constant stress over the CEO's qualifications and the resolutions and rescission motions related to the CEO's legal expenses, there is no evidence that good government is not being provided by the local government."*

She referred to the Governance Review and recommended that the Mayor be encouraged to work with the Panel to overcome the present problems.

81. On 11 November 2003 the Minister wrote to the Mayor referring to a meeting the previous evening and acknowledging the Mayor's preference to resolve the matter in conjunction with other councillors: T6866. The letter requested the Mayor to bring to the attention of Council the Minister's strong views that recent problems with the City appeared to reflect a deterioration in relationships within the Council which, if allowed to continue, would have a further adverse impact on community confidence in, and the reputation of, the City and local government in general. The Minister's letter urged Council to accept its responsibility to act quickly to bring the matters to a speedy and satisfactory conclusion for the benefit of the community.
82. Ms Gwilliam wrote a memorandum to the Minister on 12 November 2003 commenting on newspaper articles which had been written on the Upper House Inquiry and specifically about the evidence given by Mr Turkington. They described the City as being "in turmoil". Ms Gwilliam made the following observation:

*"There is no doubt that there is strong interpersonal conflict within the Council but apart from issues dealing with Mr Smith (eg. legal expenses or performance appraisals) the debate and decision on other issues is relatively normal. At the present time good government is being provided at the City of Joondalup. The governance review is addressed in the issues raised by Mr Turkington in his evidence."*  
(0802CMG3)

83. On 13 and 14 November 2003 the Department sent memos to the Minister providing updates that reflected the “rapidly deteriorating situation” at the City: 0702SMC16 and 0702SMC17. In a further letter to Mayor Carlos dated 17 November 2003 the Minister requested Council to undertake to release the Governance Review report to him as soon as possible and to consider releasing the report publicly: 2206MISC20.
84. On 18 November 2003 Mr Cole prepared a briefing note outlining the case for and against suspension of Council or, in the alternative, for and against Council be allowed to resolve the matter: 0702SMC22. On the same day the Minister sought, through the Attorney-General, Crown Solicitor’s advice: 0802CMG8.
85. On 19 November 2003 Mr Douglas e-mailed Mr Smith referring to a discussion that morning and attaching a draft letter which he suggested that elected members consider sending to the Minister as well as to media outlets, the DLGRD, and LGMA: 2704ML88. The proposed signatories were Crs Brewer, Kenworthy, Mackintosh, O’Brien, Gollant, Kimber, Nixon and Prospero. It expressed concern about public statements made by the Minister, including that there was a “Liberal-led faction” in Council. The letter stated that all decisions had been made in accordance with legal advice. The letter was critical of the Minister’s support for the views of Mayor Carlos which did not represent the views of Council. Later on the same day Mr Douglas e-mailed Mr Smith with a copy of a personal letter from Mr Douglas to the Minister enclosing a copy of the City’s submission to the Standing Committee Inquiry: 2704ML89.
86. On 24 November 2003 the Minister wrote to Mayor Carlos stating, *inter alia*:

*“I request Council to demonstrate to me by Thursday, 4 December 2003, that it has achieved a satisfactory resolution of the underlying issues of the City, and that it has embarked on a programme to restore proper working relationships within the Council.*

*If Council cannot achieve these outcomes, I will use the powers available to me under the Local Government Act 1995.” (0902DGW4)*

### **Further Request by CEO for Payment of Legal Expenses**

87. On 26 November 2003 Mr Smith e-mailed Mr Robinson requesting that Council authorise payment of an invoice from BDW for \$7,756.60 (excluding GST), being for services rendered in the period 6 - 14 November 2003. The e-mail noted that a number of other

accounts from BDW were still outstanding due to an unresolved rescission motion. Some of the work related to matters pertaining to the incident involving Cr Hart on 6 November. Mr Robinson expressed his concerns to Mr Smith about this invoice in view of the fact that Mr Smith had commenced proceedings against the City, the incident may not have necessitated immediate legal advice and the overall level of legal costs which had been incurred. This matter was re-agitated by Mr Smith with Mr Robinson again on 7 and 10 December 2003, and Mr Smith asserted that Mr Robinson was holding an unreasonable position.

### **Special Meeting of Council: 25 November, 1 and 3 December 2003**

88. At the special meeting of Council held on 25 November 2003 to discuss various matters, including the Minister's demand and the CEO's contract of employment, Council decided (10/5) to appoint a deputation to meet with the Minister, to include Crs O'Brien, Prospero, Gollant, Brewer and Mackintosh. As previously noted, the Council also resolved (10/5) that Mr Douglas' submission on behalf of the City to the Standing Committee become the basis of the deputation to the Minister, with Council fully endorsing the submission. The meeting was then adjourned to 1 December 2003. A Council delegation accompanied by Mr Douglas attended a meeting with the Minister that day, following which the Minister wrote to Mayor Carlos stating that he would abide by his decision to give the Council until 4 December 2003 to resolve its issues: (1511DSC128).
89. There was much evidence given about this meeting, particularly about the failure of members of the public to leave the gallery when Council resolved to go behind closed doors, and the apparently hostile manner in which elected members were treated as they left the chamber. There was also evidence of the events that occurred after the meeting was closed when members of the gallery stayed in the chamber, some of them occupying the councillors' places.
90. According to Mr Carlos' evidence, he invited members of the public to come forward into the well of the chamber because a number of them were in the foyer, there being no room in the gallery. He was also concerned to assuage their resentment by affording them the opportunity to ventilate their concerns in discussion. This action was interpreted by a number of witnesses, including the members of the Governance Review Panel, as unseemly and as a disgrace to local government.
91. The meeting was unable to resume behind closed doors on 1 December 2003 due to the presence of members of the public and press in the Council chamber. Accordingly, the

meeting was adjourned to 3 December 2003 on which occasion the minutes recorded approximately 200 members of the public in attendance. Council decided to go to open doors and to allow electronic media in the Council chamber. Cr O'Brien then moved, seconded Cr Gollant, to close the meeting 10 minutes after it had begun. Mayor Carlos and Crs Caiacob, Hart, Walker and Hollywood voted against the motion which was carried. The remaining matters of business from the agenda of the special meeting of Council on 25 November 2003 were carried forward to the agenda of the next Council meeting on 16 December 2003.

92. It is evident there was some anticipation of public disturbance of the meeting of Council to be held on 1 December 2003. Mr Smith had e-mailed the City's directors and councillors during the morning indicating that he would put security arrangements in place.
93. On 2 December 2003 *The West Australian* published an article headlined "Public Gate-Crashes Meeting – Anarchy reigns as angry ratepayers lay siege to Joondalup Council Chamber": 1105SMC26. The article reported that the meeting failed to start after about 250 ratepayers refused to leave the chambers and 10 of Joondalup's 15 councillors refused to attend until the public gallery was emptied. Ratepayers filled the councillors' 10 empty seats at the invitation of Mayor Carlos and called for Mr Smith to be sacked and the Minister to intervene. Mayor Carlos was quoted as saying:

*"(Councillors) have made it quite clear that they are not going to come into this chamber while you (the ratepayers) are here. I do not intend to ask you to leave. You may leave of your own accord but that is up to you. As a democratically elected Mayor I believe that you should be here to observe everything that goes on. If we are going to pay out a large sum of money you should be here to hear details of this."*

### **Meeting of Council: 2 December 2003**

94. At the meeting of Council on 2 December 2003 Cr Caiacob tabled a 404 signature petition from residents requesting that the Council terminate Mr Smith's employment contract immediately and without compensation. A motion by Cr Gollant, seconded Cr Kimber, to censure Cr Hart in respect of the incident on 6 November 2003 was passed (8/4): 2206MISC72. Council voted 8/4 to request the Minister to suspend it, Mayor Carlos and

Crs Caiacob, Hollywood and Walker voting against the motion. The terms of the motion were as follows:

*“Moved Cr Baker, seconded Cr Nixon that the Council:*

- (1) Notes that the Minister has informed the Council that unless it has achieved a satisfactory resolution of the underlying issues at the City by 4 December 2003, the Minister will use the powers available to [him] under the Local Government Act 1995.*
- (2) Notes and accepts the City’s legal advice from one of this State’s leading Local Government Lawyers, Mr Neil Douglas of Minter Ellison, lawyers, and now confirmed by advice from independent Senior Counsel, Mr Kenneth Pettit SC, the SC appointed by the State Government to assist the Royal Commissioner in the WA Police Royal Commission:*
  - (a) there are no grounds on which the City can lawfully terminate the CEO’s employment unilaterally; and*
  - (b) any forced termination of the CEO’s employment is likely to require a significant payment, by the City, to the CEO – although this payment may be recoverable by the City from the Mayor in his personal capacity;*
- (3) Determines that it is not in the City’s interests for the Council to terminate, or agree to the termination of, the employment of the CEO because, in view of the Mayor’s conduct, the departure of the CEO is unlikely to result in the return of good governance to the City.*
- (4) Determines that the underlying cause of the City’s disharmony is the Mayor’s repeated and consistent failures to act in accordance with his responsibilities under the Local Government Act 1995, the City’s Standing Orders, the City’s Code of Conduct and the Mayor’s declaration of office:*
- (5) Reaffirms that the Mayor’s repeated and consistent failures to act in accordance with his obligations:*
  - (a) are deliberate refusals to accept the lawful and proper exercise of the Council’s decision making powers;*
  - (b) undermine the lawful authority of the City’s duly elected Council;*
  - (c) have adversely affected the City’s reputation;*
  - (d) have adversely affected the good governance and the functioning of the City;*
  - (e) have exposed the City to a risk of legal liability for damages to the extent that the Mayor’s actions might be attributed to the City; and*
  - (f) have resulted in, and are continuing to result in, great harm and cost to the City and its ratepayers.*
- (6) Determines that, given the harm that the Mayor is causing to the City, the legal incapacity of the City to prevent the Mayor so acting, and the Council’s wish to avoid further harm being inflicted on the City, the Council requests the Minister to exercise his power to suspend the Council in order to enable:*
  - (a) the public to be properly informed; and*
  - (b) good governance to be restored to the City.*
- (7) Delegates Crs O’Brien, Gollant, Nixon, Prospero, Mackintosh and Brewer seek a meeting with the Minister for Local Government to inform him of Council’s decision.*

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(8) *Authorises Minter Ellison to respond to the correspondence to Blake Dawson Waldron on behalf of the CEO relating to the CEO's employment with the City."*

95. The decision by Council to request the Minister to suspend it, taken on legal advice, was one which if acceded to by the Minister would have the inevitable consequence of the Minister appointing an Inquiry Panel. The Council could not but anticipate that the course advocated by its decision would involve substantial expenditure associated with the conduct of the inquiry. Councillors could have chosen the alternative of resigning from office, precipitating the less expensive option of an election.
96. In relation to the Writ of Summons issued by Mr Smith, it was moved by Cr Hollywood, seconded Cr Walker, that Council authorise Mayor Carlos to seek and obtain legal advice from Phillips Fox and place an upper limit on expenditure of \$5,000.00 as per policy 2.2.8 (legal representation). The motion was lost 5/7, with Crs Baker, Brewer, Gollant, Kimber, Mackintosh, O'Brien and Prospero voting against.
97. The Council decided to go behind closed doors to deal with 15 confidential notices of motion. As the members of the public and press would not vacate the chamber a motion to go to open doors was passed, followed by a motion that the meeting be closed. The CEO called in the Police Service to vacate the gallery. At the end of the meeting there were some 17 outstanding items of business, including numerous rescission motions.
98. On 4 December 2003 the *Joondalup Community* published a front page editorial calling on the Minister to "put an end to this farce" and suspend the Council. On 5 December 2003 the Minister suspended the Council.
99. The meetings on 1, 2 and 3 December 2003 witnessed extraordinary conduct on behalf of the members of the public who attended. They included a number of people who have been characterised in the Inquiry as "Council watchers" for the reason that they regularly attended Council meetings. Those who gave evidence indicated a range of reasons for their interest in Council and City affairs. One of them, Mr Magyar was a former elected councillor of Wanneroo and Joondalup. Most of the others were members of local residents and ratepayers' associations or sporting associations. The Combined Residents and Ratepayers Association served to unite some of these groups.
100. The interest of these persons in Council affairs led them to question the probity of Mr Smith and to support and provide information to Mayor Carlos and other councillors who had the

same concern. The coverage given to the issue by the print and electronic media, especially through Mr Bartlett, raised the profile of the issue as one of general public importance. Public concern rose over a period of time together with a level of frustration on the part of those who considered that Council's response to the issue was inappropriate and unrepresentative. It was in the face of a bold demonstration of the sentiment of that section of the public who attended the meeting on 1 December 2003 and supported Mr Carlos' position that the majority of councillors went to the Minister and requested their own suspension.

101. It is unusual in local government, according to the evidence of Mr Mickel, Mr Frewing, Mr Wittber and Mr Cole that such unruly conduct as was evident at the last meetings of the Council should occur. That evidence speaks tellingly of the extraordinary level of grievance to which the Council's conduct had given cause.
102. Members of the Governance Review Panel described what they witnessed at the meetings of Council in November and December as a descent into "mob rule". They were critical of Mayor Carlos for his conduct of meetings and attributed to him some responsibility for the events that took place. On the evidence, the members of the public who attended the meetings of Council never took over the proceedings; although their behaviour may have caused the meeting to be adjourned. They were engaged in demonstrations of their opposition to the course of conduct taken by the Council. That they had cause for such conduct reflects on the Council in this instance.
103. The conduct of Mayor Carlos in his chairing the Council meetings, of which the Governance Review Panel was highly critical, may have contributed to or encouraged the behaviour of members of the public, but it was not the cause of the events that took place. It was unavoidable, given the tenacity with which he held his position, and the popularity of his cause, that he would be perceived as a champion of the public interest. It is in the nature of leadership in a democratic system of government, that public confidence and support be sustained. There is little doubt that Mayor Carlos would not have survived in his position, notwithstanding the conclusion earlier expressed that he should have resigned, without considerable popular support. In hindsight, it is regrettable that the majority of Council did not appreciate to what extent the views of Mayor Carlos were representative of legitimately held views in relation to issues of probity. It is apparent from the evidence given by witnesses who formed that majority that a number of them remain, even to this time, dismissive of the views expressed on behalf of those members of the public who supported

Mayor Carlos, view that it was appropriate to investigate the probity of Mr Smith's qualifications, as Mayor Carlos and those who supported him were advocating.

104. The evidence given to the Inquiry and the submissions made to it over the last 15 months have not revealed sufficient rational basis for the decision of Council not to resolve the issue of the CEO's probity, other than that, having embarked on that course in December 2002, every further step along that way potentially made it more and more difficult and costly to do so. It is a hallmark of the LGA that it is intended to result in transparency, accountability and community participation in the affairs of local government. Elected members must be respectful of that intent and of the interests of the community they are elected to serve. Those principles were not being observed while there remained unaddressed by Council, an issue being debated publicly concerning the probity of the qualifications of the CEO of the City.

### **Supreme Court Action by CEO Against City and Mayor**

105. On 27 November 2003 a Writ of Summons was issued out of the Supreme Court of Western Australia by Mr Smith against Mayor Carlos and the City of Joondalup as first and second defendants: 1511DSC126. The claim endorsed on the Writ was for damages for misfeasance in public office, negligence, intentionally inflicted harm, breach of contract, and interference with contractual relations; exemplary damages in respect of the above claims; interest, and a declaration that the plaintiff was entitled to terminate the employment contract, all arising from Mayor Carlos' conduct between September 2000 and the date of the Writ, and the conduct of Cr Hart as a councillor of the City, which conduct was pleaded to be in breach of the Mayor's duties of office, negligent and in breach of the defendants' duties of care, as well as constituting a course of conduct calculated or likely to cause the plaintiff physical and/or mental harm, breaching the contract of employment and causing or inducing the second defendant to breach its contract with Mr Smith. The Writ did not make any claim for damages for defamation. On 22 December 2003 Mr Smith's solicitors filed a 52 page Statement of Claim: 1511DSC127.

## Conclusions

- A. Cr Hart acted improperly by misusing the privilege she had of entry to a restricted access area within the City’s Administration building to admit a television journalist and crew into the CEO’s office on 6 November 2003, facilitating a trespass on the premises of the City and breaching the Code of Conduct by causing Mr Smith unwarranted embarrassment.**
- B. Council denied natural justice to Cr Hart by not affording her the right to respond to the censure motion against her before it was passed.**
- C. The behaviour of Mayor Carlos on 13 November 2003 towards Mr Loader in threatening to have him dismissed was in breach of the Code of Conduct: showing lack of respect for, and casting unwarranted aspersions on, an employee.**
- D. It was wholly inappropriate that Mr Smith, who had been in conflict with the City concerning his employment contract since his solicitors wrote to the Council on 15 April 2002, retained his role and the power which he had delegated to other officers on 14 May 2003 to deal with his contract of employment, the Council having declined to stand him aside.**
- E. On the issue of the CEO’s contract of employment, it was not possible to reasonably advance a single submission on behalf of the City as a whole to the Upper House inquiry which, in accordance with the resolution of Council, represented “the City and any current or former elected members or employees other than the CEO”.**



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## Part 9

### The Council Comes Under Scrutiny

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#### Governance Review Report

1. The Governance Review Panel consisted of Mr Stephen Cole, Director Capacity Building, DLGRD, Cr Ian Mickel, President of the Shire of Esperance and immediate past President of WA Local Government Association, and Mr Cliff Frewing a senior officer from the City of Swan, now the CEO of the City of South Perth. Mr Bruce Wittber, a consultant for WALGA, was appointed as the research officer to the governance review. The Panel (apart from Mr Cole) had no input into the Terms of Reference.
2. Mr Cole formulated the Terms of Reference with Mr Smith. He wrote to Mr Smith on 7 August 2003 (0702SMC13) attaching agreed Terms of Reference and setting out the proposed form of the review. The Terms of Reference (0702SMC14) did not address the resolution of the issue of the CEO's employment. This was explained in Mr Cole's evidence in the Inquiry when he was asked about possible solutions at that time.

*COUNSEL ASSISTING: So that was the - - ultimately the only course of action that you saw as being open to your section? That is, facilitating the establishment of a committee that would review the council's meeting procedures?---At that time. I mean, the decision had been taken by Council that the issue was over. Mayor Carlos had been obviously working within Council to try and resolve the Smith issue. Council, upon legal advice, had come up with that resolution and at that time we were hoping certainly it was over, that Carlos would abide by that resolution, and - - but we, having witnessed the way the Council meetings were run, thought well, the first exercise would be to try and get - - or improve Mayor Carlos's improvement - - oh, sorry. Improve Mayor Carlos's understanding of standing orders and improve meeting procedures*

*and hopefully with that other issue out of the way, they could get back to providing good government for the City of Joondalup. (T4999 7/2/05)*

3. The terms of reference of the Governance Review were as follows:

*The Governance Review panel will assess and make recommendations on the operations of the Council of the City of Joondalup with particular reference to –*

- (1) The development of an appropriate working relationship between elected members that will achieve good government for the City and an appropriate public image for the local government within the community.*
- (2) Whether or not the behaviour of elected members related to their local government responsibilities, both personal and collective, is appropriate in terms of the Council's responsibilities and public perception.*
- (3) The ordinary meetings of Council with particular regard to meeting procedures, behaviour of participants, the operation of Standing Orders and whether those Standing Orders require amendment.*
- (4) Whether or not the relationships between elected members are having, or could be perceived to be having, an impact on the fairness, objectivity and outcome of the decisions being made by Council.*
- (5) Whether the Code of Conduct is appropriate and adherence to that code.*
- (6) The nature and effectiveness of the working relationship between elected members and senior employees.*
- (7) Whether the information and advice to elected members from the executive is appropriate and sufficient and how that advice is being received and used in Council's deliberations and determination of matters.*
- (8) The adherence to the requirements of the Local Government Act that the Mayor and CEO are to "liaise on the local government's affairs and performance of its functions".*
- (9) The nature and effectiveness of the Council's decision-making structures.*
- (10) Whether the Council decision-making processes are fair, open and objective (in accordance with the Act and community interest).*
- (11) Whether or not the nature and source of statements to the media regarding Council matters and decisions are appropriate, fair, reasonable and within the context of the Local Government Act.*
- (12) The participation, nature and effectiveness of the elected member induction process and on-going development opportunities for elected members.*

4. It appears from Mr Cole's evidence that in early July he had formed the view that the situation concerning the CEO's qualifications had been settled by the decision of Council at the 24 June meeting.
5. As far as Mr Cole was concerned this decision indicated that Council was satisfied with the situation concerning Mr Smith. An appropriate process had been followed which addressed accountability issues. At T4999 7/2/05:

*[T]he Council, it seemed to me, had responded to those issues and the way that the Mayor was driving the issue, had taken legal advice and had made a decision that they were satisfied with the situation with Denis Smith and they wanted it dropped so that they could get on, so it seemed to me in terms of accountability, decision-making, they'd been through an appropriate process.*

At T5014 7/2/05:

*COUNSEL ASSISTING: Now, were you at any time of the view that the City hadn't taken an appropriate course of action in relation to this issue? That is, with the action which they resolved to take on 24 June, on the advice of Minter Ellison to sort of put an end to the debate over the CEO's employment and his qualifications? Did you ever have any misgivings about that in terms of its reasonableness or appropriateness? --- No. I think I've said somewhere else that perhaps in terms of the decision to pay legal expenses I had some misgivings, but in terms of that resolution on the night and the fact that, as far as I could see, they had tried to follow proper process. There were concerns about the appointment, the ongoing employment of Mr Smith, and the councillors had sought to get legal advice about that, where they stood, after taking into account that legal advice, and I wasn't privy to that so I don't know specifically what was said behind closed doors but it seemed to me from outside that they had tried to address the issues, taken legal advice and had come up with a fair and appropriate decision, so I didn't have any misgivings about that side of it.*

6. Mr Cole held the view that the CEO issue had been appropriately dealt with, by proper processes. This belief influenced his assessment of the situation as one that related solely to processes of Council. Although his division was Capacity Building, Mr Cole had access to other information his Department possessed. Issues relating to the CEO's employment were still the subject of assessment by Mr Harrington's division. By August 2003 the issue of the CEO's honesty had grown to such significance that it should have been clear that any resolution of the problems at the City needed to address this as the underlying cause of subsequent problems. This had been evident for some time:

*COUNSEL ASSISTING: [B]y the time you came to have this briefing session with the Joondalup officers and solicitors on the 4th of July, did you have an understanding as to what the issue was, what was besetting the Council in terms of the CEO's employment? --- Yes, in terms of the arguments that Mayor Carlos had been putting at that time, in terms of his –*

*So what did you understand his position to be? --- His position, I understood certainly at that time that he – he had little faith in Denis Smith because he distrusted him because he lied over the qualifications issue, and that quite honestly he couldn't work with him because of that lack of trust, and certainly there has to be a great deal of trust between Mayor and CEO. (T5019 7/2/05)*

7. Mr Cole's understanding of the situation is conveyed in the following part of an e-mail to Mr Smith on 2 September 2003 (0702SMC15) in which he refers to the possibility of a statutory inquiry:

*"The question must be asked whether there are grounds for an inquiry. Despite what some elected members said the other night perceptions do carry enormous weight and unfortunately the public's perception about the City of Joondalup is at present negative. The causes of those perceptions are many and varied but, like all perceptions, they are valid. If the Council does not behave with absolute decorum for the next six months then any disturbance will raise questions and complaints about good governance. There will be an inclination to question whether there should be an investigation of the quality of governance at the City of Joondalup. At the end of the day such an inquiry may well find that good governance is being provided but the satisfaction of Council saying "I told you so" is dwarfed by the other costs to the local government. Therefore, a reason I am pushing so hard for a Council initiated governance review is that the benefits are potentially large and the costs in dollars and stress are so much less than an inquiry."*

8. As Mr Cole confirms in his submission to the Inquiry, his focus was on decorum. He contends that: *"If Council had behaved with absolute decorum then the current inquiry would not be underway"*. His efforts were directed towards restoring the working relationships between the elected members.
9. It is submitted by Mr Cole that as far as he was concerned *"Council had made a decision regarding the CEO and he expected that decision to be implemented"*, and by the DLGRD that *"Mr Cole's personal opinion on whether that decision was right or wrong was irrelevant to the situation"*. Mr Cole contends that is so because he had to *"operate with the view that democracy prevails and that decisions made by Council will be adhered to"*.

10. As discussed elsewhere in this report the LGA directs the DLGRD to have as its primary focus of intervention or assistance to local authorities the provision of “good government”. That involves assessing whether the processes of government have been ethical, i.e., right or wrong, not merely whether decisions have been in accordance with majority rule. The view of the Inquiry, based on the evidence and with due consideration of the LGA, is that the merits of the decision were relevant to the Department’s role and function, particularly its function in determining whether or not circumstances giving rise to a failure to provide good government were such as to warrant an exercise of the Director-General’s power under Section 8.2 or Section 8.3 or advice to the Minister as to exercise of the power under Section 8.2 or Section 8.16 and 8.19; but were not recognised as such in the circumstances which prevailed at the time.
11. The proof of that is in the fact that the merits of that decision are among the matters forming part of the terms of reference of this Inquiry. Mr Cole had set himself a difficult, if not impossible task: to restore working relationships among elected members without addressing the central ethical issue around which those relationships had disintegrated.
12. In his report entitled “Assessment of the situation and options for action” dated 13 November 2003 (0702SMC16) Mr Cole, after making a number of observations on the situation at Joondalup, stated the following conclusion:

*“The continuing employment of the CEO is the essential factor in the dispute at the City of Joondalup. The attitude of the Mayor and his critical supporters is such that it is unlikely the matter will be resolved while all of the current players continue in place.”*

13. He recommended that the Governance Review continue. He said:

*“I submit an inquiry would distract the Council and give it the excuse not to take any action regarding Mr Smith’s severance. In contrast, the Governance Review can occur parallel with the severance negotiations because a lot of elected members will begin to see that as a means of restoring their public credibility and own internal relationships post Mr Smith.”*

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14. He recommended that the Minister give strong support to the Governance Review and “support the Council in terms of its recent decision to establish the committee which has the task of negotiating with Mr Smith on his departure from the organisation”. He also recommended that the Minister:

*“Advise the Council and public that no action will be taken to suspend the Council or institute an inquiry at this time but a strong monitoring role will continue and both remain an option if the situation deteriorates any further.”*

The DLGRD contends that the reasons for not dealing with Mr Smith’s qualifications in the course of the Governance Review were:

- (i) A decision had been made (10/5) on 24 June that stated Council was not interested in considering Mr Smith’s qualifications, was satisfied with his performance and wanted to get on with the task of governing the City.
  - (ii) The Mayor and a minority of elected members did not accept the decision.
  - (iii) Relationships between some elected members and some with the CEO were strained.
  - (iv) Points 2 and 3 were negatively impacting on the governance of the City.
  - (v) The Department needed to act.
  - (vi) The Department called for a Governance Review (initially termed a strategic review).
15. The DLGRD then contends that:

*“Had the Terms of Reference for the Governance Review contained an item addressing Mr Smith’s qualifications then the Review would not have proceeded and the Council could have reached a state of dysfunction more quickly.”*

16. That contention raises the obvious questions which can be asked from hindsight: Why is that? Is it because the CEO controlled the process to his own advantage? Has the delay contributed to the provision of good government to the City?

17. The DLGRD then contends that:

*“Any ensuing inquiry is most likely to have criticised the Department for a lack of intervention, for a lack of endeavour to help the council to resolve its relationship and governance problems. The Governance Review did not positively resolve the working relationships between council members because certain parties did not want it to succeed and failed to co-operate with it.”*

18. Which raises the further questions: Was the activity undertaken for the sake of avoiding criticism? Was it not predictable that if the central issue of contention within the Council

was not being addressed, no amount of co-operation with the Review would have solved that problem?

19. These matters are raised not out of some perverse desire to criticize the DLGRD, but to precipitate some analysis of what happened, so as to provide some guidance as to how any analogous situation might be dealt with in the future. It might be concluded from hindsight that the Governance Review was a possible solution, but there was too much stacked against it for it to succeed.

20. The Governance Review Report set out its methodology at page 9:

*“The primary focus of the Governance Review is the operation of the Council and the relationship of the Council with the executive staff. During the assessment process the Panel utilised an extensive questionnaire, which was completed by 12 of the 15 elected members as well as the CEO and three directors. All elected members were invited to undertake an interview with the Panel; an opportunity that was taken up by 14 elected members including the Mayor. The CEO and directors were interviewed by the Panel.”*

21. Mr Wittber’s evidence was that the questionnaires were returned by elected members and officers “in the latter part of September, the early part of October 2003”. The interviews however were not commenced until 27 November 2003 and did not conclude until a week after the suspension of Council: T12501 22/6/05. Mr Wittber said that he attended meetings on 11, 18 and 20 November and 2 and 3 December.

22. The Governance Review Report (1801CJB2) raised a number of issues in relation to the conduct of Mayor Carlos, and identified a group of councillors who were described by Mr Cole as Mayor Carlos’ “support group”: T5103 8/2/05.

23. The Governance Review found that Mayor Carlos met regularly with members of his support group in the Mayor’s office before Council meetings to discuss issues before Council: Report p51.

24. Mr Frewing gave evidence that he did not witness such a meeting but during the course of an evening meal he saw councillors leave the dining room and head in the direction of the Mayor’s office: “So I can only conclude that they conducted a meeting in the Mayor’s office outside of the council chamber”: T12446 22/6/2005. Mr Frewing, in cross-examination by Ms Hart, said that he did not know whether councillors were going to the Mayor’s office but

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relied on the remaining councillors' comments that they "were going off to have their meeting again". He never actually saw any councillor enter the Mayor's office: T12457 & T12565 22/6/2005. He agreed that once a councillor had left the dining room they could have gone almost anywhere, such as the library, balconies, reading rooms, pigeon holes and photocopiers, but he suggested that that would have been a coincidence: T12458.

25. Ms Yarranton gave evidence that as the Mayor's personal assistant, she observed that there was a split in the Council, and certain councillors would meet with Mayor Carlos, but there were no regular meetings as such: T8566 8/4/2005.
26. Mr Wittber gave evidence that Mr Caiacob told him that he had meetings in the Mayor's office prior to the meeting: T12492 22/6/2005. When he was cross-examined on this point he said that his notes indicated that the response was given in relation to the question: "Are you comfortable being part of the Mayor's team". He said that he did not have any independent recollection of this conversation and said that the comment in his notes could have either been made by himself or another panellist: T12508 – 12509.
27. Mr Caiacob gave evidence that on three occasions he attended a meeting in the Mayor's office on matters not just in relation to the CEO issue, but also to do with a rescission motion in relation to the Sorrento Beach Redevelopment and a letter to Ms Gwilliam. Mr Caiacob said that he did meet with the Mayor in relation to matters to do with his ward, but only met with him three times in relation to Council business. Mr Caiacob was clear that at no stage did he communicate to Mr Cole that he attended the Mayor's office before Council meetings to make decisions on how the group would vote in Council: T12039 31/5/2005.
28. Mr Mickel said that he recalled Mr Caiacob saying that there were meetings in the Mayor's office in relation to the CEO issue: T12563 22/6/2005. Mr Mickel said that he never actually saw any councillors entering or leaving the Mayor's office: T12529 22/6/2005.
29. Mr Cole in evidence said that he saw councillors leave the dining room on two or three occasions. His recollection was that the Mayor would signal to a number of other councillors and they would go off together: (T10608, 10609):

*COUNSEL ASSISTING: So when you say in your report "the Mayor was most overt in his calling of meetings" you're relying on – partly on your observations of certain people going off with the Mayor - ? --- And discussing it with the other two members of the governance panel. They were certainly – they had the same view as myself, because they had observed it.*

*Would they have had any greater opportunity to observe - ? --- No. They would have attended less of those dinners than I did, but it was certainly their view as well.*

*And I think your evidence was that you were told of these? --- Yes. And some of the other officers comments that this is a regular occurrence, so I guess in that way – Can you recall who told you it was a regular occurrence? --- I would have thought Denis Smith would have done so on one occasion. I think Clayton Higham another. I mean, they were the sort of people I spoke to most often at these sort [sic] of dinners.*

30. The Panel relied on comments they received from other councillors to form the conclusion that the Mayor met with his support group to discuss strategies prior to Council meetings. Whilst the Panel may have had a basis for so finding, the evidence before this Inquiry does not support a finding that the Mayor and the four councillors who ultimately came to support him on the issue of the CEO's employment met regularly in the manner described. Whilst it is obvious that meetings would have occurred for the purpose of discussing and obtaining support for rescission motions, the suggestion that the group caucused is not supported by the evidence of the individuals involved, which is accepted. The Panel, with respect, correctly observed that:

*“Groupings of like-minded elected members are going to occur on all significant issues requiring a decision of Council. In a healthy Council such groupings are going to be mobile, independent, objective elected members combining with like-minded members on different issues.”*

31. The report made a number of criticisms of the Mayor, including one based on an observation that at a meeting attended by members of the Panel the Mayor called for an adjournment because of inappropriate behaviour and during the adjournment mixed with his supporters in the gallery to receive congratulations and garner support. It was observed to be a “very divisive gesture”: Report p45.
32. During evidence to the Inquiry no member of the Governance Review Panel testified that they could actually hear what was being said when Mayor Carlos spoke to members of the public. Mr Carlos gave evidence that he was trying to pacify the members of the gallery so that he could recommence the meeting. Mr Frewing said that if the intention of Mayor Carlos was to quieten the public gallery then the best place to do that was from the Mayor's Chair with the microphone so that the whole of the Chamber could hear what the Mayor had to say. He did not believe that it was Mayor Carlos' aim to quieten the public gallery by speaking to them: T12452 22/6/2005.

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33. Cr Caiacob gave evidence on this matter and stated under cross-examination by Mr Carlos that he was standing next to him at the time this incident is said to have happened: T12043 31/5/05.

*“I also entered the public gallery and I was standing next to yourself and my comments to the public gallery were, “If you don’t move the business of council can’t proceed.” I believe that’s what you were also saying to the people if the people can’t move - - “If the people don’t move out of the gallery the business of council is interrupted and that’s what we are here for. We’re here for the business of council. Not just one issue but the full business of council. All items on the agenda.”*

34. Mr Frewing gave evidence that Mayor Carlos showed favouritism towards one group of councillors consisting of Crs Hart, Walker, Caiacob and Walker. He said that Mayor Carlos spoke harshly to some councillors without due regard to the Standing Orders or Code of Conduct and appeared to give preference to certain councillors during debate: T12446 22/6/2005. Mr Frewing believed that there were councillors who were allowed in debate to put successive points of view, rather than a speaker for a motion followed by a speaker against a motion; giving preference to one of the four councillors: T12454 & 12564 22/6/2005.
35. Mr Wittber also said that Mayor Carlos had strong criticisms of people like Crs Kimber and Baker, and appeared biased in favour of others. He conceded that this “bias” may have been apparent due to the design of the Council Chamber as in certain circumstances he believed that the Mayor may simply not have seen certain people trying to get the call. Mr Wittber said that he could not say that one councillor was always given preferential treatment over another, but could say that one of the four councillors would be given the call over one of the others: T12516 22/6/2005.
36. Mr Caiacob gave evidence that he did not receive any special treatment from Mayor Carlos as due to the position of his seat in the Council Chamber he was often overlooked by the Mayor to speak: T12044 31/5/2005.
37. When Ms Hart questioned Mr Mickel and Mr Frewing as to whether she received any special treatment from Mayor Carlos, neither of them could say that she did, but repeated that they recalled four councillors receiving special treatment. Members of the Governance Review Panel could recall special treatment being given to one of four councillors at a time but they were unable to recall individual treatment being given to particular councillors:

T12460 & 12478 22/6/2005. It is apparent from part 7.2.1.1 of the Report that the Panel otherwise relied on questionnaire responses to support the statement that the Mayor “needs to demonstrate fairness and consistency with all 14 councillors”. However, the Panel also acknowledged that the responses of some councillors indicated that “certain other councillors were deliberate in their disruption and had no respect for the chair”.

38. The evidence supports a conclusion that the demeanour of the Mayor towards different councillors may have been observed to indicate favour or otherwise with certain councillors and that certain councillors were disruptive and disrespectful to the chair. Such a finding is supported by the tape-recordings of various meetings heard during the course of evidence.
39. Mr Frewing gave evidence that he observed factional voting on matters relating to the CEO: T12447 22/6/2005. Mr Mickel also said that he observed a faction on one subject, which was the issue of the CEO: T12476 22/6/2005. The report itself at p51 states: “The Panel has not used the word faction because the groupings are so obviously related to the one major issue”.
40. If a number of councillors have each individually arrived at an independent view, then consistently adhering to that view in relation to a series of decisions based upon that view does not constitute a failure to independently exercise discretion, and is not the basis for reaching a conclusion as to the existence of a faction, or at least a faction made up of members not independently exercising their individual judgments. Mere consistency of decision-making in relation to a single issue does not indicate a failure of individuals to make decisions independently of the will of others.
41. Mr Wittber gave evidence that in his opinion rescission motions were being used to frustrate process. This supported his view that there was faction operating in relation to the CEO issue, particularly as the same names kept “cropping up” on rescission motions, five councillors being required to support a rescission motion: T12494 22/6/2005.
42. There were many rescission motions in 2003, only a small number of which were to do with the CEO issue, with most members of Council moving or supporting rescission motions at one time or another. Mayor Carlos and Crs Hollywood, Hart, Walker and Caiacob cannot reasonably be labelled as a faction, merely because they joined in supporting a number of rescission motions. That group of councillors can be clearly identified as making proper use of a rescission motion on one occasion in relation to a motion concerning the CEO’s legal costs,

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when they obtained relevant information from the DLGRD after the original decision sought to be rescinded was made. Various groupings of councillors also used rescission motions for tactical reasons.

43. At Appendix 2 is a summary of the rescission motions dealt with by Council in 2003. The list demonstrates that the rescission motions were used in relation to a number of matters where the requisite number of councillors was of the view that a decision made by Council should be revoked. One notice of rescission which was given by Cr O'Brien for the ordinary meeting of Council of 29 April 2003 was not moved on that occasion and it was either not pursued or left to lie on the table thereafter, effectively staying the original decision, which was to approve the use of land for a therapeutic massage centre. The subject of rescission motions was addressed in the Governance Review Report, the Panel noting at page 30:

*“Rescission motions are a necessary reserve process that enables Councils to reverse decisions that were wrong because of various reasons. Unfortunately, excessive use of such motions is a very strong indicator of a Council that is becoming dysfunctional.”*

44. The Panel came to the view that the use of rescission motions in the period July – November 2003 was an abuse of the process which was intended to frustrate the proper governance of the Council and to deliberately delay the implementation of decisions that had been democratically approved. The Panel also noted that the use of rescission motions was defended by some elected members who claimed that a number of decisions, particularly those related to the employment of the CEO, were implemented following the submission of a late item and were not properly considered.
45. On the evidence available to the Inquiry it is not possible to infer a general proposition that rescission motions were employed in a manner that constituted an abuse of process. Rather, they reflected, on the part of whichever group of councillors supported them, an attempt to revoke what were perceived as objectionable decisions by Council. The manner in which they were dealt with in the weeks leading up to the date of suspension of Council, with motions being allowed to lie on the table thereby preventing the implementation of the decision in question was a sign of increasing dysfunction.

46. In relation to Public Question Time the Governance Review Report stated:

*“It was evident to the Panel that there was a need for Mayor Carlos to exercise more discipline on the nature of the questions that were asked. There were examples of the people asking the same or similar questions at each meeting, as though it was a well-orchestrated campaign, which clearly was never the intention of the public question time process. This process became most obvious over the CEO’s employment. It is accepted that this can be difficult to stop in the first instance but a quick ruling that such a question had already been answered would inhibit the practice.”*

47. Mr Frewing gave evidence that members of the public were allowed to ask direct, inappropriate questions and make comments to some of the elected members and staff, which in his opinion should have been ruled out of order: T12450 22/6/2005.
48. Mr Mickel gave evidence that in public question time, people were expressing their views in regards to the operation of council. He also believed that there was an orchestrated campaign with the same people aggressively attacking certain councillors. He based this view on the three council meetings that he attended: T12486 22/6/2005.
49. Mr Wittber was of the opinion that questions relating to the CEO should have been ruled out of order as Council had dealt with the issue in November 2002 when it reaffirmed Mr Smith’s appointment; however, it was not improper for the public to take an interest: T12510 – 12511 22/6/2005. He was also of the opinion that some questions were repeated: T12513. Mr Wittber said that, “on paper the questions may seem innocuous, but in the manner in which they are asked and the nature in which they are asked can perhaps give rise to a different perception”: T12512.
50. The Inquiry received a great deal of evidence of Public Question Time at meetings from December 2002 to December 2003 and has found that questions were not orchestrated except to the extent admitted by Mr Baker. It is clear from the evidence that legitimate public concerns were not answered by the City over a sustained period of time, and that public frustration and discontent were bound to result.
51. The Governance Review Report found that elected members required more training. It would appear from the evidence of Mr Brewer (T1626 17/11/04) and Ms Hart (T1757 18/11/04) that there was only a limited induction programme made available to new councillors following the election in May 2003. Mr Brewer described “an induction night” where he received a “huge” amount of material to read. A weekend exercise that was

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discussed never eventuated. He attended a course later in the year but could not remember in his evidence what it covered or what in fact was covered in the induction process. Ms Hart recalled that each director of the City told them about what they did and the relevant processes. She said the information was “too much, too fast, too soon”. She noted that no mock meeting was ever held as planned with the intention of providing training in standing orders.

52. These experiences are to be contrasted with those of councillors who were elected in 1999 nearly all of whom spoke of a more intensive induction programme over a number of evenings involving guest speakers and a facilitator. Mr Patterson recalled that staff went out of their way to make sure that councillors were clear on their duties and the ethics involved: T524 11/10/04. He recalled a fairly intensive induction process over a two week period. Ms Hurst also described the programme as lasting for a fortnight. She said it was very heavy but there was much to learn. There were a number of visiting speakers: T618 12/10/04. Mr Carlos recalled a one week programme at which he learnt about the Act and the regulations. Mrs Walker recalled going to a session every night for a week. She subsequently undertook WALGA training over a period of 12 months: T2013 24/11/04. Mr Nixon recalled an induction programme involving three to four sessions in the first week: T3727 16/12/04. Mrs Mackintosh recalled two weeks of intensive training which included going through the Local Government Act: T4393 25/11/05. Ms Barnett said that her induction programme was very good and that she could not have asked for better training.
53. The Governance Review Report noted a submission by the CEO that a two day workshop was offered to councillors following the May 2003 election but insufficient councillors agreed to it (p57). Mr Mike Smith has submitted that this was the case also.
54. The Inquiry did not receive sufficient evidence of the detail of induction programmes provided by the City to newly elected members to enable any conclusions to be drawn as to the reason for less comprehensive induction in 2003, but the number of mistakes which have been identified on the part of Council during the period under investigation would suggest that the elected members’ induction programme should be reviewed and expanded to ensure that it deals with statutory roles, duties and entitlements, Standing Orders, the Code of Conduct and the concept of “good government” as one which takes into account ethical decision making and the recognition and accommodation of minority points of view.

55. The Final Report of the Governance Review Panel was submitted by Mr Cole, the Chair of the Panel, to Mr Clayton Higham, as Acting Chief Executive Officer, on 14 May 2004: 1801CJB2. The report recommended as follows:

- 1: *The agenda briefing session process would be improved by-*
  - (a) *Retaining public access to the sessions but removing public question time.*
  - (b) *Members of the public who have a specific interest in a matter may be given an opportunity to address the Council if they submit a written request to the CEO at least 24 hours before the session.*
  - (c) *Advising elected members at the beginning of the session of the issues that will be subject to a formal presentation by a staff member during the session. Such issues will be determined by the CEO taking into account (d) below.*
  - (d) *Requiring elected members to advise at least 24 hours before the session of the issues they wish to have addressed. Staff would then make presentations on such requests.*
  - (e) *The chair making it very clear that no debate between members will be allowed.*
  - (f) *Being more liberal with the time made available for the sessions.*
  - (g) *Providing notes to members who do not attend of the issues that have been covered so that such members can seek answers to their queries from other elected members or staff prior to the matter being considered in the ordinary meeting.*
- 2: *If Council were to consider further amendments to the briefing session process or even trialling a committee system structure it should undertake a study of the strengths and weaknesses of each system by analysing the methods used by other Councils in the metropolitan area.*
- 3: *Council take urgent action to adopt contemporary standing orders.*
- 4: *Upon adoption of the new Standing Orders Local Law all elected members, CEO and relevant staff undertake appropriate training.*
- 5: *Council should draft a policy that questions in public question time related to the performance, actions or attitudes of individual elected members or staff members will not be permitted. Questions need to be about the performance, action or operations of the local government. The public needs to be made well aware of this policy.*
- 6: *All elected members should give an undertaking that where they are proposing an amendment to a motion that is listed in the agenda they will-*
  - a) *give advance notice in writing to the CEO who would then provide that advice to all elected members in the most efficient and convenient form;*
  - b) *provide reasons for the amendment; and*
  - c) *if prior advice is not given Council should vote on whether a proposed amendment will even be considered.*

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- 7: *In the review of the Standing Orders Local Law strong consideration be given to limiting the potential abuse of meeting outcomes by inappropriate use of procedural motions. Training in meeting procedures for elected members to include content on the appropriate use of procedural motions.*
- 8: *The role of the presiding person in controlling abuse of personal explanations be strengthened in the review of the Standing Orders Local Law.*
- 9: *Stronger controls must be introduced on the consideration of late items at the City of Joondalup meetings. The review of the Standing Orders Local Law should incorporate such rules.*
- 10: *The treatment of notices of motion should be an essential element of the review of the Standing Orders Local Law. It is essential the Standing Orders should stipulate that where a notice of motion, including a rescission motion, is placed on the agenda it should either be moved at the first available meeting or else lapse. If the mover is not present then another member should be authorised to move it, failure to do so would render the matter as lapsed. There should also be a position that a similar notice of motion cannot be moved for at least three months unless it is approved by an absolute majority of the Council.*
- 11: *Confidential items should be listed in the agenda to be handled at the end of the meeting or if such an item requires attendance by a specialist advisor then the item should be subject of a special meeting.*
- 12: *The Code of Conduct needs to be reviewed by a reinstated or incoming Council as such a review will help educate the members in the provisions of the code. Also, there needs to be a training session run for the elected members in the content and adherence to the code.*
- 13: *Council to establish a policy that states that elected members have full access to all aspects of legal advice obtained by the staff on behalf of the local government.*
- 14: *Establish a clear protocol between the Mayor and the CEO about attendance at Council meetings by invited guests or specialist advisors from outside the local government.*
- 15: *Staff must be cognizant of the need to submit and seek prior endorsement of the Council of any reports or submissions that purport to represent the Council view. Best practice would require that when submitting a document that purports to be a Council view that a lack of a Council vote endorsing support must be advised to the receiving body. Such comment would serve as an advisory note for future readers.*
- 16: *Review the structure of the Council chamber to make it more conducive to a better meeting environment. At the very least Council needs to review the electronic controls for the meeting. Elected members should have their e-mail facility compulsorily closed during the time of the Council meeting.*

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- 17: *Any person who is elected to the role of Mayor at the City of Joondalup should undertake a high quality course or equivalent training in the role of Mayor. Such a course will make it very clear that the Mayor needs to have-*
- a) *a thorough understanding of the roles as defined in the Act;*
  - b) *a sound grasp of standing orders;*
  - c) *no greater rights than other elected members;*
  - d) *an inalienable responsibility to treat all members with fairness and objectivity and the need to develop the Council as a team; and*
  - e) *a sound understanding of the code of conduct.*
- 18: *All persons who seek election to the position of Mayor at the City of Joondalup for the first time should commit to a course of the type referred to in the last recommendation.*
- 19: *All persons elected as Mayor at the City of Joondalup in future years should participate in the Mayors and Presidents Support program so that a skilled mentor is available to assist an inexperienced Mayor.*
- 20: *Elected members of the City of Joondalup be provided with extracts from the 1997 Royal Commission into the City of Wanneroo where it dealt with how elected member factions had caused so many problems for that Council. The extracts would be recommendation (f) (i) which is on p1089 of the final report and paragraphs 34.3.1 (page 1037) to 34.3.24 (page 1044). With this information in mind it is to be hoped that elected members will refuse to be part of select groups that meet or liaise for the purpose of gaining an advantage over other individual or groups of elected members by determining the content of debate and how to vote on issues irrespective of what is best for the community.*
- 21: *The City of Joondalup should include a requirement in its code of conduct that when the Mayor is advising the media of Council decisions or other issues on behalf of the local government that personal views are not to be expressed. The right of the Mayor to express a personal view is acknowledged but it must be done separately to an announcement when speaking on behalf of the local government and the Mayor must make maximum effort to inform the media that he/she is expressing their own view.*
- 22: *The Council needs to investigate ways whereby it could appoint an alternative spokesman when Council is of the view that its views are not being represented appropriately. If amendments to the legislation are required then the Council should make a submission to the Minister.*
- 23: *The City of Joondalup develop a protocol in terms of a working relationship between the Mayor and CEO. Such a protocol, which should be adopted by the Council, would define the responsibilities, requirements of both parties and the manner and timeliness that such liaison would occur.*
- 24: *The code of conduct for the City of Joondalup for both elected members and staff could be strengthened in terms of the requirements for the Mayor and CEO to liaise.*

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- 25: *All elected members must adhere to the code of conduct and refrain from vilifying fellow elected members and staff.*
- 26: *Every new elected member is to receive a complete copy of the CEO's current employment contract and a copy of the report relating to his last performance review.*
- 27: *In the future the City of Joondalup CEO contract should be based on one of the proforma contracts developed specifically for Western Australian local government.*
- 28: *Council should review the performance appraisal process so that when the contract for the next CEO is being prepared it has identified the process that best suits its requirements.*
- 29: *With regard to the provision of information to elected members, the Council should-*
- a) *develop a protocol outlining elected member access to information;*
  - b) *establish a standard form for elected members to request information;*
  - c) *establish a record of requests for information and response to requests;*
  - d) *make the record of requests available to all elected members.*
- 30: *The City of Joondalup note the comments made in the Report on the Review of Agendas and Minutes prepared by Laurie Vicary and consider the report's findings.*
- 31: *Tender evaluation processes be reviewed and Council determine its requirements in terms of the form and content of tender evaluation reports and recommendations.*
- 32: *The Mayor or any other elected member should not be involved in the exercise of delegated authority. In the case of planning issues at the City of Joondalup the District Planning Scheme No. 2 should be amended to permit the Director Planning and Community Development to exercise the delegated authority without consultation.*
- 33: *Council continue the development of their consultation policy and include a heading "community consultation" in the agenda report pro forma.*
- 34: *Council develop an elected member training plan. Elected members be asked to give a commitment that they will take a full training suite related to their responsibilities during their time in office. An essential part of the training plan must be a high quality induction program that includes a tour of the administration area including all the departments/service areas and a detailed update on current and committed projects.*
56. At 7.2.2 the Panel stated:

*"Through observation, discussions and interview, the Panel developed a high regard for the calibre, integrity and work ethic of the individual elected members. Unfortunately, the events associated with the employment of the CEO, and for some*

*their lack of experience, overwhelmed their genuine intentions to work for the benefit of the community.”*

57. As to the effects of dysfunction on the operations of the City the Panel made the following observations at 7.2.2 (p61):

*“It is evident that at Joondalup the working relationships between a majority of the executive staff and the Mayor and some elected members are in a very unhealthy state. Trust, understanding and dialogue between the parties are missing. The pressure is more evident and pronounced on some executive staff but all are being impacted. It is inevitable that such pressure on the senior staff will have negative impacts on virtually everyone in the organisation.*

*The impact of the dysfunctional Council has impacted severely on the executive staff and the general operations of the Council through such issues as the number and duration of special meetings of the Council, adjourned meetings, lengthy question time, questions on notice, late meetings and requests for legal advice. In short, there is an overall lack of meeting efficiency.”*

58. These observations are consistent with the evidence received in the Inquiry.
59. The following observations are made with the benefit of hindsight and are not intended to reflect adversely on the members of the Governance Review Panel. By the time the Governance Review got fully underway in November 2003 the situation affecting the Council was such that it was destined not to achieve its aim of assisting Council to work through its issues. By August 2003 the Council was well and truly bogged down on the CEO issue. By their own admissions, councillors viewed the Council as functioning satisfactorily, except on that issue. Because of its limited terms of reference and the timing of its implementation, the Governance Review did not get to the heart of the CEO issue and merely addressed the terminal symptoms of the resulting disorder. The DLGRD has submitted as follows:

*“If Mr Smith’s employment with the City of Joondalup had been resolved as Mayor Carlos wanted and he had been dismissed the Council would still have been dysfunctional because of the way the Mayor and people of similar views on the Council had behaved over a period of time. It would have taken a considerable amount of time and changed relationship processes the majority of elected members to have been able to develop a working relationship with the Mayor based on trust.”*

60. Whilst this may have been so by the time the Department recommended to the Minister that the Council be suspended, Mr Cole’s assessment in mid November 2003 was that on most

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issues the Council was capable of providing good government and that it was only in relation to issues related to the CEO that strong divisions were obvious. As at 10 November 2003 Mr Cole's advice was that –

*“The likely outcome of an inquiry would be that the local government is providing good government despite the distractions of the ongoing disputes over Mr Smith's employment, his contract, his performance appraisal and his legal expenses.”*  
(0702SMC16)

61. It is abundantly clear to the Inquiry that the governance problems experienced by the Council with respect to the issue of the CEO's employment resulted from the intractability of the minority on issues to which they ascribed high ethical importance. In the circumstances, procedural issues could not usefully be addressed in isolation from the substantive issues.
62. The various recommendations of the Panel as to procedural matters can hardly be said to, even if they had been made and implemented timeously, solve the problems which eventually brought about the Council's suspension.
63. Although the Report identified mistrust as an obstacle to the establishment of a working relationship between the Mayor and the CEO and the Mayor and the majority of councillors, it was not able to offer any remedy for this problem. None of its recommendations was capable of restoring confidence in the CEO on the part of Mayor Carlos, the minority councillors and the members of the public who expressed their concerns about this issue.
64. Lack of decorum in Council meetings was the consequence not the cause of dysfunction. For this reason the Inquiry does not accept Mr Frewing's submission that “had the Mayor conducted himself and Council meetings at appropriate standards, the Governance Review would not have been necessary and nor would this Inquiry have been necessary”. As the Panel stated at p16 of the Report:

*“As a general overview the Council has been seen since the May 2003 elections to become progressively dysfunctional in its operations and has been affected by internal division related to some elected members' concerns regarding the employment of the CEO.”*

65. The following general observations can be made in light of the experience of Joondalup. Where there is any level of discord or dispute between the CEO of a local authority and the

Council of that local authority then the Department should ensure that there is a process for independent advice to the Council and/or intervention by the Department between the CEO and the Council. A Council does not have any capacity under the LGA to obtain advice or assistance independently of the CEO. It has no executive power. This limits the ability of the Council to deal with a matter in which the CEO has an interest, or is otherwise in conflict with the local government.

66. In such circumstances, the Department ought to be ready to use all the statutory powers it has available to ensure that a proper course of action is taken. It should provide advice, assistance and support, but should not let the possibility of voluntary support inhibit it in the use of coercive powers. It is not the case that a conflict between a CEO and a Council should be regarded as a matter solely between the CEO and the Council because the LGA alters the relationship which would ordinarily apply between them as employee and employer by giving the CEO significant administrative powers which can be exercised independently of the Council and effectively curtailing the capacity of the Council to act independently of the CEO. The appointment of a CEO creates a statutory relationship between the CEO, the Mayor or President, the Council and other employees which has special features which do not exist in other employment situations.
67. It may be argued that the situation at Joondalup did not involve a dispute between the CEO and the Council as such, because the majority of councillors supported the CEO. Yet, having regard to the role of the Mayor under the LGA, a conflict between the Mayor and the CEO must also be recognised as giving rise to a conflict of interest. In the case of Joondalup, it created an even more complex set of circumstances calling for a more sophisticated resolution strategy than was employed either by the Council or the Department.
68. The DLGRD needs to have and use a process for assessing the merits of local government decision-making. The authorised person's inquiry is probably adequate and guidelines should be established for the circumstances in which it should be implemented. Discretion and restraint are necessary and appropriate and it will remain a matter of judgment in each case as to whether that form of intervention is required. The distinction between a poor decision and an improper decision may be difficult to draw in many cases, but it ought not to have been so in the case of Joondalup.

69. This Inquiry has clearly demonstrated that the present form of the legislation does not provide a mechanism for the Minister or the Director-General to intervene directly in a dispute between a CEO and a Council or provide them in any direct sense with a dispute resolution process. That deficiency needs to be remedied. Neither the Minister nor the Department can reasonably fulfil that function. There ought to be a statutory body specifically designed to do so.

### Suspension of Council

70. Mr Cole reported to Ms Gwilliam on 4 December 2003, stating that although he had previously advised that on matters other than the CEO issue, Council was making well-considered and appropriate decisions and that good government was being provided, this was no longer the case. He said he had no choice but to recommend that the Minister in the strongest possible manner that the Council be suspended. He referred to recent developments, including: the difficulty caused by Mayor Carlos' insistence that he be an observer at a meeting of the working party despite Mr Douglas' advice that he should leave; the issue of Supreme Court proceedings by Mr Smith; the legal advice of Mr Pettit; the delegation of elected members to the Minister; the Mayor's public campaign against Mr Smith; the public airing of issues such as the CEO's credit card claims; the Christmas hamper issue; Christmas party costs and Deputy Mayoral allowance; a series of meetings showcasing the level of dysfunction within the Council; and the increasing use of revocation motions most often by the Mayor and the councillors who tended to support him. Mr Cole said in his conclusions and recommendations:

*“With regard to the issue of the continuing employment of the CEO there are two groups of elected members. I submit one is a faction of five and the other a grouping of ten. The term faction is used for one group because they meet as a group in the Mayor's office on a regular basis and most often before any meeting of Council. There is no doubt they work out strategies and tactics and voting patterns in those meetings. As time goes by it seems this group is becoming more entrenched. The other 10 elected members are termed a group rather than a faction because there is no evidence of caucussing on matters other than the Smith issue. It is my view that if the Smith issue were to be resolved this group would revert to 10 individuals determining issues on their merits. In my opinion and with limited empirical evidence, it is apparent if all elected members were present, every vote related to the Smith issue would be 10/5.”*

71. Mr Cole identified 15 circumstances indicating dysfunction: 0702SMC24.

72. On 5 December 2003 the Minister directed that the Council be suspended. He appointed five Commissioners, Mr John Paterson (Chairman), Mr Alan Drake-Brockman (Deputy Chairman), Mr Michael Anderson, Ms Ann Fox, and Ms Steve Smith.
73. On 11 December 2003 a special meeting of Council (Commissioners) resolved to appoint Deloitte Touche Tohmatsu to undertake a detailed audit of the CEO's compliance with his employment contract, to obtain independent legal advice from Fiocco's Lawyers and Senior Counsel in relation to issues in connection with the employment of the CEO as a matter of extreme urgency, and to authorise related actions, pursuant to a direction by the Minister to inquire into and report to him with respect to the CEO's employment.
74. Mr Douglas gave written advice to the Chairman of Commissioners on 9 February 2004 regarding 18 rescission motions that were outstanding. He recommended that the motions be allowed to lapse pursuant to Clause 3.12 of the Standing Orders on the basis that to change any previous decision would involve a real risk that the City's defence to Mr Smith's proceedings would be prejudiced. He recommended against the Commissioners expressing any view on the merits of previous decisions, which would be the subject of review by this Inquiry.
75. Eight of the 11 councillors who completed questionnaires for the Governance Review stated that decisions were being made on a political basis and involved political factions: Governance Review Report (1801CJB2, at pp 4321-4328, 4274-3). It was suggested by suspended Cr Baker (who was formerly the Member for Joondalup in the State Parliament), that party political interests were served by the decision to suspend the Council and institute this Inquiry, with an ultimate intent of achieving the dismissal of the elected Council. The former Minister, the Hon Tom Stephens MLC, the Premier, and the Acting Premier, the Hon Eric Ripper MLA, at various times prior to the institution of the Inquiry characterised the majority of councillors who supported Mr Smith as a "Liberal-led faction", referring implicitly to the leading role of Cr Baker in the decisions of Council which were supportive of the CEO. Mr Bartlett described such remarks as "political point-scoring".
76. As a consequence of those matters being raised the Hon Tom Stephens, the Hon Ken Travers MLC (North Metropolitan) and the Hon Tony O'Gorman MLA (Joondalup) were called to give evidence.

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77. The Inquiry heard evidence about the role of the Minister and those advising him in relation to the affairs of the City of Joondalup and the role played by local MPs. It is apparent from this evidence that the Minister did no more than perform his Ministerial role under the LGA, based on the advice of officers of his Department. The interest of Mr Travers and Mr O’Gorman, concerning as it did the operations of local government within their electorate, and reflecting the concerns of their constituents, was legitimate and appropriate and that any suggestion of some kind of conspiracy to displace the Council for any party political advantage is unfounded.
78. As the evidence made clear, the references to Mr Baker did no more than describe his political affiliation, which had no relevant impact upon events in the City of Joondalup. There was no credible evidence which suggested that there was any party political faction operating in the Council, or that any political parties were having any impact on the affairs of local government in the City. Various individuals had political associations in relation to their participation in State and Federal politics, as is their democratic right. That had no perceptible impact upon how they participated in the provision of local government in the City of Joondalup.
79. It is not the function of this Inquiry to adjudicate upon the Minister’s decision which, after all, merely triggered the process. Neither is this Inquiry permitted by the rules of Parliamentary privilege (nor would it serve any purpose of this Inquiry) to question what may have been said in the State Parliament. What is said in that place, while it may be relevant to the business of that level of government, is not of assistance in determining what occurred in the conduct of local government in the City of Joondalup. The function of the Inquiry is to inquire into whether there has been a failure to provide good government by the Council. The role of the Minister and the Department is only relevant to the extent that it may have influenced the operation of Council during the period under review. In the case of the Minister, he received from time to time submissions and reports on events affecting the City that he referred for advice. The evidence given to the Inquiry clearly establishes that the Minister at all times acted upon the advice of the Department which was provided independently and in the manner one would expect of any department of the public service.

### Report of Standing Committee on Public Administration and Finance

80. The Standing Committee tabled its report on the LGA on 12 December 2003. The Committee noted that it had resolved to treat the events surrounding the appointment of Mr Smith as an illustrative practical case study as part of a broader inquiry into provisions of the LGA dealing with the appointment of CEO's. The report stated that it was clear from the evidence gathered that the Council was bitterly divided on matters relating to the appointment and employment of Mr Smith and that this bitterness was adversely impacting upon the efficient functioning of the Council and the day to day operations of the City.
81. The report found that the current provisions of the Act were not sufficiently detailed or prescriptive enough with respect to the appointment of a CEO and made recommendations for the implementation of best practice administrative procedures, and the amendment of the Act to provide clearer guidance. The Committee also made observations about the power and role of the Minister and the DLGRD. It expressed concern at "the current overly conservative and restrictive interpretation of these powers with respect to intervention in local governments where there is clear evidence of administrative inefficiency and dysfunction".
82. One of the Committee's recommendations was that all local governments note and endeavour to implement the recommendations of the NSW Independent Commission Against Corruption's "Report on an Investigation into Mr Glenn Oakley's Use of False Academic Qualifications" and that they be noted in any guidelines developed for the employment of CEO's. The subject of that report was found to have falsified academic qualifications over a period of 15 years, claiming to hold a Bachelor of Science (Honours) and a Graduate Diploma in Education from the University of Newcastle. Before detection, Oakley held a conjoint professorial appointment at the University's Graduate School of Business and an appointment as Chair of the University Foundation Board. He had also falsely claimed to have a Masters of Business Administration Degree from the University of New South Wales and a philosophy doctorate from the University of New England.
83. The Commissioner, Irene Moss, stated in the report:

*"The public have a right to expect not only that those appointed to public sector positions are appropriately qualified but that they are honest. False representations as to academic qualifications, or whether or not such qualifications are needed for the*

*position, indicate a lack of integrity on the part of the applicant and should make that person unsuitable for public sector employment.”*

### **Termination of Mr Smith’s Employment: Dixon Advice**

84. Mr Harry Dixon SC and Mr Tom Dixon of the Sydney Bar provided written advice to the City in relation to Mr Smith on 9 March 2004: 1801CJB11.

85. Counsel, upon a detailed analysis of the evidence concluded that formal qualifications were relevant in the selection process and “commonsense would demand the conclusion that the representations played at least some part in inducing the City to enter into the contract”. Furthermore they observed that –

*“had it come to light at an early stage of the selection process that Mr Smith did not have the tertiary qualifications he claimed to have, it is difficult to believe that serious questions would not have been raised about him and or his integrity or suitability for the job. This is particularly so when it appears that the misrepresentations concerning his tertiary qualifications were made at least to Coffs Harbour City Council and to Warringah Council in earlier job applications.”*

86. Counsel advised that their analysis had to be viewed against the position of the City as expressed in its submission to the Upper House Inquiry wherein it was emphasised on behalf of the City that:

- (a) qualifications were not in issue in the recruitment and selection process;
- (b) professional qualifications of any type were not an essential criterion for appointment;
- (c) the evidence “overwhelmingly” supported the conclusion that no one questioned Mr Smith about his qualifications;
- (d) that when considering the matter in December 2002 Council was entitled to attribute even less significance to the qualifications; and
- (e) in the circumstances the Council was entitled to declare full confidence in Mr Smith at that time.

87. Counsel observed that –

*“In light of this position, it appears to us to be very difficult for the City to now assert that the misrepresentations as to tertiary qualifications identified above were of such a*

*material kind that they entitled the City to terminate the contract (either when the misrepresentations were revealed or now). A case now based on a contrary contention as to materiality would, in our view, face very significant obstacles.*

*Thus, even without issues of election or waiver ... we could not advise the City to summarily terminate the contract without significant risk."*

88. Counsel went on to argue that the right to rescind may have been lost through election, condonation, or waiver of the City's rights to rely on the misrepresentations. The issue had been squarely brought to the Council's attention in November 2002 and Mr Smith's qualifications had been viewed at that time. "This information readily enabled all concerned to identify the misrepresentations which had occurred (with or without legal advice)". Counsel noted that resolutions expressing confidence in Mr Smith were made in December 2002, February 2003, June 2003 and September 2003.
89. Significance was also given to the resolution on 24 June 2003 following Minter Ellison's advice as to whether Mr Smith could be directed to produce his qualifications. Counsel did not share the view that there was a risk that such a direction "would not be lawful and enforceable". Counsels' view was that the advice of Minter Ellison did not reach any conclusions concerning facts surrounding material issues. They noted the statement in the written advice of 24 June 2002 that "clearly there would be advantages in establishing what is the truth in relation to each of these questions. We do not have the power to determine what is the truth". Counsel were of the view that this power did exist in the Council. They observed:

*"In our view, at that point, the Council either had sufficient information to make a judgment or alternatively, had the ability to obtain information to make a judgment as to the course it should take. It was making a clear choice not to rely on the conduct of Smith and thereafter the contract continued to be performed by both parties."*

90. With respect to the issue as to whether the City had made an election not to rely on the misrepresentation, counsel advised that the law was not entirely settled but there were cases which indicated that the courts had attributed to parties who are legally advised, the knowledge of their solicitors about the legal right to elect between competing options. They observed that it was apparent that the City's solicitors had knowledge and that it was therefore "at least arguable that the previous Council with its knowledge and the imputed knowledge of its solicitors as to the legal consequences of the misrepresentation, made the

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requisite election to affirm the contract”. As a result, Counsel advised that it was “also doubtful on this ground that it is open to rely on the misrepresentations”.

91. They then concluded as follows:

*“Mr Smith misrepresented his qualifications and his experience in his CV provided to the City prior to his appointment in August 2001. Despite these misrepresentations:*

- (i) it is unlikely that the City will now be able to show that the misrepresentations were so material as to justify summary termination of the contract;*
- (ii) it is our opinion on balance that the City previously elected not to rely on the misrepresentations as grounds to lawfully determine the contract prior to the expiry of the five year fixed term; and*
- (iii) a summary termination of the contract will now render the City liable to damages.*

*Had the previous Council, with or without detailed advice, acted differently, the rights to terminate may well have been different.”*

92. On the strength of this advice the Commissioners agreed to a negotiated settlement of the legal proceedings and the termination of Mr Smith’s contract on terms that the City paid Mr Smith:

- (i) \$385,000.00 in compensation for the termination of employment; and
- (ii) \$90,000.00 in respect of settlement of the legal proceedings and threatened defamation litigation.

93. The deed giving effect to the settlement was executed on 12 March 2004 when Mr Smith resigned his position: 2206MISC75. The City further agreed to pay \$20,000.00 for relocation expenses.

### **Deloitte Touche Tohmatsu Report**

94. One of the terms of reference requires the Inquiry to enquire into “adherence to the provisions of the contract of employment by the CEO and Council”. A similar inquiry was carried out by Mr Martin Langridge of Deloitte on the instructions of the Commissioners. Mr Langridge made an “agreed upon procedures” report which was submitted to the City on 5 March 2004. Mr Langridge was examined and his report was the subject of close examination during the Inquiry: 1702MPL2. The report addressed 15 procedures related to Mr Smith’s contract: 1702MPL1.

95. A draft of the report was provided to Mr Smith whom Mr Langridge interviewed on 29 January 2004 with the view to resolving issues arising from the draft: 1702MPL1.
96. In respect of credit card expenditures, the Deloitte's report identified the lack of tax invoices and the consequential loss of GST to the City:

*“From a review of the unsubstantiated expenses, there is no evidence to suggest that these were not legitimate business expenses incurred by Mr Smith on behalf of the City, however this cannot be concluded with certainty.*

*There are, however a number of instances where sufficient documentary evidence has not been supplied to support the expenses charged to the credit card. The lack of tax invoices represents a cost to the City in respect of GST that would otherwise be recoverable if tax invoices were available. The value of this unrecovered GST is possibly in the order of \$600 over the entire period.*

*We also note that following our enquiries tax invoices were discovered by Mr Smith in his records for 5 items totalling \$1,336.95 and a further 5 invoices totalling \$420 have been obtained from the supplier concerned. These invoices should now be provided to finance to allow the input GST to be recovered.”*

97. The Inquiry found 21 instances on Mr Smith's corporate credit card statements where supporting documentation had not been provided.
98. From a total of 23 credit card statements, 18 statements did not have the credit card expenditure authorised by the Approving Officer. These transactions occurred during the period 27 March 2002 to 25 September 2003.
99. Mr Smith told the Inquiry he was advised at the start of his employment that he should submit credit card documentation to the Manager Audit and Executive Services, Mr Robinson. It would then be referred to “the director of corporate or financial services”: T4734 1/2/05. It is certainly the case that Mr Robinson verified and signed the first three credit card statements December 2001 - February 2002: P5429-5415.
100. The Executive Management Group (EMG) met on the 28 June 2002. The EMG members were the City's Directors and the CEO, Mr Smith. On the agenda was Mr Robinson's proposal for a change to the review and authorisation process for the City's credit cards. As part of the review Mr Robinson proposed that the CEO's credit card be authorised by the Director, Resources Management and Corporate Services. Mr Robinson's proposals were

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endorsed by the group, with the exception of the authorisation of the credit card expenditure of the CEO and Mayor. These would instead be authorised by Manager Audit and Executive Services: 1503KBR46. Mr Smith's attendance at the meeting was confirmed on the agenda and the memo issued following the meeting notes Mr Smith's attendance: 1503KBR46.

101. Following the review of credit card procedures in June 2002 Mr Smith was required to submit his credit card expenditure, with the supporting documentation, to Mr Robinson, Manager Audit and Executive Services, for verification of the transactions as legitimate business expenses. Mr Robinson was then required to sign the statements before forwarding them to the Finance Officer. Obviously, this process allowed the opportunity for Mr Robinson to point out any lack of documentation, or clarify with Mr Smith any issues in relation to a transaction.
102. The departure from the formal process was not identified until 17 months later during the Deloitte's audit, which commenced in December 2003. Mr Langridge raised the issue of the apparent lack of adherence to the appropriate authorisation process in relation to payment of Mr Smith's credit card expenditure, specifically the lack of authorisation by the approving officer, Mr Robinson. Mr Smith's response to Mr Langridge was that his personal assistant, Ms Helen Hill, had delegated authority and carried out the approval of his credit card expenditure from April 2002: 0102 DIS77.
103. Mr Smith stated that Mr Robinson was aware that Ms Hill authorised the credit card expenditure: 0102 DIS77. In evidence to the Inquiry Mr Smith confirmed this response to Mr Langridge: T4772 1/02/05. Mr Smith said that Mr Higham and Mr Djulbic had informed him that personal assistants had authority to process credit cards: T4769 1/2/05. Mr Smith did not seem to differentiate between "processing" a credit card transaction and "authorising" it.
104. Mr Smith told the Inquiry that Ms Hill processed the application: T4769 1/2/05. Questioned further by Counsel Assisting whether he regarded Ms Hill's role as one of authorising his credit card transactions, Mr Smith stated: "Yes. It would have been".

*COUNSEL ASSISTING: And how was she authorised to do that? --- In my understanding there was certain delegated authority given to a number of staff in the organisation to certain levels of expenditure and Miss Hill - - Mrs Hill at the time had a level of delegation which would have allowed her to certify the expenditure authorisation and there was provision made on the form where I would confirm that the above expenditure had occurred and then underneath that there would also be an expenditure authorisation which was normally executed by her. (T4770 01/02/05)*

105. Ms Hill's evidence to the Inquiry contradicts Mr Smith's view of her role. Ms Hill advised that she had authority for certain cash expenditure and for purchase orders to the value of \$1000, this being raised to \$10,000 by 13 June 2002: 2704HLH2. This authority did not relate to corporate credit cards: T9531 27/4/05. Asked if Mr Smith's understanding was correct, Ms Hill responded "No. That's not correct": T9533 27/04/05. Ms Hill went on to clarify her role in processing Mr Smith's credit card expenditure, pointing out it was a simple role (T9533-9535 27/4/05) similar to what she did as Mr Higham's personal assistant: T9536 27/4/05.
106. Mr Kevin Robinson supported Ms Hill's statement. When asked to confirm that Ms Hill did not have delegated authority to approve Mr Smith's credit card Mr Robinson stated, "The credit card expenditure should have been referred to myself from June 2002 onwards": T7369 16/3/05.
107. In further evidence Mr Smith told the Inquiry he was unaware that his credit card should be authorised by Mr Robinson. He had no recollection of the Executive Management Group Meeting of the 28 June 2002 or the memo issued to the Executive Management Group following the meeting. When taken to the documents relating to the meeting, Mr Smith accepted that this was the practice put in place: T4773-4777 1/2/05.
108. Mr Robinson gave evidence that Mr Smith was not happy with his proposal that the Director of Corporate Services and Resource Management be allocated the task of authorising Mr Smith's credit card: T7273-7274 15/03/05. Mr Robinson was asked by his counsel, Mr Hooker, how he knew this was so:
- "Because my recommendation was for both the Mayors and also for Mr Smith that expenditure be authorised by the Director of Corporate Services and Resource Management and it was changed at the meeting to reflect it should be the Manager, Audit and Executive Services."*
- MR HOOKER: "Do you know whose idea it was that the position of Manager Audit and Executive Services become the authorising officer for the CEO and the Mayor"? - -- "That was Mr Smith's".*
109. The final stage in the reconciliation of credit card expenditure is the check undertaken by the Finance Officer to confirm that all documentation is attached, the correct cost code is quoted and the correct signatures are present. The Inquiry's examination of the credit card statements found there was no follow-up of the authorisation of the credit card statements

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and little if any follow-up of missing documentation. This is confirmed by Mr Langridge's report (1702MPL2), which details the missing documentation.

110. Mr Schneider told the Inquiry that City staff were not aware of the changes; processes were generally communicated by word of mouth. Mr Schneider believed the process that had been in place before 2002 did not require the approval of the credit card expenditure and staff had continued to follow that previous process. Additionally, staff would not check for documentation, only that there was an expenses code on the credit card statement. Mr Schneider felt there was a lack of guidance in the finance area, however, he accepted that the procedures were in place but were not complied with: T8863 14/4/05.
111. During the relevant period City employees processing financial documents did not follow basic financial reconciliation processes. It is evident that the City's staff needed prescriptive guidance. This need should have been apparent.
112. As a means of transparency and accountability, payments for all corporate credit cards are included in the list of financial accounts, submitted to Council for approval on a monthly basis. This is a requirement under Regulation 13, *Local Government (Financial Management) Regulations 1996*. This list is called the warrant of payments.
113. Mr Schneider said that prior to his joining the City there was a time when all credit card transactions were itemised in the warrant of payments. He understood that during the period Mr Smith was CEO this changed so that an aggregate total sum was listed: T8857 14/4/05. Mr Langridge concluded that for a total of 14 months between March 2002 and September 2003 credit card payments were not included in the warrant of payments reported to Council. Mr Schneider explained that this was an error made by the finance department. Mr Schneider gave evidence at the hearing that the "Statutory Accountant" had responsibility for including the credit card payments in the Warrant of Payments.

*"The Statutory Accountant put forward a proposition that the credit card information had been filed in another file and when he came to put all the information together for the warrant of payments he didn't pick it up that it was in another - - because it was in a separate file. Someone had changed the system from what he'd been previously used to for the last number of years that he'd been doing it."* (T8848 14/4/05)

114. The financial manager who also failed to notice the missing payments compounded the omission: T8848 14/4/05. As reported by Mr Langridge, Council had no information

regarding the expenditure against the corporate credit cards for 14 months. There is no evidence to suggest any member of Council raised the issue until November 2003.

115. On the 27 November 2003 Cr Hart sent an email to Mr Schneider (1404PBS6) asking where the information regarding the CEO's credit card could be found in the warrant of payments. Mr Schneider informed Cr Hart of the oversight and assured her credit card expenditure would be included in the November 2003 warrant: 1404PBS7. An aggregate of corporate credit card expenditure for the month of October 2003 appeared in the Warrant of Payments presented to the meeting of Council 16 December 2003.
116. Mr Robinson told the Inquiry that he expected any statements that did not comply with the City's procedures would not have been processed by the Finance Department and have been returned to him. The failure of Mr Smith to submit his credit card statements to Mr Robinson for authorisation only appeared to come to Mr Robinson's attention when he spoke to Mr Langridge in December 2003: T7276 15/3/05. However, Mr Robinson was aware from at least 28 June 2002 (1503KBR47) that he had been given the task of authorising the credit card expenditure of the CEO: T7368 16/3/05.

As CEO it was Mr Smith's responsibility to ensure that appropriate financial accounting procedures were in place and followed. A high level of probity is required in the administration of public funds.

117. Mr Smith attended the National General Assembly of Local Government Conference in Alice Springs from 3 November 2002 - 6 November 2002 with his wife: 0202DIS78. Mayor Bombak and Mrs Bombak also attended. Ms Hill, on the 6 November 2002, submitted a cheque request (0202DIS78) for \$700 in respect of an advance for daily travel allowances for Mr Smith.
118. Following his return from Alice Springs Mr Smith completed and signed a travel allowance acquittance on the 5 December 2002 outside the prescribed seven day period. Included in the acquittance were \$100.00 for coffees and \$76.00 for taxis. Contrary to the policy, there were no receipts submitted as supporting evidence of this expenditure. Mr Smith also submitted his credit card expenditure, completing the additional information box and signing the credit card statement.

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119. Mr Langridge found, and it was evident to the Inquiry, that a number of purchases to the sum of \$344.15 (of which \$176.00 was unsubstantiated) made using the credit card had also been acquitted against the daily allowances and had therefore been paid twice by the City. These were as follows:

Date	Amount claimed	Expenditure	Credit card statement Exhibit and page number	Credit card voucher Page number	Daily Allowance Acquittal Exhibit and page number	Tax Invoice/receipt Chronology Page number
2/11/2002	\$101.50	Perth Airport Parking	0202DIS80 5365	5664** 5363**	0202DIS78 5281.004	5281.008
2/11/2002	\$150*	Overlander Steakhouse	0202DIS80 5365	5362	0202DIS78 5281.004	5281.009
4/11/2002	\$81.05	Overlander Steakhouse	0202DIS805365	5360	0202DIS78 5281.004	5281.010
8/11/2002	\$19.94	Delta Europa Fuel	0202DIS80 5365	5356	0202DIS78 5281.004	5281.005

\*Included \$8.35 gratuity

\*\* Credit card voucher and Tax Invoice submitted

120. Mr Langridge raised the issue of these expenses in his draft report. Mr Smith's written response on 20 February 2004 was:

*"My personal assistant completed the expenses claim. It appears from the report that some of the expenses details are incorrect. This is clearly an administrative error. No doubt appropriate enquiries with the administrative persons concerned will confirm this is the case."* (0102DIS77)

121. Giving evidence, Mr Smith stated several times that these duplicate claims had never been raised with him by the forensic auditor and that the matter had never been drawn to his attention: T4744, T4745, T4746 01/02/05.

122. Although Mr Smith accepted the auditor's findings, he maintained the duplicate payments issue was not in the draft report he had seen and he had not seen the final report. Mr Smith was not prepared to accept the draft report was the same as the Deloitte Touche Tohmatsu final report: T4748 1/2/05. Later during evidence Mr Smith was taken to the draft report and conceded that the issue was raised. Mr Smith told the Inquiry that his response to Deloitte's reflected this error: T4784 2/2/05. The draft report was not tendered as an exhibit as the relevant paragraphs were the same as in the final report.

123. Mr Smith said it was his Assistant, Ms Hill, who had prepared the documentation, but he accepted full responsibility: T4784 2/2/05. When shown the daily allowance acquittal form (0202DIS79) Mr Smith agreed it was completed by him (T4785 2/2/05) not Ms Hill. Ms Hill later told the Inquiry that Mr Smith completed his own daily allowance acquittals following conferences: T9578 17/4/05. Mr Smith was asked what role Ms Hill had in this, he explained that she would have filled out and completed the documentation for the credit card statement: T4793 2/2/05.
124. Mr Smith was shown the credit card statement (0202DIS80) and he agreed he had completed the statement in the right hand column, (“cardholder comments”), annotated the statement “incorrectly credited \$1183-04 to COJ paid by D Smith 25 Nov MasterCard”, and signed to verify the expenditure. Ms Hill had correctly annotated the statement against the Qantas transactions “ x note Fares paid for alternative flights - amount credited by Qantas”.
125. Ms Hill recalled that on this occasion, she assisted Mr Smith, with the completion of his credit card statement, going through the expenditure with him: T9535 27/4/05. Ms Hill recalled this as it followed Mr Smith’s visit to Alice Springs. The more usual practice would be for her to maintain a file of receipts throughout the month and then complete the comments and additional information, taking the statement to Mr Smith to sign the confirmation of expenditure: T9534 27/4/05.
126. Mr Smith was questioned during the hearing regarding leave taken (T4758-4770 1/2/05) and was firm in his responses that all leave taken was taken appropriately with the approval of Mayor Bombak or the Council, in most instances the leave was awarded as “special leave” rather than annual leave. Mr Smith told the Inquiry that senior officers did not have the benefit of flexible hours, but were often required to work extra hours. He said that on the advice of the forensic auditors he regarded “special leave” as time off in lieu and applied for as such.
127. The Deloittes’ audit dealt in depth with Mr Smith’s annual leave. Mr Langridge raised a number of issues regarding periods of leave which had not been accounted for and gave detailed evidence of the audit findings confirming that the City records were incorrect regarding leave: T5725 17/2/05. The annual leave taken by Mr Smith was not recorded. A letter from Mr Langridge outlining the audit findings relating to Mr Smith’s annual leave was sent to Mr Robinson on 14 May 2004: 1702MPL4.

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128. Subsequent investigations by Mr Robinson identified another period of leave, not recorded against entitlement, being 23 December 2002 through to 3 January 2003. Following his departure from the City of Joondalup Mr Smith was asked to repay six days overpaid leave amounting to \$2,415.21.
129. Following the Agreed Upon Procedures Report the City of Joondalup commissioned its own internal audit of all corporate credit cards: 1503KBR48. The internal audit found that there were adequate procedures in place, which were published on the City's Intranet, Section 5.6 Corporate Procedures Manual, but the procedures were not being followed.
130. In respect of other procedures audited by Mr Langridge no conclusions were reached adverse to Mr Smith. It was also noted that on one occasion Mr Smith's substantiation documents amounted to \$244.95 more than was claimed apparently because the total was in excess of the stipulated daily allowance sum.
131. As CEO, Mr Smith was responsible to ensure that appropriate financial accounting procedures were implemented and followed. This duty is ethical, professional, contractual and statutory in nature. It is set out explicitly in the Code of Conduct which not only requires the maintenance of records and the compliance with proper administrative and management practices, but also that employees be "scrupulously honest" and that Council resources entrusted to them be used lawfully. It is open to conclude on the evidence, to a high standard of proof, that Mr Smith wrongfully failed to record his annual leave taken and duplicated a number of expenditure claims arising from his trip to Alice Springs in 2002.

### **Complaints to the DLGRD**

132. It was suggested in cross-examination of Departmental witnesses by Mr Birmingham QC, for Mrs Mackintosh, Mr Kimber and Mr O'Brien, that the problems experienced by the Joondalup Council in 2003 were contributed to by a failure on the part of the Department to deal timeously with complaints against Mayor Carlos.
133. The first relevant complaint was a letter by Mr Smith to the Director-General dated 7 May 2003 (0902QNH15) bringing to her attention a potential offence under Section 5.65. This letter did not indicate what the alleged offence was but said it related to meetings on 18 February 2003 and 29 April 2003 when Council considered a report relating to legal advice in relation to the behaviour of an elected member.

134. In a further letter dated 30 May 2003 Mr Smith wrote to the Director-General (0902QNH16) in similar terms referring to the same meetings indicating that the legal advice was sought in relation to the behaviour of Cr Carlos. The letter also referred to the Council meetings on 15 and 20 May 2003 which considered issues relating to the CEO's employment. Mr Smith stated that on these occasions Mayor Carlos did not disclose a financial interest. This was based on the fact that his lawyers Blake Dawson Waldron had indicated that in their opinion Mayor Carlos had a financial interest because of Mr Smith's threatened legal action.
135. Then on 3 June 2003 Mr Smith wrote to the Director-General (0902QNH17) again referring to a potential alleged offence under Section 5.65. The letter complained that a Council item on 27 May 2003 related to the policy for the mayoral motor vehicle. The Mayor had vacated the chamber due to a financial interest but subsequently returned and voted on a procedural motion that the motion "lie on the table".
136. These letters were the subject of a report by Mr Morris dated 2 July 2003: 0902QNH18. This report identified five complaints in Mr Smith's correspondence. Mr Morris reported on 2 July 2003 (0902QNH18) that the first identified complaint being in relation to Cr Carlos' vote on the motion to authorise legal expenditure for the CEO was unsubstantiated. Similarly the second complaint that related to Cr Carlos voting on a further decision to authorise legal expenses on 29 April 2003 was unsubstantiated. The third and fourth complaints related to the special meeting on 15 and 20 May 2003 in respect of which Blake Dawson Waldron had contended that Mr Carlos had an interest because of potential legal proceedings against him. This complaint was found to be unsubstantiated. The fifth complaint related to the procedural motion on which Mayor Carlos voted on 27 May 2003. Mayor Carlos absented himself from the chamber when Council dealt with a motion that substantially reduced his mayoral entitlements, albeit at his suggestion. After this was debated Mayor Carlos returned to the chamber and voted on the procedural motion that the motion lie on the table. Mayor Carlos believed he had no financial interest in the procedural motion.
137. The complaint was found to be substantiated on the basis that "it is the view of the Department that, in the absence of formal legal opinion of the facts, there is evidence that in this instance Mayor Carlos appeared to breach the financial interest provisions". The report advised that whether a prima facie case existed and whether the prosecution was in the public interest would influence any decision to prosecute. The report recommended that Mr

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Smith be informed of the outcome of the assessment in relation to complaints one to four and that item five be deferred for further assessment.

138. On 18 July 2003 Mr Morris met with Mr Smith and Mr Loader at the offices of the Department: 0902DLM7. Mr Smith said the reason for the meeting was to ascertain what was happening to his complaints about Mayor Carlos. He thought the Department was intentionally dragging its heels in relation to his complaints whilst dealing efficiently with complaints by Mayor Carlos. Mr Morris was not able to ascertain how Mr Smith was aware of any complaint that Mayor Carlos may have made. Mr Morris informed Mr Smith that there had been four complaints that were written off after initial assessment. A fifth was being assessed further. A sixth, which had just been received, did not specify what the alleged breach of Section 5.65 was.
139. The fifth was the subject of legal advice: 0902BMP7. The advice of the Acting Crown Solicitor, Mr Lyon, focused on the meaning of the word “matter” in Section 5.67. He was of the view that an elected member could have a financial interest in a procedural motion but he had insufficient knowledge of the facts to be able to advise further. He thought the City should be informed of the legal position.
140. On 15 July 2003 Mr Smith wrote to the Director-General (0902QNH25) raising a potential alleged offence under Section 5.65. The letter enclosed a press release from Cr Kimber dated 4 July 2003 which set out a number of matters which in the opinion of Cr Kimber (and Cr Baker who admitted authoring the release) should be dealt with in priority to the CEO’s qualifications. The letter did not explain how the release breached the Act and when this was put to Mr Smith he wrote to the Department on 24 July 2003 (1404MGS20) asking that his previous letter be disregarded.
141. On 9 September 2003 Mr Smith wrote to the Director-General (0902BMP12) alleging a potential breach of Section 5.65. In relation to the leaking of a confidential report containing legal advice. The subject of the complaint was not indicated. The Department made enquiries about the City’s procedures for handling confidential documents but was unable to take the matter any further.
142. As at the date of the suspension of Council the complaint about Cr Carlos voting on the procedural motion in relation to the mayoral vehicle had not been resolved. It is apparent that no prosecution was indicated.

143. Mr Smith was examined as to the basis of his complaints and was unable to add any substance to them. Nearly all of the complaints made by Mr Smith against Mr Carlos were self-interested and calculated to damage his reputation. None of them was of a type that would impede the business of Council. All of the complaints Mr Smith made against Mr Carlos were made after he was elected Mayor and challenged Mr Smith to prove his qualifications and work history. The complaints did not show clearly from what conduct the alleged breaches arose and they provided little in the way of supporting material. The only complaint by Mr Smith found to have any substance was in relation to a procedural motion relating to an item, which although it involved a benefit to Mayor Carlos in terms of mayoral entitlements, resulted in fact from Mayor Carlos' decision to relinquish his entitlements and was therefore unlikely to warrant prosecution.
144. Regardless of the outcome of the complaints, the length of time which it took to deal with some of the complaints is regrettable. It is contended on behalf of some parties that the length of time taken to deal with complaints is significant because prompt attention to complaints may avoid a permanent schism developing between parties in dispute. It is also contended that a delay in dealing with a particular matter is a circumstance which is open to be interpreted as the DLGRD favouring one party over another. The evidence from departmental officers suggested that complaints were being dealt with as rapidly as was possible, given the resources available to them to deal with a range of competing demands upon them. The DLGRD points out that 90% of complaints from the City of Joondalup were dealt with within 6 months. That high statistical rate of dealing with complaints will not, of course be satisfactory to some if their interest is a complaint against a person which has fallen into the group comprising the 10% not dealt with within 6 months. I expect that the DLGRD will note the contentions made and take them into account as best they can in the future.

### **Warringah Council Inquiry 2003**

145. The Report of the Inquiry into the Warringah Council by Emeritus Professor Maurice Daly was published in July 2003. The Inquiry addressed the affairs of the Warringah Council from September 1999. It is instructive in the context of the present Inquiry because some of the issues and problems it addressed were very similar to those addressed by this Inquiry.
146. Professor Daly observed that some councillors and members of the public had argued that the public image of a dysfunctional Council at Warringah had been generated by the unruly

## CHAPTER 3

### PART 9

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behaviour of people in the public gallery at Council meetings. Whilst his report was critical of some behaviour at Council meetings he said that the gallery was inflamed by the calling of police to meetings, the Council going behind closed doors, the allowance of insufficient time for the public to speak at meetings, the failure of the Council to follow due process at times, and the reading of Disorderly Conduct advisory statements at the commencement of meetings which suggested “a combative approach” to the public. He described the reaction of some mayors, some councillors and the general managers as being at times draconian.

147. The Inquiry also addressed what was described as a “grand conspiracy theory” which argued that political forces intent on dismissing the Warringah Council had generated a false impression through the media and by other means that the Council did not operate effectively and that a small group of failed candidates in the 1999 election had orchestrated a dirty campaign to bring down the Council. The Inquiry found no credence in the theory and also found that the active role taken in local government affairs by unsuccessful candidates was not a conspiracy.
148. It was also submitted to Professor Daly that those people who made written submissions to the Inquiry and who appeared were only a small proportion of the population of Warringah and not representative. He found to the contrary.
149. The report also addressed the observance of elected members of the Code of Conduct and the Code of Meeting Practice. He noted that some councillors thought that if they followed the rules governing meeting practice then they had satisfied their behavioural obligations. He found that councillors generally had not taken the Code of Conduct seriously, and certain breaches were a singular and material factor in creating a bad image of the elected representatives amongst the community.
150. Professor Daly made findings that factionalism existed in the elected body which was apparent when the elected members dealt with major property development issues. A consistent pattern of 5/4 voting was recognised by the community and judged by many to be evidence that the pro development faction was making decisions without taking care to measure the merits of the issues. A major product of factionalism was found to be the disruption of Council meetings for which both factions had been at fault.
151. Findings critical of the “majority” councillors were made in respect of complaints of belligerence and intimidation towards the minority councillors. He observed that the most

substantial threat that “hung in the air” was that of defamation following the *Jones v. Sutton* case. The “majority” councillors were found to have behaved in a derisive and abusive manner within the Council chambers and at public meetings. Petitions presented by groups had been ignored. Individuals who opposed their views had been ridiculed, belittled, and ignored within the Council chambers.

152. The Report concluded that no adverse findings should be made against Mr Smith because:
- (a) he did not make himself available at the public hearings or make a written submission and therefore the allegations made against him could not be tested; and
  - (b) the allegations related to past events and the Inquiry was concerned that to make judgments about the present and future capacity of the Council to provide efficient and effective governance.

Nevertheless, the Inquiry concluded that “whether the allegations are right or wrong, they have been a factor in lowering the levels of community confidence in the Council”.

## Conclusions

- A. It cannot be said that there was a faction of five in relation to the CEO issue. Rather, there was a group of elected members who shared the Mayor’s position on that issue. These elected members came to the same view as Mayor Carlos independently exercising their own judgment and discretion.**
- B. The terms of reference of the Governance Review did not permit the Panel to address the Council’s decisions in relation to the CEO as a cause of the Council’s governance problems. Because of its limited terms of reference and the timing of its implementation, the Governance Review did not get to the heart of the CEO issue and merely addressed the terminal symptoms of the resulting disorder. This diminished the usefulness of the Review.**
- C. Where there is any level of discord or dispute between the Chief Executive Officer of a local authority and the Council of that local authority then the Department should ensure that there is a process for independent advice to the Council and/or intervention by the Department between the CEO and the Council.**

- D. The present form of the legislation does not provide a mechanism for the Minister or the Director-General of the Department to directly intervene in a dispute between a CEO and a Council or provide them in any direct sense with a dispute resolution process. That deficiency needs to be remedied. Neither the Minister nor the Department can reasonably fulfil that function. There ought to be a statutory body specifically designed to do so.**
- E. During the relevant period City employees processing financial documents did not follow basic financial reconciliation processes. It is evident that the City's staff needed prescriptive guidance. This need should have been apparent.**
- F. As CEO it was Mr Smith's responsibility to ensure that appropriate financial accounting procedures were in place and followed in relation to the approval of credit card expenditure. Mr Robinson was not proactive in ensuring that the task assigned to him in that regard was being performed. He should have noticed the failure of the CEO to observe the City's financial procedures.**
- G. Mr Smith wrongfully failed to record his annual leave taken and duplicated a number of expenditure claims arising from his trip to Alice Springs in 2002.**
- H. There was no significance to the provision of good government of the City in the manner or timeliness with which complaints to the DLGRD about Mr Carlos were dealt.**

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## Conclusions and Recommendations

### General Conclusions

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#### Councillors

1. I have no difficulty accepting the submission of Senior Counsel for Mr O'Brien, Mr Kimber and Mrs Mackintosh that they acted with the best interests of the people of Joondalup at the forefront of their minds, with honest intent and without any personal gain or benefit and sacrificed their time in providing public service to the electors, resident and ratepayers. The same can be said for all councillors, and they are to be commended for that.
2. Where the Council as a group has failed to provide good government is in failing, in various instances identified in Chapter 3, to make ethically sound decisions. In those instances, the decisions of the Council were not rational, or not adequately informed and otherwise not in the interests of the City.
3. A number of councillors contributed to the failure to provide good government by engaging in conduct, which has been specifically identified in Chapter 3, which was not ethical because it did not comply with the Code of Conduct. Such conduct contributed to poor relationships between councillors and in turn caused a breakdown of the level of co-operation between councillors which is necessary for a Council to perform its function of providing good government.
4. The most significant error of judgment of the Council was to pay insufficient regard to the reports in *The West Australian* of 20 November 2002 and *The Sunday Times* of 15 December 2002 that Mr Smith had been found to have lied to the District Court of New

South Wales in Sydney concerning his qualifications (and to have given unsatisfactory evidence in other respects in that case) and fail to investigate those matters, as Cr Carlos suggested in debate at the Council meeting of 17 December 2002. Those errors set in train a course of conduct in which a diminishing, but substantial majority of the Council made a series of decisions supporting the CEO, Mr Smith, and in opposition to Mr Carlos, an elected member whom the district elected as its Mayor, without paying due regard to the interest of the City of Joondalup in preserving public confidence in the honesty and integrity of its CEO.

5. Mr Carlos, both as a councillor and as Mayor adopted a principled position in relation to the investigation of the probity of Mr Smith, but alienated other councillors by the occasionally unsatisfactory manner in which he pursued the matter, such as –
  - his use of the public media to comment adversely on other councillors;
  - his carelessness with the truth in relation to certain matters of fact of significance to other councillors; and
  - his failure to take appropriate steps to reveal to other councillors information upon which he based his views,all of which contributed to a loss of confidence in him by a number of councillors.
6. He was, therefore ultimately unsuccessful as a leader of the Council and ought to have resigned when that position became irreversible.

## **Denis Smith**

7. Mr Smith's position as CEO of the City has now been terminated by agreement with the Commissioners, and so conclusions reached about him are of little ongoing significance to the City. Submissions on his behalf point to consistent and overwhelming evidence heard by the Inquiry of his good performance and the support he had, for that reason, from most of the elected members and staff of the City. That, however, was never the real issue in contention. The debate between councillors often confused performance with integrity, which Mr Carlos and others rightly put in issue, resulting in an irrational response to that issue.

8. The misrepresentations in the CVs Mr Smith provided to the recruitment consultants to the Coff's Harbour City Council, the Warringah Council and the City of Joondalup and his untruthful evidence before Judge Gibson in the District Court of New South Wales, were deserving of investigation. Once ascertained they irreparably damaged his reputation for honesty and integrity to a point where no public sector employer, such as the City of Joondalup, could continue to employ him, because of the impact on its own reputation; regardless of his capabilities as an administrator.
9. Had the Council responded appropriately to the issue of Mr Smith's probity the City may not have incurred the legal obligations which, on the basis of the Dixon advice, conditioned the settlement by which the termination of his employment was secured.

### **Failure to Provide Good Government**

10. The tortuous process which commenced with the decision in March 2001 not to renew the position of Mr Delahaunty as CEO and ended with the suspension of the Council on 4 December 2003, was one in which elected members strayed many times from the path of rational and otherwise ethical behaviour, both in the way in which they behaved individually towards one another and in the way they behaved as a group, by reason of their decisions, towards the electors whom they were representing. They significantly failed in that regard to provide good government to the City of Joondalup.

### **City Officers**

11. Counsel for various officers of the City have submitted on their behalf in emphatic terms that officers of the City are in a position of special vulnerability suffered by as a result of the events which have led to this Inquiry and the process of participation in the Inquiry. They argue that they, as a category of participants in the events, run the risk of their careers being adversely affected by the conclusions of the Inquiry. Bearing that in mind I accede to their request that I make the following set of findings in on the basis of the evidence before the Inquiry in relation to –
  - Mark Loader
  - Clayton Higham
  - Kevin Robinson

- Mike Smith
  - Laurie Brennan
  - Hazel Yarranton
  - Helen Hill
  - Peter Schneider
12. Each of those persons –
- (a) was committed to the role he or she was assigned to perform;
  - (b) at all times performed his or her role with sincerity, in good faith and to the best of his or her ability;
  - (c) at all times performed his or her role competently;
  - (d) at no time engaged in any act of impropriety.
13. Further, because of the delegation of power by the CEO on 14 May 2003 to –
- Clayton Higham ;
  - Mark Loader ; and
  - Kevin Robinson
- each of them bore a particular burden beyond that which would ordinarily be expected of them in the positions to which they had been recruited.
14. Mr Higham was impressive as a person who maintained balance in a role which must have caused him a great deal of discomfort.
15. Because of the significance of Human Resource issues to the matters under consideration, the Human Resources Manager of the City, Mr Loader was a particular focus of attention. He was asked to perform a role in relation to which he had little prior experience. The personal trauma he suffered in trying to perform it to the best of his ability was readily apparent.
16. Mr Robinson is a highly qualified and astute servant of the City who was placed in a role of in relation to the CEO which required him to confront the CEO and yet continue to perform his duties under his direct supervision.
17. Mistakes were made. Chapter 3 of this Report has examined in great detail the events in which City officers played a role over the period in question, including the erroneous selection of the recruitment consultant, the unsatisfactory documentation of the employment

contract, the failure to note and report discrepancies in the CEO's professed qualifications, the occasional inadequacy of officer's reports and the failure of certain financial controls. These shortcomings do not reflect on the probity or competence of the City's officers. The errors and defects in the administrative processes of the City which are detailed in this Report were generally a consequence of the extraordinary circumstances in which the Administration found itself. Occasionally it was as a consequence of ordinary human frailty from which no individual can be expected to be free.

18. As a matter of principle, it was inappropriate for officers of a local authority of standing below that of CEO to ever be placed in the position where they were involved in any significant way in the recruitment of a CEO or the management of a conflict between the CEO and elected members. Structural changes ought to be made in the process of recruitment and supervision of the position of CEO of a local authority which eliminate the possibility of such a circumstance arising in any local authority in the future.

## **DLGRD**

19. The DLGRD, whilst appropriately responsive to the unfolding circumstances, was ultimately ineffective in preventing the disintegration of good government in the City. That was principally because the relationship between the DLGRD and local authorities is not structured in such a way which allows the DLGRD to control the process of prevention which their Capacity Building Division seeks to implement. The preventative process operates only on a co-operative basis and the root cause of the problem in this instance was not capable of a co-operative remedy. The enforcement role of the DLGRD is one which traditionally has been sparingly used because of its invasive character and the inappropriateness of the State government unnecessarily interfering with the autonomy of local government. An alternative structural arrangement is proposed below which may be more effective because it devolves authority for the functions of enforcement and prevention to an instrumentality of local government.

## **Selection Process**

20. The selection process for a new CEO undertaken by the City was flawed in many respects, as a result of –
  - (a) the capriciousness of Council's decision not to offer Mr Delahaunty a renewal of his contract;

- (b) the failure of Council to apply objective criteria and clerical error in the process of the selection of a recruitment consultant;
- (c) the inexperience of the recruitment consultant in the highly specialised process of selection of the CEO for a local authority;
- (d) the inexperience of City staff in advising on an appointment to such a high level position within the local authority;
- (e) the failure to make public reputation checks in relation to the candidates for selection;
- (f) the lack of an adequate process to guard against a misrepresentation of qualifications by a candidate.

## **Contract of Employment**

21. There were a number of defects in the process of arriving at the contract of employment. Freehills were engaged to advise on the drafting of the contract and to advise on how a motion for the Council's decision to offer the position to Mr Smith should be framed so as to maintain confidentiality, but were not engaged in the process of negotiating, documenting and executing the contract. The finalisation of the contract was ultimately arrived at in a hurry. Mr Delahaunty who left in early September 2001, did not involve himself in the matter. Mr Loader, the Human Resources Manager, was inexperienced in the process. Mr Turkington, who is not legally trained, made some drafting suggestions, but despite the terms of the resolution of 28 August 2001 was not formally involved in the process until the day the contract was signed by him on behalf of the City.
22. The end result was that the Council did not satisfy itself as to the terms of the proposed contract, as it was required to do by the LGA Section 5.36. There was a defect in the performance review clause of the contract which arose out of the process of drafting, which left no provision for the appointment of one member of the three member committee, which the contract provided should conduct that review. There was also no clause allowing for termination by the City of the CEO's contract upon notice. The draft prepared by Freehill's contained a term giving the City the right to terminate on three months notice, as does the model contract prepared by the DLGRD. The evidence as to why that clause was removed from the final form of the contract remains obscure.

## Legal Advice

23. The City received and/or paid for an extraordinary amount of legal advice during the period under Inquiry:

Clayton Utz's advice on whether there was a statutory obligation under the LGA to advertise the position of CEO, 10 April 2001.
Clayton Utz's subsequent advice as to whether, if the position was advertised, the remuneration had to be stipulated.
Freehills' advice on the the contract of employment of the CEO and the resolution of the Council to offer the contract to Mr Smith, 27-28 August 2001
Kott Gunning's advice on compliance by the City with the subpoena to produce documents in <i>Jones v Sutton</i> , 15 April 2002.
Freehills' advice in relation to disclosure of the CEO's employment contract under the Freedom of Information Act to the Hon Ken Travers MLC and in relation to a request by the DLGRD for documents, February 2003.
Kott Gunning advice on defamation re Cr Walker's comments about South Perth councillors, 27 December 2002.
Freehills' advice to Robinson 11 February 2003 re ability to investigate and stand down Smith and to Loader 14 February 2003 re contractual obligations to CEO.
Blake Dawson Waldron's ("BDW") advice to CEO re defamation and letters to Cr Carlos 7 March 2003 and 20 March 2003.
Freehills' advice re Carlos' motion and breach of s 5.93 re improper use of information to gain advantage or cause detriment at direction of Smith.
Minter Ellison's advice re Special Meeting of Council 15 May 2003
BDW's letter to Mayor & Councillors 15 May 2003 re Smith's contract and provision of qualifications to Mayor.
Freehill's advice 20 May 2003 to Robinson, Higham and Loader, re Smith's qualifications.
Minter Ellison's advice to Council meetings of 17 and 24 June 2003 re liability in relation to Smith and prospects of inquiry into his qualifications.
BDW's further advice to Smith, June 2003.
BDW's further advice to Smith, July 2003.
BDW's further advice to Smith: 22 July-23 August 2003.
BDW's further advice to Smith: 26 August- 3 September 2003.
Minter Ellison's advice re Chilver's e-mail, July 2003.
Minter Ellison's advice to Council meeting 9 September 2003 re Mayor and public statements.
BDW's further advice to Smith: 4 September-24 September 2003.
Minter Ellison's advice re Mayor's statement on ABC, 16 October 2003.
Minter Ellison's advice re Mayor's statement on ABC, 21 October 2003.
BDW's representation of Smith at Upper House Inquiry.
BDW's further advice to Smith: 21 October 2003.
Minter Ellison's advice re disclosure of legal advice, 24 October 2003.
BDW's letter re Working Group: 31 October 2003.

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Minter Ellison's advice re Mayor's "A Current Affair" statement, 4 November 2003.
Minter Ellison & BDW meeting re Working Group, 5 November 2003.
Minter Ellison's advice re Mayor's Rescission motion, 7 November 2003.
Minter Ellison's advice re CEO's performance review, November 2003.
BDW letter re Hart incident, 7 November 2003.
Minter Ellison's advice re Hart incident, 9 November 2003.
Minter Ellison's advice re CEO's contract and corporate credit card, 10 November 2003.
Minter Ellison's advice re CEO's contract and corporate credit card, 11 November 2003.
Minter Ellison's advice re motion to dismiss CEO, 11 November 2003.
BDW letter to Mayor Carlos re allegation of breach of contract, 11 November 2003.
Minter Ellison's advice re Loader incident, 13 November 2003.
Minter Ellison's submission to Upper House Inquiry, 17 September 2003.
Minter Ellison's advice re Primrose motion, 19 November 2003.
Minter Ellison's advice re power to stand down CEO, 21 November 2003.
Minter Ellison's brief to Pettit SC, 22 November 2003.
Minter Ellison's advice re Mayor's comments in <i>The West Australian</i> , 28 November 2003.
Minter Ellison's & BDW attendance at Working Group, 1 December 2003.
Pettit SC's advice, 1 December 2003.
Minter Ellison's attendance at Meeting with Minister, 1 December 2003.

24. The cost of that advice to the City and Mr Smith was significant. The total amount (excluding GST) paid over that period to Minter Ellison (including Mr Pettit's fee) was \$326,262.04, to Blake Dawson Waldron \$51,485.13, and to Freehills, \$48,056.19. Given the extraordinary circumstances which prevailed at the time, it is not surprising that there was a good deal of advice sought. However, the degree of resort to legal advice by the CEO on his own behalf and on behalf of the City is nevertheless to be regarded as excessive, even in those circumstances, as I have commented elsewhere in this Report.
25. In Chapter 3 detailed comment is made on the effect and consequences of particular advice given. That commentary indicates instances where I have formed the view that particular advice can now be seen not to have assisted the provision of good government by the Council. I have identified where I have formed a different view about the law or the facts upon which advice was given, and where the consequently different advice which might have been given and followed may have occasioned a different result. That has to always be understood in the context that I am viewing such matter from a different perspective from that of the practitioners providing the advice at the time, that is, with hindsight; and with the benefit of a process of inquiry into such matters.

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## Recommendations

### Reinstatement or Dismissal of Council

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26. Viewing the matter from the date of suspension of the Council, the fact that the Councillors resolved to request that the Council be suspended and almost all of them ultimately attended upon the Minister to do so, because they recognised that they could no longer function properly as a Council, suggests that the appropriate recommendation is that they be dismissed.
27. The evidence given by suspended councillors indicates that, if anything, their opposition to one another's positions had become entrenched. Even though the establishment of the Working Group to address the termination of the CEO's employment was generally supported, the requisite relationship had broken down to such an extent there would not appear to be any prospect that the councillors who were suspended could readily return to functioning as a coherent unit, even in the absence of Mr Smith. That circumstance ought ordinarily lead to the Council being dismissed to allow the residents and ratepayers an opportunity to elect a new Council which may have some prospect of acting in their interests to provide good government to the City.
28. However, the current position in relation to the Council is that the terms of the following suspended councillors expired in May 2005:
- Cr Baker
  - Cr Barnett
  - Cr Kenworthy
  - Cr Kimber
  - Cr Mackintosh
  - Cr O'Brien
  - Cr Hollywood
29. Those who were elected in May 2003 and whose terms are not due to expire until 8 May 2007 (Crns Nixon and Gollant having resigned) are:
- Mayor Carlos
  - Cr Brewer
  - Cr Caiacob
  - Cr Hart
  - Cr Prospero
  - Cr Walker

30. The dynamics of the interaction of the individual members of the Council might be seen to have radically altered as between those who now remain in office and those were in office at the time of the suspension. There are elements of uncertainty as to what steps may be taken to deal with the fact of some many vacant positions and what the individual make-up of the Council may be after those steps are taken.
31. The question arises, therefore, whether a recommendation as to dismissal or reinstatement should be made on the basis of the conduct of the members of the Council, as constituted at the time of suspension, or the conduct of the individual members of the Council, as presently constituted, or whether one must view the Council as a corporate entity and judge it as a whole, based on its conduct as an entity during the time when it had a capacity to act.
32. In any event, if one divides the councillors into –
- a. those who supported the majority position in relation to Smith, or the “protectionist” position; and
  - b. those who supported an investigation of Smith, the “honesty at all costs” position,
- in relation to the crucial issue, one still has a mix of those who occupied each position remaining on the Council. I have commented above on the respective merits of those two positions. Each of those positions contributed to the disorder which ensued in the Council and led to its ultimate incapacity to function and so provide good government to the residents and ratepayers.
33. Although I have expressed my approval of the pursuit of honesty and integrity as an overriding value, in the circumstances in which the pursuit of that ideal took place its effect on the capacity of the Council to govern was reasonably foreseeable, whether or not it was deliberately pursued by those who adopted that position. Therefore, it is not a basis for criticism of the “honesty at all costs” approach if the consequence of persistence with that approach is the dismissal of the Council.
34. I have expressed the view that a preferable ethical position to have been adopted by Mayor Carlos once it became clear that he did not have the confidence of, and was unable to lead, the Council, was to resign and seek a mandate from the electorate by running for election to the vacancy thus created.

35. It follows from that view that I am now of the opinion that the appropriate legal and ethical solution is for the positions of all elected members to be declared vacant and an election to occur, in order for the electors to have a clear opportunity to express their view as to the persons whom they prefer to represent them, based (if relevant) on the issues which have been the subject of this Inquiry.
36. The term of reference dealing with relationships makes Code of Conduct breaches particularly relevant. If Councils are intended to work like corporate boards, or a Cabinet, then high standards of personal conduct must necessarily be observed to ensure that the merits of decisions are determined rationally and objectively. One of the reasons for so many irrational decisions on the part of the Council was a lack of respect for the dignity of other members, which impaired the quality of debate and the reasons for decision. *Ad hominem* argument as well as distrust and personal animosity contributed to the poor quality of debate and decision-making. That poor conduct on the part of councillors between themselves was observed by members of the public and reduced is the kind of conduct which is bound to reduce public confidence in a Council.
37. In addition, as Section 8.25 requires the dismissal or reinstatement of the Council as a whole, rather than any consideration of the role of individual members of the Council, my view is that the recommendation I make should be based upon a view of the Council as a whole, as it was functioning when last it was able to do so. That entails placing no weight upon the current composition of the Council or making any independent assessment of the relative merit of the positions of those individual councillors who remain in office. That leads me to the conclusion that I am justified in recommending the dismissal of the Council, regardless of any view I might have as to the merit of the individual positions of the councillors who remain in office. I am reinforced in my adoption of that approach by the consideration that Section 2.37(1) empowers the Governor to declare all remaining offices vacant where the circumstances are as they are at present, that is, where more than half of the elected offices of the Council are vacant. In other words, even if I were to recommend reinstatement the practical result may have been the same if the Governor had exercised the power in Section 2.37(1).

**Recommendation 1:** It is recommended that the Council be dismissed

## **Abandonment of Elected Local Councils?**

38. When the elected members of a local government have failed to provide good government as comprehensively as those of Joondalup have, one is bound to re-consider the fundamental premises on which the institution is based.
39. The question whether this country needs three levels of government has been a common topic of conversation for a long time. Some have argued that we need only two. Another question, and it is related, is whether we need democratic local government.
40. A case can be put for abandoning the system of elected local Councils. Local government elections involve a very small proportion of the electorate as voting figures for Joondalup show. There is a great deal of apathy. Interest in local government issues normally arises from "backyard" problems experienced at an immediate and proximate level. Occasionally there are larger planning and development issues that excite controversy, but if one considers anecdotally the mainstream press coverage of local governments the emphasis nearly always tends to be on competence and integrity. The big issues will occupy State government departments anyway, viz, Planning and Infrastructure, Environment, and Regional Development.
41. If a corporate model is desirable, and it seems that the 1995 Act would reflect this, then arguably the community interest could be better served by professional commissioners appointed by the State government on merit for a fixed term renewable only once, so none can make a career of this kind of service, or be unduly influenced by prospects of re-appointment.
42. Under this model local government would be regulated by a statutory body according to appropriate corporate governance principles. Expressions of interest could be called for and the selection process would be governed by stated criteria. The aim would be to have "boards" governing statutory corporations, accountable for their decisions:
  - (a) to the residents through existing mechanisms such as public question time, electors' (residents') meetings, and consultation with representative groups;

- (b) to the State in a similar way to the present system (but with the added involvement of a Local Government Commission);
  - (c) and to the law by the process of administrative review for which the State now has a specialised tribunal.
43. This system would particularly suit large urban districts and could be introduced on a trial or graduated basis. The City of Joondalup would be a good place to start. It operated under commissioners from its inception in 1998 until the first Council was elected in 1999 and has done so since December 2003. It may be argued that there would seem to be no demonstrable advantage in returning to an elected Council with all the risks that would entail.
44. In the case of Joondalup the Inquiry has seen a city of 160,000 residents, with an annual budget in the order of \$80m, and a workforce of over 500, governed by a group of persons who have been shown, as a group, despite their commitment and good faith to have been singularly inept. However well-meaning their intentions, it is obvious that they were not the best qualified persons in the district to govern the City. Yet, it cannot be inferred or anticipated that any other group of persons similarly selected would have done or would in future do a better job.
45. I suggest that this model be considered as one which the community through Parliament might address as a means of ensuring that the best qualified and most able persons are appointed to run large local governments. The present system, if left unchanged, will continue to create the sort of problems that have brought about the last three panel inquiries into the Cities of Cockburn, South Perth and Joondalup and various authorised person's inquiries and the inquiries into the Shire of Wanneroo, which preceded the creation of the Cities of Wanneroo and Joondalup.
46. Such an approach will no doubt be regarded as controversial, but some may wish to entertain it on the basis that the present system is outmoded and impractical and having regard to the primary functions of local government, the overriding interests of the State in significant matters, the poor participation levels of electors at polls and the proven limitations of elected representatives. The conclusion might be that democratic ideals no longer justify the retention of elected local government representatives.
47. Many might argue that the view expressed above is an unbalanced view of the capacity of elected members to provide good government to a local district because it is based and

focussed on the few occasions when local authorities have been the subject of investigation, when there are 144 local authorities operating in the State, the vast majority of which have not been identified as failing to provide good government. It might also be argued that the City of Joondalup elected members may be said to have failed to provide good government only in respect of a single issue. The general weight of the evidence is that on all other issues the Council was competently performing its functions. If that is the prevailing view, then it may be that a freshly elected Council can deliver a satisfactory form of local government to the district.

48. If such a radical reconsideration of the current system of government as abandonment of the system of elected local councils is not something which relevant decision-makers wish to contemplate, then there are a number of significant, less extreme, reforms which could be contemplated, in order to improve the provision of good government to local government districts, including Joondalup.

**Recommendation 2:** An assessment be made of the arguments for and against the continuation of elected councils as opposed to appointed boards of commissioners for local government.

## **Polarisation and Policy-Making v Corporate Governance**

49. Government at Commonwealth and State levels is in part run on an adversarial party political basis. In some other States local government is apparently also conducted on the basis of recognised party political divisions. It might be suggested, as it was by a political scientist reported in a local newspaper recently, that difficulties in local authorities providing effective government might be alleviated if local government became party political and the existing political parties could then bring their infrastructure into local government to make it function more effectively.
50. Apart from the fact that such a view assumes a degree of organisational stability and effectiveness in the existing political parties which I am not sure is supported by any evidence, such an idea misconceives the appropriateness of the comparison between local government, as it is presently structured, and the other tiers of government.

51. At the State and Commonwealth levels the adversarial party political system operates only in the process of obtaining government and in the public debates in the Parliament. government decision-making is conducted by a Cabinet which does not function on the basis of adversarial party political debate. It is axiomatic to the Commonwealth and State systems that the Cabinet is composed of the single party which won Government. Some parties divide internally into factions, but those factions, while they may have some influence over who may become a member of the Cabinet, do not appear to operate within the Cabinet in arriving at decisions of government. The State and Commonwealth Cabinets also function on the basis of a strict code of secrecy of decision-making. The key point to note is that cabinet decision-making does not appear to operate on the basis of a polarised oppositional style of decision-making.
52. Local government Councils form a closer analogy to the Cabinet of a Commonwealth or State Government than they do to any other element of the governments at those other levels. That suggests that to impose the adversarial elements of Commonwealth and State system of government on local government would be a conceptually mistaken approach.
53. The Cabinet style of government places a high premium on unity. It reinforces that unity by enforcing the impregnability of the shroud of confidentiality which attends debate within the Cabinet. Each individual is thus free to debate vigorously within the Cabinet without the risk of being criticised in public for any view expressed, other than that arrived at by the Cabinet as a whole, at the conclusion of the debate.
54. Local government, as presently constructed, falls somewhere in the middle (some might say between the two stools) of the decision making of a publicly conducted legislature and a privately conducted Cabinet. The Commonwealth and State models suggest that it has been recognised that it is preferable that an executive decision-making body avoid any process which is likely to frequently result in polarised views.
55. Trading corporations also generally operate on the basis that the board of directors of the company will work co-operatively in the direction of the strategic vision of the company and in the interests of shareholders to whom they are accountable. Public dissent usually results in the departure of the dissenter. Publicly expressed disagreement is generally regarded in our society as a sign of weakness in a governing body and, in a trading corporation, is often eradicated for fear of an adverse impact on public confidence in the corporation and in turn upon the value, or perceived value, of the corporation.

56. On the other hand public debate might be regarded as one of the hallmarks of a healthy form of government run in accordance with principles of participatory democracy.
57. The Code of Conduct of the City of Joondalup makes reference to an assumed approach of “teamwork” between elected members and employees. It is suggestive of a cabinet of government.
58. This discussion identifies a constitutional uncertainty as to where local government is placed and how it is expected to operate by comparison with other levels and forms of government and suggests the need for a broad policy debate, so as to arrive at a clear definition of the mode of government of elected Councils.
59. My view, adopted as a consequence of this Inquiry and the Inquiry into the City of South Perth (2002) is that the election of Council members from among those eligible in the district does not provide a mechanism which fits those elected for executive functions.
60. The purpose of councillors is to represent the public. They ought not be required to engage in functions for which they have no skill, such as the recruitment and supervision of administrators. Neither should they be directly involved in the processes of providing government services within a district.
61. The current form of the LGA recognises and reinforces that distinction between the administrative service provision role and policy-making and legislative role of elected members. The primary functions of elected members should be –
  - a. to set broad guidelines and policy which are responsive to the public interest; and
  - b. as an agency for discerning unresponsiveness, incompetence or corruption at a local level in the administration of the local government.
62. If that view is not to be adopted, then the present system should be reinforced with Standing Orders for meeting procedures and a Code of Conduct which more closely resembles that of the cabinet form of government which prevails in the State and Commonwealth arenas. It would need to be understood and accepted by the relevant public that a move in that direction must inevitably be a move towards a less public form of decision-making, and so alter the levels of transparency of decision-making which currently prevail in local government. It is a significant policy consideration as to whether or not that is desirable.

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63. It is with those thoughts in mind that I recommend a reconsideration of the legislative provisions which structure local government in the State and the appropriate role, responsibilities and procedures of elected Councils.

**Recommendation 3:** The role of Councils should be to set policy and as a watchdog against unresponsiveness, incompetence and corruption and away from the administration of service provision.

**Recommendation 4:** If recommendation 3 is not followed, then Councils should be fashioned and procedures adopted more akin to those of a Cabinet style of government, including principles of Cabinet secrecy and solidarity.

**Recommendation 5:** If neither of recommendations 3 or 4 is regarded as desirable, then serious consideration should be given to the appropriate role, responsibilities and procedures of elected Councils.

## Mayoral Position

64. The ambivalence of the provisions of the LGA and the Code of Conduct between the Cabinet and Parliamentary styles of representation is particularly to be found in the situation in which Mayor Carlos found himself. As an elected representative he was entitled to express his views on matters, which he saw as going to issues of good government. He had the responsibility to act as a “leader of the community” and “demonstrate the highest level of civic conscience” (Code of Conduct, p 13 and LGA Section 2.10). As Mayor he also had those responsibilities (LGA Section 2.8), and had been elected to represent the whole district. He also had a responsibility to speak on behalf of and, thus, lead the Council. Those responsibilities came into conflict when the Council declined to follow the direction in which he wished to lead them.
65. One easy way to avoid the dilemma of Mayor Carlos is to take a small step in the direction of a Cabinet-style government by amending the LGA to abolish the direct election of the Mayor by the electors of the district and limit the role to one appointed by and from the elected members. That would be a movement in the direction of corporate solidarity, but would the electors see it as their interests? The State Parliament in the *Local Government Amendment Act 2004*, Section 17 amended the procedure under Sections 2.11 and 2.12 for

changing the method of filling the office of mayor or president by adding to the local government's power to do so by a special majority vote a process of change by a majority vote of electors at a poll, where the change has been proposed by 250 or 10% of electors. That amendment suggests that it was the State Parliament's view in 2004 that such matters should be decided by the district's electors or their duly elected representatives.

66. In the light of what has happened in the City of Joondalup, it is presently up to the electors of that district to consider whether to suggest that a change should be made in the method of filling the office of Mayor and they should exercise the power they have under the LGA to take that course.
67. In my opinion the present arrangement in Joondalup where the Mayor is elected by electors from the whole district is more suited to the policy and watchdog model of government than the Cabinet model. Given that I favour the policy/watch-dog style of elected local council, it follows that I believe it is appropriate that a Mayor be popularly elected by the district electors, as an alternative form of representation to elected ward councillors. It may result in a greater potential for tension between a Mayor and councillors than would follow from a Council appointed Mayor. However, that is less significant than the representative variety which it provides, when one is not aiming for a Cabinet style of decision-making.

**Recommendation 6:** Consideration should be given to whether it remains appropriate for the local government Council and electors of a local district to decide that a Mayor is to be elected by the electors of a district. The recommendation of this Inquiry is that the Mayor should continue to be popularly elected by the electors of the district.

## **Appointment of CEO: Executive Power & Elected Representatives**

68. The employer-employee relationship under the LGA, as between the Council and CEO is fundamentally flawed. The flaw arises from the fact that the elected councillors appoint and purportedly supervise the CEO but they have no capacity to exercise executive power except through the CEO.
69. That is illustrated by the fact that, when Cr Carlos moved on 18 February 2003 to suspend the CEO, it was the CEO who took responsibility, as he was entitled by law to do, for the report which went to Council on that motion. If the CEO had observed the Code of Conduct, he would have recognised a conflict of interest and declined to participate in the provision of

the report. The Council could have directed the CEO to delegate responsibility for that matter to another officer, but it is the CEO who is responsible for giving advice to the Council on such a matter. He did not do so and, in any event, he would have a conflict of interest in making a decision on how to advise the Council even on the issue of a direction to delegate. Even if the CEO had immediately delegated power to another person, as he later did, he was not precluded from directing the exercise of that power or intervening in its exercise. *The Interpretation Act 1984* Section 59(1) provides:

*Where a written law confers power upon a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon him under a written law –*  
(a) *such a delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated; ...*

70. That rule is illustrated by the fact that when the CEO on 14 May 2003 delegated power to deal with matters arising in relation to his contract to his contract to officers of the City he was lawfully entitled to direct them as to how to exercise the delegated authority and did so from time to time. For example, he directed them to seek legal advice in relation to certain matters.
71. The delegation, which occurred on 14 May 2003, was also demonstrated not to ensure the necessary degree of separation of the interest of the CEO by the fact that the CEO varied the personnel to whom the delegation extended. Mr Kevin Robinson, who had first suggested the delegation, was initially a delegate. His delegation was withdrawn. There were various reasons suggested for why that occurred. It is open to conclude that one of the possible reasons for the withdrawal of the delegation was that Mr Robinson may have been less favourably disposed to Mr Smith than the other delegates and may have resisted on principle some directions given to him by Mr Smith. Whether or not that was the case or was a reason for the variation of the delegation need not be decided, but the fact that it was open to the CEO to vary the delegation whenever and for whatever reason he chose, points to a flaw in the power structure which is inherent in the fact that the Council, acting as agent of the City, as employer of the CEO was dependent upon the CEO to facilitate the execution of that role.
72. The dismissal of the Council and its replacement by another will not remedy this systemic defect in the structure of local authorities under the LGA. It has made a substantial contribution to the events which occurred in the present instance.

73. There is an ever-present potential in local government for it to fail to function effectively because the relationship between the elected arm and the executive arm of local authorities, as set out under the LGA has the flaw pointed out above. Local authorities are structured differently in that regard from any other form of elected representative government. Local authorities might be said for that reason to be designed to fail.
74. It is ironic that local government, as the lowest level of government, in some respects has the greatest expectation of executive capacity cast upon its elected representatives. There is a confusion in local government between legislative, executive and judicial functions being performed by the same group of persons which does not exist at the Federal and State levels. It is the confusion between representative functions and executive functions, which is alluded to above, which is of most acute significance.
75. At Federal and State levels the elected representatives do not appoint staff. All administrative assistance is provided at Commonwealth and State levels by persons appointed pursuant to public service legislation. To cite an example of a form of regional representation, the former Aboriginal and Torres Strait Islander Commission had elected regional councils throughout the nation, but those elected representatives played no role in appointing or supervising executive staff. Executive services were provided to the Commission by persons appointed pursuant to public sector legislation.
76. An interesting comparison can be drawn between local governments and various other statutory authorities within the State. Under the *Water Corporation Act 1995* and the *Electricity Corporation Act 1994* the power to appoint the CEO is in identical terms in sections 13 of each Act:

“ **13. Chief executive officer**

- (1) There is to be a chief executive officer of the corporation.
- (2) The powers —
  - (a) to appoint and remove the chief executive officer; and
  - (b) to fix and alter his or her terms and conditions of service,are vested in the board.
- (3) The board is to obtain the concurrence of the Minister before it exercises any of the powers conferred by subsection (2).
- (4) Subject to any provision of his or her terms and conditions of service, the chief executive officer may resign his or her office by giving notice in writing to the board.

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- (5) The board may appoint a person to act in place of the chief executive officer —
    - (a) during a vacancy in that office; or
    - (b) during any period when the chief executive officer is unable to carry out his or her duties or is absent from the State.
  - (6) Despite subsection (2), the Minister is to appoint the initial chief executive officer. ”

77. The *Water Corporation Act 1995* and the *Electricity Corporation Act 1994* also provide in identical terms as follows:

**14. Role of chief executive officer**

Subject to the control of the board, the chief executive officer is responsible for, and has the necessary powers to administer, the day to day operations of the corporation.

**15. Staff**

- (1) The power to engage and manage the staff of the corporation is vested in the board.
- (2) The power conferred by subsection (1) —
  - (a) includes powers to determine remuneration and other terms and conditions of service and to remove, suspend and discipline staff; and
  - (b) does not preclude the delegation of any matter under section 35.
- (3) The remuneration of members of staff and other terms and conditions of employment are not to be less favourable than is provided for in —
  - (a) an applicable award, order or agreement under the *Industrial Relations Act 1979*; or
  - (b) the *Minimum Conditions of Employment Act 1993*.
- (4) Nothing in this section affects the operation of Part VID of the *Industrial Relations Act 1979*.

*[Section 15 amended by No. 20 of 2002 s. 27; amended in Gazette 15 Aug 2003 p. 3692.]*

**16. Minimum standards for staff management**

- (1) The board must, after consultation with the Commissioner for Public Sector Standards, prepare and issue an instrument setting out minimum standards of merit, equity and probity applicable to the management of the staff of the corporation.
- (2) In subsection (1) —
 

“**management**” includes recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment.
- (3) In complying with subsection (1) the board is to have regard to the principles set out in section 8 of the *Public Sector Management Act 1994*.

- (4) Section 13(3) is not affected by the requirements of subsection (3).
- (5) The Commissioner for Public Sector Standards may at any time recommend to the board any amendment that he or she thinks should be made to an instrument issued under this section.
- (6) The board may —
  - (a) amend an instrument issued under this section; or
  - (b) revoke it and substitute a new instrument,but, except where subsection (5) applies, is to do so only after consultation with the Commissioner for Public Sector Standards.

- 78. An important distinction between a local government under the LGA and Western Power and the Water Corporation is that the boards of the latter statutory corporations are not elected by a popular vote to represent an electorate, but are selected for appointment in order to exercise executive power and so there is some expectation that they will have been appointed because they have some expertise in exercising executive power. Even in those circumstances there is still an obligation to concur with the Minister before appointing a CEO.
- 79. Another form of comparative example is the Clerk of the Legislative Council in the State Parliament. That person is appointed by the Governor upon the recommendation of the Presiding Officer. The Clerk of the House is not an employee of the State Government. The functions of the Clerk are set out in the Constitution Act and the Standing Orders of the House. Under the *Constitution Act 1889* the Clerk may be removed by a vote of the House. The Clerk's salary and allowances are determined by the Salaries and Allowances Tribunal. He is not subject to any further written contract of employment, but terms and conditions of employment, such as leave entitlements, are determined by the Presiding Officer in accordance with the Parliamentary Employees' Award.
- 80. In order to eradicate this structural defect identified in the appointment of the CEO of a local authority and adopt a process more akin to that which applies in other areas of government, the CEO of local authority should be appointed in the same or a similar manner to that of a CEO under the *Public Sector Management Act 1994*.
- 81. In the Report of the Standing Committee on Public Administration and Finance in relation to the *Local Government Act 1995* Mayor Katherine Jackson of the City of Melville was

reported<sup>2</sup> as suggesting that local government CEO's should be appointed and have their remuneration packages determined by the Salaries and Allowances Tribunal<sup>3</sup> or a tribunal convened by WALGA. She submitted:

*Whatever the configuration, it is important to have an independent body to appoint, assess the performance review and decide the appropriate salary of the CEO.*

82. Mayor Jackson proposed that such an independent body could:<sup>4</sup>
- Compile comparative information regarding CEO's wages and performance across the State (and throughout Australia, if required).
  - Advertise CEO positions as they arise.
  - Consult with local governments as to the skills and abilities required for CEO positions.
  - Develop expertise in evaluating organisational review documents prepared by local government staff.
  - Develop expertise in drafting standard contracts for CEOs to ensure fairness and equity across the State.
  - Provide an independent tribunal to hear grievances between elected members and CEOs'.
83. In addition to the structural problem of Councils not having the executive power of engaging in the supervision of CEO's, to which I have pointed, the inadequacy of the process of appointment of a CEO by an elected Council which I have observed in relation to this Inquiry into the City of Joondalup and that which I reported upon in relation to the selection of a CEO for the City of South Perth leads me to concur with the view of Mayor Jackson of the City of Melville that:
- [The] first responsibility [of elected members] is to go out and represent the people. Selecting CEOs, paying CEOs and assessing performance reviews on CEOs really ought to be in somebody else's hands who is capable of doing it.
84. Under the *Public Sector Management Act 1994* that function is performed by the Commissioner for Public Sector Management.

<sup>2</sup> At para. 6.101.

<sup>3</sup> The Salaries and Allowances Tribunal, which operates pursuant to the *Salaries and Allowances Act 1975*, does not have power to appoint persons, but merely sets salaries and allowances for certain categories of specified and prescribed officer holders which are paid from Consolidated Revenue of the State.

<sup>4</sup> Submission No 36, October 22 2003, p 3, Report para. 6.105.

**PUBLIC SECTOR MANAGEMENT ACT 1994 - SECT 45**

**3. Interpretation**

“agency” means —

- (a) department; or
- (b) SES organisation;

“chief executive officer” means —

- (a) person holding office under Division 2 of Part 3 as the chief executive officer of an agency; or
- (b) person deemed to be a chief executive officer under regulations referred to in section 4;

“Commissioner” means person for the time being holding the office of Commissioner for Public Sector Standards created by section 16(1);

“department” means department established under section 35;

“public sector body” means agency, ministerial office or non-SES organisation;

“SES organisation” means entity which consists of —

- (a) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position —
  - (i) established or continued for a public purpose under a written law; and
  - (ii) specified in column 2 of Schedule 2;and
- (b) persons employed by or for the purposes of that body or holder under that written law or another written law;

**16. Commissioner for Public Sector Standards**

- (1) An office of Commissioner for Public Sector Standards is created.
- (2) The office created by subsection (1) is not an office in the Public Service.

**17. Appointment, etc. of Commissioner**

- (1) The Commissioner shall be appointed by the Governor on the recommendation of the Minister, and shall hold office in accordance with this Division.
- (2) Before making a recommendation under subsection (1), the Minister shall consult the parliamentary leader of each party in the Parliament.
- (3) Subject to this Division, a person appointed as the Commissioner shall hold office for a term of 5 years, and is eligible for reappointment.

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**21. Functions of Commissioner**

- (1) The functions of the Commissioner are, having regard to the principles set out in sections 7, 8 and 9 —
- (a) to establish public sector standards setting out minimum standards of merit, equity and probity to be complied with in the Public Sector in —
    - (i) the recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment of employees; and
    - (ii) such other human resource management activities relating to employees as are prescribed,and monitor compliance with those public sector standards;
  - (b) to establish codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees, and monitor compliance with those codes;
  - (c) to assist public sector bodies to develop, amend or repeal codes of conduct —
    - (i) setting out minimum standards of conduct and integrity to be complied with by themselves and their employees; and
    - (ii) consistent with codes of ethics established under paragraph (b),and monitor compliance with those codes;
  - (d) to assist public sector bodies and employees to comply with public sector standards, codes of ethics and codes of conduct established or developed, as the case requires, under this subsection;
  - (e) to monitor compliance by public sector bodies and employees with the principles set out in sections 8(1)(a), (b) and (c) and 9;
  - (f) subject to regulations referred to in section 98, to establish procedures of the kind referred to in section 97(1)(a);
  - (g) to report from time to time to the Minister of the Crown responsible for a public sector body on the compliance or non-compliance by the public sector body and its employees with the principles set out in sections 8(1)(a), (b) and (c) and 9 and with public sector standards, codes of ethics and codes of conduct established or developed, as the case requires, under this subsection;
  - (h) to report from time to time to each House of Parliament on —
    - (i) the compliance or non-compliance by any particular public sector body or public sector bodies and its or their employees with the principles set out in sections 8(1)(a), (b) and (c) and 9 and with public sector standards, codes of ethics and codes of conduct established or developed, as the case requires, under this subsection; and
    - (ii) any other matter arising in connection with the functions of the Commissioner;
  - (i) to report annually to each House of Parliament on the compliance or non-compliance by public sector bodies and employees with the principles set out

in sections 8(1)(a), (b) and (c) and 9 and with public sector standards, codes of ethics and codes of conduct established or developed, as the case requires, under this subsection; and

- (j) to perform such other functions as are conferred or imposed on the Commissioner by this Act.

### **34. Constitution of Public Service**

The Public Service is constituted by —

- (a) departments;
- (b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and
- (c) persons employed under this Part, whether in departments or in the Senior Executive Service in SES organisations, or otherwise.

### **35. Departments**

- (1) The Governor may, on the recommendation of the Minister —
  - (a) establish and designate departments;
  - (b) amalgamate or divide existing departments and designate the resulting department or departments;
  - (c) abolish departments; and
  - (d) alter the designations of existing departments.

### **45. Appointment of chief executive officers**

- (1) Each chief executive officer shall be appointed for such term not exceeding 5 years as is specified in the instrument of his or her appointment by the Governor for and on behalf of the Crown on the recommendation of the Minister under this section, but this section does not apply to the reappointment of a person to his or her office of chief executive officer.
- (2) Subject to this Act, the employment of a chief executive officer is to be governed by a contract of employment referred to in section 56.
- (3) When there is a vacancy or impending vacancy in the office of a chief executive officer, the Minister shall, unless that vacancy or impending vacancy is to be filled by transferring a chief executive officer to that office under section 50, or temporarily by directing an employee to act in that office under section 51 —
  - (a) inform the Commissioner of that vacancy or impending vacancy; and
  - (b) request the Commissioner to act under this section to enable the filling of that vacancy or impending vacancy.
- (4) The Commissioner shall, on receiving a request made under subsection (3), invite —
  - (a) the Minister;

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- (b) if the Minister is not the responsible authority of the agency concerned, that responsible authority; and
  - (c) if the responsible authority of the agency concerned is not the Minister of the Crown responsible for that agency, that Minister of the Crown,

to inform the Commissioner of any matters that they wish the Commissioner to take into account in nominating a person or persons suitable for appointment to the office referred to in subsection (3).

- (5) The Commissioner shall notify the vacancy or impending vacancy in such manner as the Commissioner thinks sufficient to enable suitably qualified persons to apply for the relevant office.
- (6) The Commissioner shall cause applicants for the relevant office to be examined, but nothing in this section requires the examination of all those applicants.
- (7) The Commissioner may seek advice from such sources as the Commissioner considers relevant and may invite such other persons as the Commissioner thinks fit to assist him or her to decide on the person or persons suitable for appointment to the relevant office, and any person so invited may take part in the examination of applicants or in the deliberations of the Commissioner on the matter or in both.
- (8) The Commissioner shall, if he or she decides on a person or persons suitable for appointment to the relevant office, nominate that person or those persons and forward to the Minister the name or names of the person or persons nominated, together with full particulars of the qualifications of that person or those persons.
- (9) After consulting the Minister of the Crown responsible for the agency in which the office of chief executive officer to which the nomination relates is located, the Minister shall decide whether or not the person, or one of the persons, nominated by the Commissioner is to be accepted.
- (10) If the person, or one of the persons, nominated by the Commissioner is accepted, the Minister shall recommend to the Governor that the person accepted be appointed.
- (11) If the person, or both or all of the persons, nominated by the Commissioner is or are rejected, the Minister may request the nomination of another person by the Commissioner and shall deal with any further nomination in accordance with subsections (9) and (10).
- (12) If the Commissioner does not nominate any person suitable for appointment to the relevant office or a nomination or further nomination by the Commissioner is rejected, the Minister —
  - (a) may recommend to the Governor that —
    - (i) in the absence of a nomination by the Commissioner, a named person; or
    - (ii) a named person other than a person nominated by the Commissioner, as the case requires, be appointed to the relevant office; and

- (b) shall cause notice of the making of that recommendation, together with the reasons for recommending the named person, to be published in the *Gazette* as soon as practicable.
- (13) In deciding on a person to be nominated or recommended for appointment as a chief executive officer, the Commissioner or the Minister, as the case requires, shall have regard to the need for the appointment of a person who —
- (a) is able to discharge the specific responsibilities placed on the chief executive officer;
  - (b) will imbue the employees of his or her agency with a spirit of service to the community;
  - (c) will promote effectiveness and efficiency in his or her agency;
  - (d) will be a responsible manager of his or her agency; and
  - (e) will maintain appropriate standards of conduct and integrity among the employees of his or her agency.

**46. Reappointment of chief executive officers**

- (1) If the Minister proposes not to recommend to the Governor that a person (in this section referred to as “**the incumbent**”) be reappointed to his or her office of chief executive officer, the Minister shall comply with section 48 in respect of the incumbent.
- (2) If the Minister —
  - (a) recommends to the Governor that the incumbent be reappointed to the relevant office, the Governor shall so reappoint the incumbent for and on behalf of the Crown for such term not exceeding 5 years as is specified in the instrument of his or her reappointment; or
  - (b) does not recommend to the Governor that the incumbent be reappointed to the relevant office, the vacancy or impending vacancy in the office of the incumbent shall be filled in accordance with section 45.
- (3) Subject to this Act, the employment of a chief executive officer reappointed under this section shall be governed by a contract of employment referred to in section 56.

**47. Performance agreements, etc. of chief executive officers**

- (1) Subject to subsection (2), a chief executive officer shall on his or her appointment under section 45, and as soon as practicable after the commencement of each financial year afterwards, enter in accordance with approved procedures into an agreement with the responsible authority of his or her agency concerning the performance criteria to be met by the chief executive officer during the period to which that agreement relates.
- (2) A performance agreement entered into between a chief executive officer and a responsible authority does not take effect until —
  - (a) the Minister, if the Minister is not the responsible authority; and
  - (b) the Minister of the Crown responsible for the agency concerned, if that Minister is not the responsible authority,

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has or have in writing approved that performance agreement and a note of that approval has been endorsed on that performance agreement, and replaces any previous performance agreement entered into between the chief executive officer and the responsible authority.

- (3) A performance agreement is not legally enforceable.
- (4) The responsible authority of the agency of a chief executive officer is responsible for assessing in accordance with approved procedures, on or shortly before the end of each period referred to in subsection (1), the extent to which the chief executive officer meets the performance criteria set out in his or her current performance agreement.

**48. Procedure before expiry of contract of employment, or removal from office, of chief executive officer**

- (1) If —
  - (a) the contract of employment of a chief executive officer is about to expire and the chief executive officer has notified the Minister that he or she wishes to be reappointed, but the Minister proposes not to recommend that reappointment; or
  - (b) the Minister proposes to recommend the removal from office under section 49 of a chief executive officer,

the Minister shall —

- (c) if the Minister of the Crown responsible for the agency of the chief executive officer is not the responsible authority of that agency, consult that Minister of the Crown; and
  - (d) obtain from —
    - (i) the responsible authority of the agency of the chief executive officer an assessment of the extent to which the chief executive officer meets the performance criteria set out in his or her current performance agreement, together with a recommendation whether or not the chief executive officer should be reappointed or removed from office, as the case requires; and
    - (ii) the Commissioner advice concerning the appropriateness or otherwise of the recommendation referred to in subparagraph (i), having regard to the manner in which the assessment referred to in that subparagraph was undertaken, to the relationship between that recommendation and that assessment and to such other factors as appear relevant.
- (2) Having complied with subsection (1), the Minister shall —
    - (a) consider the assessment and recommendation, and the advice, obtained under subsection (1)(d) before not recommending the reappointment of the chief executive officer concerned or recommending his or her removal from office, as the case requires; and
    - (b) if, contrary to the advice of the Commissioner, the Minister does not recommend the reappointment, or recommends the removal from office, of the chief executive officer concerned, forthwith cause to be published in the *Gazette* the fact that the

Minister has not recommended that reappointment or has recommended that removal.

- (3) If the contract of employment of a chief executive officer who has notified the Minister that he or she wishes to be reappointed expires without —
  - (a) that chief executive officer having been reappointed; and
  - (b) the Minister having complied with the requirements of subsections (1) and (2) in respect of that chief executive officer,

that contract of employment continues in force as if it had not expired until the Minister complies with the requirements of subsections (1) and (2) in respect of that chief executive officer and that chief executive officer is notified in writing of his or her reappointment or that chief executive officer receives payment under section 56(5)(b).

**49. Removal of chief executive officer from office**

The Governor may, on the recommendation of the Minister made under section 48, at any time remove a chief executive officer from office.

**56. Employment of executive officers to be governed by their contracts of employment**

- (1) Subject to this Act, the employment of an executive officer shall be governed by a contract of employment between the executive officer and his or her employing authority.
- (2) A contract of employment referred to in subsection (1) shall —
  - (a) be in writing;
  - (b) be signed by or on behalf of the parties to that contract; and
  - (c) expire on the day on which the term of appointment of the executive officer concerned expires or is terminated.
- (3) Subject to sections 48 and 49, a contract of employment of an executive officer may be terminated before its expiry on the expiry of not less than 4 weeks' notice of termination —
  - (a) given to him or her by his or her employing authority, or payment in lieu of that period of notice by that employing authority to the executive officer of an amount not exceeding such amount as is prescribed; or
  - (b) given to his or her employing authority by the executive officer or such shorter period of notice as is agreed between the executive officer and his or her employing authority.
- (4) A contract of employment referred to in this section (in this subsection referred to as “**the original contract**”) may be varied at any time by a further contract in writing entered into, and signed by, the parties to the original contract, but the term of the original contract cannot be extended to a total period of more than 5 years after the day on which the original contract came into force.

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- (5) If the employing authority of an executive officer does not propose to reappoint, or to recommend the reappointment of, the executive officer, that employing authority shall —
- (a) notify the executive officer of that fact not less than 4 weeks before the expiry of his or her contract of employment; or
  - (b) pay the executive officer in lieu of that period of notice an amount —
    - (i) not exceeding such maximum amount as is prescribed; and
    - (ii) not less than such minimum amount as is prescribed for each day by which that period of notice falls short of 4 weeks.
- (6) The employing authority of an executive officer acts for and on behalf of the Crown in any contract of employment between that employing authority and the executive officer.

### 57. **Matters to be dealt with by contracts of employment**

- (1) The matters to be dealt with in a contract of employment between an executive officer and his or her employing authority include —
- (a) the functions of the office of the executive officer, including the meeting of performance criteria;
  - (b) the remuneration to be accorded the executive officer in accordance with any relevant determination of the Tribunal or such other arrangements as are prescribed; and
  - (c) any election by the executive officer to retain a right of return within the meaning of section 58.

- (2) In this section —

“**Tribunal**” means Salaries and Allowances Tribunal established by the *Salaries and Allowances Act 1975*.

85. A CEO of a local government performs statutory functions and so, like other public sector CEOs should be appointed by the Governor to perform those functions and the LGA should be amended to so provide.
86. A statutory body should be responsible for the appointment and supervision of all CEOs for all local governments within the State. Such a statutory body would be obliged to consult with the elected Council of each local government as to the specific requirements of the district. The statutory body should be accorded powers similar to those given to the Public Sector Standards Commissioner under the Public Sector Management Act and should have power to set salaries and allowances similar to the powers set out under the *Salaries and Allowances Act 1975*.

87. Councils would need to be provided with a mechanism under the legislation for the making of complaints concerning the CEO to the statutory body and the resolution of disputes between the Council and the CEO by the statutory body. Such a re-structuring of the relationship between CEOs and elected Councils would fill the gap which has been demonstrated in this Inquiry to exist in terms of a mechanism for the resolution of any dispute which may arise between a CEO and a Council. The 2004 amendments to the LGA deal with the issue of resolving disputes between councillors, but do not address the relationship between the Council and the CEO.
88. This Inquiry has clearly demonstrated that the present form of the legislation does not provide a mechanism for the Minister or the Director-General of the Department to directly intervene in a dispute between a CEO and a Council or provide them in any direct sense with a dispute resolution process. That deficiency needs to be remedied. Neither the Minister nor the Minister's Department are properly constituted or appropriate to fulfil that function. A statutory body ought to be specifically designated with that function.

**Recommendation 7:** A CEO of a local government performs statutory functions under the LGA and so, like other public sector CEO should be appointed by the Governor, or the Local Government Commission proposed by this report, to perform those functions and the LGA should be amended to so provide.

**Recommendation 8:** A statutory body, such as the Local Government Commission proposed by this Report, should be responsible for the appointment and supervision of all CEOs for all local authorities within the State. Such a statutory body would be obliged to consult with the elected Council of each local government as to the specific requirements of the district. The statutory body should be accorded powers similar to those given to the Public Sector Standards Commissioner under the *Public Sector Management Act 1994* and should have power to set salaries and allowances similar to the powers set out under the *Salaries and Allowances Act 1975*.

## Local Government Commission

89. The DLGRD and the Minister were reluctant to exercise and delayed in exercising their powers under Part 8 of the LGA because they perceived the exercise of those powers to be an interference of a State Government in the functions of a local government. They applied the principle that one tier of government should not unduly interfere in the operations another. That is a reasonable principle to apply in many cases. However, in this case, where there was no other effective means of expeditiously resolving the problem identified by this Inquiry, the application of that principle resulted in the unchecked descent into dysfunctionality which was suffered by this elected body. That is not a result which anyone could regard as desirable.
90. The broad structural solution which I propose to these difficulties is that a permanent Local Government Commission be established. A Local Government Commission would have the virtue over the present arrangements that it would be part of the third tier of government and not inhibited by any concerns about one tier of government interfering with another. It would have the clear objective, for and on behalf of local governments, of preserving the integrity of local government throughout the State.
91. A Local Government Commission could either be a statutory corporation of a similar structure to the Corruption and Crime Commission, where the functions of the Commission are under the control of a single commissioner<sup>5</sup> or constituted by a Board of Commissioners similarly to the Environmental Protection Authority<sup>6</sup>. It could be assisted in its administrative functions by the Department of Local Government and Regional Development.<sup>7</sup>

### ***CORRUPTION AND CRIME COMMISSION ACT 2003***

#### **8. Corruption and Crime Commission established**

- (1) A commission called the Corruption and Crime Commission is established.
- (2) The Commission is a body corporate with perpetual succession.
- (3) Proceedings may be taken by or against the Commission in its corporate name.

*[Section 8, formerly section 6, renumbered as section 8 by No. 78 of 2003 s. 35(1).]* ”

<sup>5</sup> In the same way that the Commissioner for Public Sector Management is responsible for functions under the Public Sector Management Act.

<sup>6</sup> See Environmental Protection Act section 7.

<sup>7</sup> In the same way that the Environmental Protection Authority is assisted by the Department of the Environment: see Environmental Protection Act s 17A.

**9. Corruption and Crime Commissioner**

- (1) There is to be a Commissioner who, in the name of the Commission, is to perform the functions of the Commission under this Act and any other written law.
- (2) Without limiting subsection (1), if under this Act or any other written law an act or thing may or must be done by, to, by reference to or in relation to the Commission, the act or thing is to be regarded as effectually done if done to, by reference to or in relation to the Commissioner.
- (3) The Commissioner is to be appointed on the recommendation of the Premier by the Governor by commission under the Public Seal of the State.
- (3a) Except in the case of the first appointment, the Premier is to recommend the appointment of a person —
  - (a) whose name is on a list of 3 persons eligible for appointment that is submitted to the Premier by the nominating committee; and
  - (b) who, if there is a Standing Committee, has the support of the majority of the Standing Committee and bipartisan support.
- (3b) Before making nominations under subsection (3a) the nominating committee shall advertise throughout Australia for expressions of interest.
- (4) Except in the case of the first appointment, before an appointment is made under subsection (3), the Premier must consult with —
  - (a) the Standing Committee; or
  - (b) if there is no Standing Committee, the Leader of the Opposition, and the leader of any other political party with at least 5 members in either House.
- (4a) In the case of the first appointment, before the appointment is made the Premier is to consult with the Leader of the Opposition.
- (5) The Commissioner is to hold office in accordance with this Act.
- (6) The office of Commissioner is not an office in the Public Service.

***ENVIRONMENTAL PROTECTION ACT 1986***

**7. Continuation and composition of Environmental Protection Authority**

- (1) The body known as the Environmental Protection Authority and established under the repealed Act is under that name hereby continued in existence subject to this Act.
- (2) The Authority consists of 5 members appointed by the Governor on the recommendation of the Minister on account of their interest in, and experience of, matters affecting the environment generally.

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- (3) Before making a recommendation under subsection (2) the Minister shall publish in a daily newspaper circulating throughout the State a notice calling for expressions of interest in appointment to the office of Authority member.
  - (4) The Minister shall consider expressions of interest lodged in accordance with the notice but may make a recommendation under subsection (2) whether or not the person recommended has lodged an expression of interest.
  - (4a) One of the Authority members shall be appointed by the Governor on the recommendation of the Minister to be the Chairman of the Authority and another to be the Deputy Chairman of the Authority.
  - (4b) The duties of the Chairman are to be performed on a full-time basis.
  - (4c) The duties of an Authority member other than the Chairman are to be performed on a full-time or part-time basis as determined by the Governor on the recommendation of the Minister in the case of that member.
  - (5) An Authority member shall not be a person who is employed under and subject to Part 3 of the *Public Sector Management Act 1994*.
  - (6) Subject to this Act, an Authority member shall hold office for such period not exceeding 5 years as is specified in his instrument of appointment, but may from time to time be reappointed.
  - (7) The office of an Authority member becomes vacant if he —
    - (a) becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
    - (b) after his appointment as an Authority member, becomes a person employed under and subject to Part 3 of the *Public Sector Management Act 1994*;
    - (c) is removed from office by the Governor —
      - (i) on the grounds of misbehaviour, incompetence, or mental or physical incapacity, impairing the performance of his functions and proved to the satisfaction of the Governor; or
      - (ii) it having been proved to the satisfaction of the Governor that the Authority member has absented himself, except on leave granted by the Minister, from 3 consecutive meetings of the Authority of which he has had reasonable notice, on the grounds of his having so absented himself;or
    - (d) resigns his office by notice in writing delivered to the Minister.
  - (8) The Chairman or the Deputy Chairman ceases to hold office as such if his office as an Authority member becomes vacant.

**17A. Provision of services, information etc. to Authority**

- (1) The Minister shall ensure that the Authority is provided with such services and facilities as are reasonably necessary to enable it to perform its functions.

- (2) Without limiting subsection (1), the Minister may, by arrangement with the Authority, and on such terms and conditions as may be mutually arranged with the Authority, allow the Authority to make use, either full-time or part-time, of —
  - (a) the services of any officer or employee employed in the Department; or
  - (b) any services or facilities of the Department.
- (3) This section does not limit the operation of section 24.

**24. Use of staff and facilities of other departments, etc.**

The Minister or the Authority may, by arrangement made between him or it and the Minister concerned, and on such terms and conditions as may be mutually arranged by him or it with that Minister and, if appropriate, with the relevant employing authority within the meaning of the *Public Sector Management Act 1994*, make use, either full-time or part-time, of —

- (a) the services of any officer or employee employed in the Public Service of the State or in a State agency or instrumentality or otherwise in the service of the Crown in right of the State; or
- (b) any facilities of a department of the Public Service of the State or of a State agency or instrumentality.

92. The Local Government Commission would have the functions of recruiting Chief Executive Officers for local authorities throughout the State, with the powers suggested by Mayor Jackson. The powers of supervising and dealing with any failure to perform or otherwise disciplining or terminating the contract of a CEO could mirror those powers vested in the Commissioner for Public Sector Standards under the Public Sector Management Act.
93. A Local Government Commission could take on the functions set out in Part 8 of the LGA of the Minister and the Executive Director, determining when to obtain information or conduct inquiries into a local authority, appointing authorised person's and inquiry panels where appropriate and recommending the dismissal of a Council by the Governor. That would have the advantage of removing the process from any suggestions which might be levelled (and were levelled in the course of this Inquiry) of State party political involvement and DLGRD involvement in the process<sup>8</sup>.
94. The Commission would also be responsible for establishing and monitoring compliance with a uniform Code of Ethics<sup>9</sup> for local authorities throughout the State<sup>10</sup>. It would assume the functions now exercised by the Governance and Statutory Support division of the

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<sup>8</sup> See, for example, Cr Baker.

<sup>9</sup> Of the kind proposed in the Local Government (Official Conduct) Amendment Bill Public Submissions Paper, December 2003: Department of Local Government and Regional Development.

<sup>10</sup> As the Public Sector Management Commissioner is.

Department of Local Government and Regional Development. It might form a Standards Panel and deal with minor and serious breaches of the Code of Ethics. It could do so as a branch of the State Administrative Tribunal or as a statutory body in its own right<sup>11</sup>.

95. A Local Government Commission could also assume the functions of a Commissioner of a local government and of the Local Government Advisory Board, under Part 2, Divisions 7 and 8 of the LGA.

**Recommendation 9:** A Local Government Commission should be established to appoint and supervise CEO's and assume the functions of the Minister and Executive Director under Part 8 of the *Local Government Act 1995* with power to perform the functions of a Commissioner under Part 2, Division 7 of the LGA and the functions of the Advisory Board under Part 2, Division 8 of the LGA.

### Local Government Assistance Authority

96. Alongside the Local Government Commission recommended there should be established a Local Government Assistance Authority. It could assume a combination of the functions of the Capacity Building Division of the Department of Local Government and Regional Development (DLGRD) and the Peer Support functions being provided by the Western Australian Local Government Association (WALGA). Its role would be to provide voluntary assistance to local authorities and individual elected members of local authorities.
97. The current structure, where the State Government combines in one department what are at least potentially, if not actually, conflicting functions of regulation and capacity building, and the DLGRD and WALGA apparently share functions of capacity building and rely on one another and personnel drawn from the Department and the Association to provide different aspects of assistance to local authorities, is, at best, curious and confusing to the outside observer.
98. There would appear to be a good argument for consolidating in one organisation, with –
- (a) a suitable statutory status;
  - (b) independence from the State Government; and

<sup>11</sup> The Public Sector Management Commissioner, for example, functions in its own right in relation to disciplinary matters concerning the State public service.

(c) access to adequate resources;

the function of assisting local authorities and the personnel within local authorities to better perform their functions.

99. Such an Authority would facilitate and co-ordinate the educational and advisory functions which are now carried out co-operatively between the DLGRD and the WALGA and Local Government Managers Australia, with the assistance of the Municipal Advancement Foundation. It might establish new measures for capacity building and consolidate, and maintain the currency of, existing measures, such as peer support groups and good governance panels<sup>12</sup>, good governance guides<sup>13</sup>, councillors' manuals, and councillors' and municipal officers' induction and continuing education courses.
100. The appearance of a conflict between the capacity building and regulatory divisions of the DLGRD arose in the course of this Inquiry when one observed the apparent reluctance of the regulatory division to enforce its powers under Part 8 of the LGA. That reluctance was able to be attributed in part to the reluctance of a State agency to interfere in a local government's autonomy, but it could also be seen as being affected by the fact that the Capacity Building Division, through Mr Cole, was determined to achieve, and invested in a process for, a cooperative mediated outcome. Because of this focus the Division was not able to provide an objective assessment of the need for a regulatory approach to be employed; particularly as the Governance Review Panel Mr Cole was leading did not have within its terms of reference a means of resolving the conflict which existed in relation to the CEO's employment.

**Recommendation 10:** There should be established a Local Government Assistance Authority to perform the present role of the Capacity Building Division of the DLGRD and co-operatively manage or assist in providing the educational and assistance roles being provided by voluntary local government industry associations to local governments.

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<sup>12</sup> Such panels might be modelled upon those described in Appendix 1 to the *Code of Good Governance* issued by the Municipal Association of Victoria and the Victorian Local Governance Association, December 1997.

<sup>13</sup> See, for example, the *Good Governance Guide* of the Municipal Association of Victoria, Victorian Local Governance Association, Department of Victorian Communities and Local Government Professionals, Pre-publication version, November 2003.

## Resources

101. To function effectively a Local Government Commission and Local Government Assistance Authority, as proposed, would need to be adequately resourced. As proposed they would assume a substantial proportion of the functions of the DLGRD and so would be entitled to a significant portion of the current departmental budget.
102. However, it is apparent to this Inquiry that the present resources of the Department are less than adequate to deal with its functions, at least its regulatory functions, within a desirable time frame. An argument could be put that upon the establishment of a Local Government Commission the 144 local authorities in the State would experience savings in terms of expenditure on fees for external consultants in the areas of recruiting, legal advice and the development and enforcement of standards of conduct, and may experience generally enhanced standards of administrative efficiency, and so should contribute to the cost of administration of the proposed Commission and/or Authority from municipal revenues. A reform of the kind recommended may well also be supported by Commonwealth grant allocations to local government.

**Recommendation 11:** The proposed Local Government Commission and Local Government Assistance Authority be funded from a combination of State and Commonwealth local government funding.

## Public Relations and Information

103. There were a number of occasions when the events which occurred which have been the subject of this Inquiry were significantly affected by what was or was not being published in the public media and what the local government and council members in particular knew about those matters and what the general public may have understood from what was published in the media as to what the local government was doing and why it was doing it.
104. The functioning of this local government and, no doubt, others would be significantly enhanced if it raised to a higher notch the manner in which it deals with the gathering, consideration and dissemination of public information relevant to its affairs.

105. The City of Joondalup has a Media Adviser. These comments are not intended to reflect adversely upon that person. The position description for the Media Adviser addresses some of the issues which I have in mind. An objective of the position is to “provide complex, specialist advice” to the Mayor and CEO “in order to obtain positive publicity for the City”. The incumbent of the position is required to have, among other things –
- Extensive negotiation skills
  - Extensive public relations skills
  - Extensive research skills
  - Extensive knowledge of local government’s role in Western Australia
106. The duties in the position description include –
- Liaise with media/journalists on a diverse range of complex and sensitive issues of public interest emanating from the Council and City of Joondalup actions.
  - Work with the Mayor, CEO and senior management to anticipate public relations issues and opportunities
  - Identify potential threats or optimise potential opportunities and develop and implement responses
  - Creative problem solving to ensure that a positive media image of the Council is promoted.
107. Allowing and enabling the Media Adviser to perform that role more comprehensively may have averted some of the problems which the City has had to face over the period upon which this Inquiry touches. The impression from the evidence is that the City, which includes its elected members and its senior employees, failed to deploy the skills above described on a number of occasions when they would have been extremely useful. Some of the reasons for that may have been –
- The status of the role within the organisation was not high enough for Council members to be aware of its potential.
  - It did not occur to the Council or senior staff to tap the skills of a media adviser on some occasions.
  - On some occasions the nature of the particular issue, involving the CEO, and the role of the Media Adviser, being subordinate to that of the CEO, meant that the officer was inhibited by the direction he received in the manner in which he was able to deal with matters related to the controversy.

- The emphasis of the Position Description was not sufficiently strong on research into information available in the public arena (or it was not perceived that the position includes such a role).
108. For example, when the “New CEO Target of Bribes Claims” article was published, one would have expected that it would have been a media adviser who was immediately despatched to thoroughly research the background to the article and provide a comprehensive report to Council, disclosing the matters which Cr O’Brien discovered. Instead, it was councillors who relied on their own resources in that regard. One can see from hindsight that a media adviser would have been an appropriate person to gather published information on candidates for publicly significant positions such as that of CEO.
109. When the “Civic Chief Lied” article was published, if the City was properly using the expertise of its media adviser, one would have expected that, subject to any directions the CEO may have given, or not given in his own interests, the Council may have received some well researched advice on the background to and likely veracity of the content of the article. A media adviser would readily have ascertained that the reports in *The West Australian* of 20 November 2002 (1210JAA4) and *The Sunday Times* of 15 December 2002 (1204MCOB8) were reasonably accurate reports and analysis of the proceedings in the District Court, by accessing the transcript and the reasons for decision. A media adviser would be likely to have recommended that legal advice be sought as to the legal implications of the proceedings for the City. Indeed it is apparent from Mr Brennan’s evidence that he did give advice to the CEO in relation to the matter (as to how he should respond) although it was not advice of which the Council was made aware.
110. In addition to the legal implications there are public relations implications from such a situation. It is necessary for elected members and officers to take into account that a significant proportion of the electors, residents and ratepayers of the City will have read such articles and formed views on the significance of what has been reported. Many will have formed views, from what they have read, as to how the decision makers should respond to the reports in the best interests of the City. A media adviser’s role in respect of the Council is to advise the Council as to the best approach to be taken to ensure that the electors, residents and ratepayers are informed that the Council and the City as a whole is aware of and responding appropriately to what has been reported.
111. A media adviser would be expected to regard what is published in the media as providing members of the public with general information in which they may have a passing interest.

One would apply to that a healthy degree of critical appraisal. Reports may not be 100% accurate and sometimes may be significantly inaccurate. On most topics readers do not need to know more than what is reported and can accept what is reported at face value. Where a report relates to a topic of particular interest because it touches on an area of responsibility of the reader it may be necessary to determine whether more information is required or to take steps to verify or challenge that account as factual. It will usually be appropriate or necessary to ascertain more information than is published in the media before making any decision which may be based on, affected by or comprise a response to what has been published. In a local government decision-makers should use the services of a media adviser to assist them with that process.

112. When it came to deciding on a strategic response to the challenge to the CEO's qualifications the Council relied heavily upon legal advice. It is now possible to see that legal advice did not necessarily result in the most appropriate strategy for dealing with the whole range of circumstances or solve the problem with which the City was faced. A lesson might be learned that a joint strategic approach might be adopted with any like issue in the future which combines legal advice with public relations advice; taking into account the skill and experience of a media adviser who has assessed the way in which the situation has been portrayed to the public by the media and how any official response might be presented to the public and the local government's constituency through the media. Advice could then be given as to how best to deal with the matter so as to have electors, residents and ratepayers understand and accept reasonable decisions of a local authority.
113. That suggestion must be qualified by the view that there remained in the matter under inquiry an inherent structural difficulty because an elected Council was trying to deal with an issue concerning the CEO. There is a structural problem with the statutory line of authority from the Council needing to pass through the CEO in order for the Council to obtain any advice or assistance. That is a complete answer as to why there would have been difficulties in obtaining the appropriate level of media advice in any event from an employed media adviser. The media adviser was two levels below the CEO in the hierarchy. Even a media consultant contracted to advise would have been contracted by the CEO or his delegate. A controversy which involves the CEO personally needs to be dealt with by a superior body to the local authority itself. The recommendation in this Report is that it be a new statutory authority. Such body ought to also ensure that it has the benefit of expert media advice if and when it may have occasion to confront any similar issue.

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**Recommendation 12:** Local authorities should ensure that they obtain media advice and the assistance of media research when the public media is reporting on matters relevant to the local authority, to assist them in identifying publicly reported problems related to a local authority and responding appropriately.

## Public questions

114. In the course of the Inquiry there was evidence and discussion of the way in which public questions were raised before Council and the way in which they were responded to. Apart from the complaints that certain questions were inappropriately ruled out of order and that some questions were apparently “orchestrated”, matters which are dealt with in Chapter 3, there were also suggestions that some questions were not adequately answered or were not dealt with. These observations generally related to the most controversial questions surrounding the position of the CEO. Whilst there is no reason to suggest that questions involving routine administrative matters were not adequately responded to by the Administration, my general impression of the evidence is that the process of responding to questions, while it may have been subject to designated procedures within the Administration, did not provide adequately for elected members to participate in and take responsibility for the answers given and issues which may arise from them.
115. In the interests of transparency and accountability it would be desirable for the Council of a local government to have a process to enable the elected members to monitor public questions and ensure that they are received and responded to in a comprehensive, coherent and timely fashion.
116. Mr Magyar submitted that a committee of Council should be established for that purpose or the responsibility given to the Audit Committee. That would appear to be a desirable step to take. The committee could be delegated the power to obtain and provide answers in an appropriate manner and recommend action to the Council as a consequence of matters being raised by questions. Questions, whether asked with notice or without, could be referred to that committee. The committee could then refer them to the CEO for answer or report. Reports and answers could then be considered by the Committee, and an appropriate form of communication of the answer, either directly to the questioner or by way of report to Council (or both) could be adopted. The Committee could be directed to provide periodic reports to the Council as to the clearance rate of answers to questions and the results (if any) arising from the questions.

**Recommendation 13:** A committee of the Council of the City of Joondalup should be established to supervise the answering of public questions and report on and recommend action relating to the answers to questions to the Council.

## Recruiting of CEO by Local Authority

117. If the present system of recruitment of CEO's by local authorities is to be retained then it needs to be different from that which prevailed in relation to the recruitment of Mr Smith.

The *ICAC Oakley Report* recommends:

1. Where job applicants assert professional and/or academic qualifications as part of their claim to a position, these qualifications should be verified prior to appointment.
  - a. The employer's designated representative (which includes any recruitment consultants engaged by the employer) should sight original certificates or certified (by the institution) academic transcripts. The costs of producing this documentation is to be borne by the applicant;
  - b. To facilitate verification each applicant should be required to give written permission to the prospective employer's designated representative for the relevant educational institution to be contacted for verification purposes;
  - c. Academic and professional qualifications of successful candidates should in all cases be verified with the issuing institution where they are required for a position or where they are a significant determinant in the decision to appoint an applicant;
  - d. In other cases academic and professional qualifications should be verified with the issuing institution on a random basis;
  - e. An auditable record of any verification should be kept and where the verification has been conducted by recruitment consultants, the consultants should be obliged under the terms of their engagement to provide the client employer with written evidence that they have undertaken the required checks.
2. All applicants should be informed through applicants' information packages of the requirement for candidates to verify qualifications prior to appointment and that such claims may be verified with the issuing institution. All applicants should also be informed in clear terms that falsely claiming qualifications will lead to their dismissal and/or prosecution for any relevant offence.
3. All applicants should also be required to sign a certificate declaring that the qualifications they assert are genuine and that they acknowledge any falsely claimed qualifications can lead to their dismissal.
4. Letters of appointment or other contractual documentation should include a provision that permits an employer to terminate the employment of an applicant who falsely claims qualifications.

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118. The current advertised vacancy package for the City can be found within the employment opportunities folder of the City of Joondalup website. The package details the City's Guidelines to Applying for an Advertised Vacancy. The sections of the package that deal with probity issues are set out below.
119. In Section 1, "Preparing the Application" an overview statement emphasises that the application is the first step towards securing an interview and therefore should be of the highest standard possible. It states:
- It should be clearly understood that providing false or deliberately misleading information within an application may result in your application being disregarded, or may be grounds for dismissal should you be successful in gaining the position.*
120. The documentation and information required to make an application is then set out in the following terms
- Application for vacancy
  - Curriculum vitae
  - Referees  
*You should include in your curriculum vitae the names and contact numbers of at least two (2) referees. Referees may be contacted to verify your claims in relation to the selection criteria. Preferably one referee should be your current supervisor or manager, alternatively a supervisor/manager from a previous position may be used.*
  - Formal qualifications  
*Photocopies of your qualification(s) or academic records of your current studies should be attached to your application. Please do not submit original certificates of your qualifications or academic records.*
121. There is nothing in the document that would clearly indicate that the processes or detail contained therein would not be relevant to anyone applying for the position of CEO but the point taken by Mr Smith in his memorandum to elected members of 25 November 2002 (1110ALP1) and in answer to Cr Carlos at the meeting of 17 December 2002 (1110ALP3), and by a number of councillors on his behalf, was that he , having been "head-hunted", did not submit an application as such. That perceived anomaly should be rectified.
122. It can be concluded from the evidence of Mr Lloyd Smith of Gerard Daniels Australia that verification of qualifications is now the standard and "best practice" in a properly conducted recruitment process.

**Recommendation 14:** A local government, when recruiting a CEO should verify the professional and academic qualifications of candidates for appointment.

### **Full Public Image and Probity Checks**

123. The position of CEO is one which has a particular significance in relation to the reputation and public image of the local government. It is important to the proper fulfilment of the public service role of a local government that it have an impeccable record, reputation and image when it comes to honesty and integrity and so that must be the case with its CEO.
124. When recruiting a CEO it is therefore important that a local government ascertain the public reputation of any candidate. It will generally be the case that a suitable candidate for the position of CEO will have had some prior role as a leader of an organisation with a public profile. There is, therefore, likely to be publicly available information concerning the reputation, public image and background of the candidate. That was the case, for example, in relation to Mr Smith. A local government, before engaging a CEO, ought to be apprised of such information. That function could be performed by an appropriately qualified media research officer of the local authority or an expert consultant engaged for the purpose.
125. If the information is misleading or incomplete, as in the case of the “bribery allegations” article concerning Mr Smith, the existence of the allegations and the complete information concerning them need to be known so that an informed decision can be made as to how such matters may affect the image of the local government and how such matters are to be managed from a public relations point of view, if there is no substance in them which ought to preclude the appointment.
126. In addition, a candidate ought to be required to provide authorities to obtain a police clearance and reports from regulatory authorities relevant to the candidate’s prior work history. In that way any record would be able to be obtained as to prior criminal activity or investigations and reports by local government or other relevant industry authorities relating to the candidate.
127. An informed decision could then be made as to the significance of such matters to the appropriateness of appointing the candidate.

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**Recommendation 15:** Local governments should engage a media research officer or consultant to identify information concerning the public reputation of any candidate for the position of CEO.

**Recommendation 16:** Local governments should require authorities from candidates for the position of CEO to obtain information from police and other regulatory authorities as to any record of convictions or investigations and conclusions of regulatory authorities relevant to the candidate.

## Legal Advice

128. It was recommended in the Report of the Inquiry into the City of Perth that there be a city solicitor appointed to ensure the availability and provision of relevant legal advice. In the case of the City of Joondalup the City had the advantage of, firstly, Freehills, and then Minter Ellison, providing comprehensive advice to Council and the Administration for a significant period of time.
129. However, this did not avoid problems still arising with the provision of comprehensive legal advice at crucial times. The advice by Minter Ellison was limited because it advised on a single strategy which did not sufficiently take into account public involvement in the issue, and an alternative approach was only suggested five months later when the initial strategy had failed. The adoption of the strategy of pursuing a mediated settlement was only instituted at a late stage when the degree of disintegration of the Council had reached a point of no return. By contrast Freehills had raised a mediated resolution in their initial advice.
130. The ultimate outcome of following a legally-advised strategy illustrates the danger of relying upon a single source for legal advice.
131. Contracts of employment of senior employees of a local authority are generally legal documents of a degree of complexity which should preclude their execution without legal advice as to the content of the contract and the process leading to execution. In relation to the contract of the CEO, legal advice was only obtained in relation to part of that process. That should not have been the case.

132. The Report of the Inquiry into the City of Cockburn warns Councils against ignoring legal advice for fear of acting improperly. That is a reasonable warning to heed. However, in the course of this Inquiry I have formed the view that certain advice provided by lawyers should be recognised as strategic advice, which the councillors, if they had recognised that, were at liberty to form their own view upon without running the risk of impropriety. To expect elected members of a local authority, who will usually not have legal expertise, to recognise that, is not reasonable. However, while it is a matter which may be easily overlooked, it is a matter which legal practitioners who are providing advice should be astute to recognise themselves and point out to those whom they are advising.
133. In the course of the meeting of 24 June 2003 councillors were provided with a detailed letter of advice and effectively no time to read or digest it before a decision was made. That is a circumstance which is of no assistance to elected members. The meeting procedures for local authorities should preclude that circumstance arising.
134. The evidence to the Inquiry indicates that it is the City's practice to keep all legal advice on a special file which collects advice together, and enables reference to in relation to analogous situations in the future. That is a desirable practice. Although, one would hope that a good deal of what was advised upon during the period being inquired into will not be repeated, so as to require legal advice
135. There was some evidence of some instances where there were officers of the City seeking advice on closely relate matters without the knowledge of one another. There is also evidence that the Crown Solicitor's office provided advice to the DLGRD on matters affecting the local authority which it would be beneficial for the local authority to be aware of. I am also aware from the Inquiry into the City of South Perth that there was advice obtained by that local authority upon the question of the obligation under the LGA to advertise the position of the CEO which was, not surprisingly, substantially similar to that provided by Clayton Utz to the City of Joondalup. It is highly likely that there is a quantity of duplication of legal advice being obtained upon similar matters by local authorities throughout the State. Local authorities and the DLGRD should co-operate to keep a central register of legal advices which may be of general assistance to local authorities, subject, of course to any requirements for the preservation of legal professional privilege.
136. Detailed views concerning the provision of legal advice on request to elected members are set out in Chapter 3 of this report. The Governance Review also expresses views on the

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provision of legal advice. I adopt the essence of the recommendation of the Governance Review that elected members should have access to legal advice.

**Recommendation 17:** Local governments should not hesitate to obtain alternative legal advice or a second opinion, where elected members are divided or hesitant about any advice given.

**Recommendation 18:** When elected members are considering advice from legal practitioners they should be careful to follow legal advice, so as to ensure that they are not otherwise acting improperly, but councillors, employees and legal advisers should be careful also to ensure that a distinction is drawn between advice which is legal advice and advice which is strategic advice, and be aware of the discretion which remains in elected members to make decisions inconsistent with strategic advice.

**Recommendation 19:** The meeting procedures for local authorities should preclude the provision of written legal advice without adequate time to read and understand it before it is acted upon.

**Recommendation 20:** Contracts of employment of senior employees of a local government are generally legal documents of a degree of complexity which should preclude their execution without legal advice as to the content of the contract and the process leading to execution

**Recommendation 21:** Local governments and the DLGRD should co-operate to keep a central register of legal advices which may be of general assistance to local governments, in so far as that may occur without impacting on the need to preserve legal professional privilege.

**Recommendation 22:** A policy should be established by the Council of the City of Joondalup which facilitates full access to legal advice by elected members.

## Committees

137. The City of Joondalup has been operating with a process of briefing sessions in lieu of committees to deal with specific subject areas. Mr O'Brien spoke favourably of his previous experience of committees, and expressed a preference for them over the system of briefing

sessions which he had experienced in more recent times at the City of Joondalup. An advantage of committees over briefing sessions is that, in addition to the element of public participation and scrutiny, it provides an opportunity for smaller group decision-making to occur within Council. Small group meetings may contribute to elected members having closer rapport with one another in the course of performing their functions. It may provide a basis for the establishment of relationships of trust among Council members participating in committees. Given the degree of alienation which occurred among councillors of the City of Joondalup over the period the subject of this Inquiry, it may be desirable for the City to reconsider the use of committees of the Council for the conduct of some of its business.

138. The Governance Review Panel recommended a study of the strengths and weaknesses of the briefing session process and the committee process before trialling the committee process. That recommendation is endorsed.

**Recommendation 23:** The City of Joondalup should consider establishing Council Committees to conduct some aspects of the business of the Council, as a means of establishing co-operative working relationships between elected members.

## Code of Conduct

139. Improved Code of Conduct provisions are required for considering and resolving minority positions, probity issues, disputes within the Council, disputes between the Council and the CEO and the reporting of inappropriate or unlawful acts by the CEO.
140. There ought to be an independent process for the enforcement of the Code of Conduct. An independent person might be appointed as a referee with respect to allegations of breaches. There should be a provision within the Code whereby each employee and elected member consents to being adjudicated upon by the referee and a set of procedures should be formulated for the investigation of complaints by the referee and the imposition of remedial directions by the referee.
141. The Governance Review Panel recommended a review of the Code of Conduct and training sessions for elected members in the provisions of the Code. I would endorse the importance of that in contributing to the prospect of elected members adhering to the Code.

**Recommendation 24:** The Code of Conduct of the City of Joondalup should be reviewed and a process of adjudication of alleged breaches by an independent referee added, and elected members should be trained in its content.

## Departmental Inquiry

142. In Chapter 3 I expressed views about the use of Section 8.2(1) of the LGA. That section now allows the Executive Director to give notice to the local government to provide information. It is to be contrasted with the power of an authorised person under the LGA to seek information from any person. The current form of Section 8.2(1) may, unnecessarily in my view, prevent the Executive Director in obtaining information from individuals within a local government. Another limitation of the present provision is that it must be executed through the CEO of a local government, as the person with statutory responsibility for acting on its behalf. Where the CEO has a personal interest in the matter the subject of the notice, then a conflict of interest arises. The provision should be amended to empower the Executive Director to require any person in a local government to provide relevant information.

**Recommendation 25:** Section 8.2(1) of the LGA should be amended to permit the Executive Director to require any person in a local government to provide any relevant information in that person's possession.



# APPENDIX 1

## Apprehension of bias applications

On 17 January 2005, after hearing submissions and receiving into evidence certain documents, I declined to accede to suggestions that I should recuse myself on the basis of apprehended bias. While it is not usual to provide detailed reasons for such a decision, because the circumstances are complex, it appears to me that there would be some benefit in articulating my understanding of the issues and my reasons for declining to recuse myself.

## Bases of applications

The reasons why it was said that I ought to consider recusing myself were put to me orally.

## Political connections with the Minister

Mr Chris Baker, a suspended councillor of the City of Joondalup, appearing for himself, with leave, asserted that he had a perception that I was not acting independently of the Minister for Local Government and Regional Development in accordance with the terms of reference assigned to me because of “party political connections” between myself and the Minister based on the fact that I have been a member of an incorporated association, the Western Australian Society of Labor Lawyers (T 3896-8). He accepted that I am not a member of any political party (T 3897). He said he was not contending that I could not make a favourable finding in relation to him because he is a member of the Liberal Party (T 3958).

It is not contended and no evidence was tendered or relied upon to suggest that it is any personal association between the Minister and myself which is the basis for the apprehension. Indeed, the Minister who appointed me is not now the Minister. Both the present and past Ministers are members of a government formed by the members of the Australian Labor Party.

Evidence presented in support of the application included:

1. A statement made by the Acting Premier on 4 December 2003 that “a Liberal Party faction bears responsibility for the complete breakdown of local government in Joondalup”.

2. A statement on 8 October 2003 by the Premier that “there are Liberal Party activists involved –former members of parliament, in fact – involved in that council”.
3. Statements by the then Minister:
  - (a) On 2 July 2003 discussing on ABC radio the situation at Joondalup and referring to a “former member of parliament, Chris Baker”
  - (b) On 10 November 2003 discussing on ABC radio the situation at Joondalup and referring to “the dominant Liberal faction on that council led by Chris Baker”
  - (c) On 18 November 2003 discussing on ABC radio the situation at Joondalup and referring to a “faction that’s led by former Liberal member of parliament for the area, Chris Baker”
  - (d) On 10 December 2003 in the Legislative Council referring to “Councillor Chris Baker” and later “ensconsed factions of the Liberal Party” and asking “Which faction is Mr Baker from?”

The Minister has power under Section 8.19 of the *Local Government Act 1995*, before or after appointing an Inquiry Panel to conduct an inquiry and make a report, to suspend the Council –

- (a) if the Minister thinks that:
  - (i) the seriousness or duration of a suspected failure of the Council to ensure that the local government preforms its functions properly; or
  - (ii) such other factors as the Minister considers relevant,make it inappropriate for the council to continue to act as the governing body of the local government; or
- (b) if the Minister thinks that the conduct of the inquiry would be likely to be seriously prejudiced if the Council were to continue to act as the governing body of the local authority.

The Minister, therefore, has a statutory obligation to form certain views about the Council if he is to properly exercise his discretion pursuant to Section 8.19. The views expressed by the Minister on 10 and 18 November and 10 December 2003 may be reflective of views he has formed which

may or may not have led to him suspending the Council and appointing an Inquiry Panel<sup>1</sup>. They do not provide a proper or reasonable basis for a conclusion that the Minister has an interest in the conclusions which an Inquiry Panel may reach after conducting an inquiry pursuant to the Act, or that the views the Minister may express prior to the commencement of the Inquiry by the Panel provide a basis for a bias by the Inquiry Panel in favour of the views expressed by the Minister.

The Minister, in exercising his power under Section 8.19, did not have the coercive powers of inquiry which are invested in an Inquiry Panel. An Inquiry Panel is appointed to inquire into matters which are specified in the terms of reference set out in the notice of appointment by the Minister, in accordance with Section 8.18. The fact that the Minister or any other member of the Government may have expressed a view about the matter prior to the appointment is something which may happen in relation to the appointment of any Inquiry Panel, if the powers under Section 8.19 are exercised by the Minister. It does not give rise to an interest in the Government or the Minister in the Inquiry. There is, therefore, no relevant interest which the Minister or Government has in the Inquiry which would provide a basis for asserting that an Inquiry Panel might have an association with a person (being a Minister or Government which happens to be of a particular political party) with an interest in the matter which would, in turn, provide a foundation for a reasonable apprehension that the Inquiry Panel would not impartially conduct the Inquiry.

### **Factions issue**

A submission, which, for the purposes of these reasons, I indicated I would treat as an application, together with Mr Baker's application, was made by Senior Counsel on behalf of Suspended Councillors Kimber, O'Brien and Mackintosh that they have an apprehension of a bias in me, as the Presiding Member of the Inquiry Panel, which will result in them being "lumped in" as part of a Liberal faction (or Liberal led faction) of Council.

It was contended for Suspended Councillors Kimber, O'Brien and Mackintosh (at T 3965) that the basis for the apprehension of bias arises from the fact that a question in the course of the Inquiry is whether political factions within the Council of the City of Joondalup have, by their conduct, prevented good governance of the City. It was contended that an apprehension of bias in relation to that question arises from the fact that I, as Presiding Member of the Inquiry Panel, am also a senior executive member of an association affiliated with the Australian Labor Party.

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<sup>1</sup> Evidence tendered to the Inquiry at a later time set out DLGRD advice and a Cabinet Minute which set out reasons for the suspension of the Council which did not include any reason relating to any party political affiliation.

It was conceded (at T 3859) on their behalf in the course of argument that:

- (a) one of the three has been a member of the ALP for over 30 years<sup>2</sup>;
- (b) that they voted on a crucial resolution of the Council with Cr Hollywood, who has publicly stated that he is a “Labor Councillor”, “a Labor party voter” and a “Labor person because I am a socialist”;
- (c) that they happened to vote with Cr Baker, who is a Liberal Party member, on the same resolution; and
- (c) that that evidence, considered together, would be good reason to conclude that “a party political point of view” was not a factor in their decision-making.

Many persons within the district of the City of Joondalup, including councillors of the City of Joondalup and persons with whom they associate, may be members of a political party or have political affiliations and will have opinions of various political persuasions. They are not reasonably to be regarded, by that fact alone, as having a bias in favour of the exercise of discretionary power by the councillors of the City of Joondalup in a particular manner.

### **Factual basis**

The party alleging bias (or reasonable grounds for apprehension of bias) must establish it by evidence; mere assertions of suspicion are not enough: *Higgins v Craig* (1984) 7 IR 86. As Morling J said in *Higgins v Craig*, at 92, “subjective opinions...cannot found a reasonable suspicion unless they are in turn based upon a reasonable assessment of all the information available to” the applicant. Equally, inferences of suspicion based on mere assertions by others cannot be an adequate basis for a conclusion as to the existence of a reasonable apprehension of bias.

At the time I determined those applications and their factual basis on the evidence then before me. During the further conduct of the Inquiry further evidence was presented which touched upon

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<sup>2</sup> The evidence did not reveal on 17 January 2004 which Councillor that was but subsequent evidence made it clear that it was Cr Mike O'Brien. Nothing was known about the political party associations of the others on 17 January 2004. Mr Kimber later gave evidence that he was not a member of any political party, but he had assisted Mr Baker as a Booth Captain in his campaign for election to the State seat of Joondalup in 2002. There was never any occasion for any evidence to be given as to any party political affiliation of Mrs Mackintosh.

those matters, which served only to confirm the conclusions reached on the evidence available on 17 January 2005.

The further evidence referred to for the purposes of this application was as follows:

- (a) A letter addressed “Dear City of Joondalup Resident”, signed by Suspended Mayor Don Carlos, endorsing ALP candidate Kim Young in respect of the Federal election on 9 October 2004. It refers to the help given by Mr Young to Mr Carlos in his campaign for election as Mayor. It includes a photograph of them together.
- (b) An election pamphlet of the same candidate, bearing the same photograph (among several others), with the caption “Don Carlos listens when Kim Young discusses the need for open and accountable government in the City of Joondalup”.
- (c) A transcript of the Annual Meeting of Electors of the City of Joondalup on 17 November 2003 in which a reference was made to Cr Baker’s association with the Liberal Party and membership of a faction.
- (d) A transcript of evidence of Cr Hollywood to the Standing Committee on Public Administration and Finance of the Legislative Council that he is proud to be a Labor member of Council.
- (e) Rules of the Society of Labor Lawyers.
- (f) A transcript of a radio interview on 26 May 2004 by Greg McIntyre, identified as a spokesman for the W.A. Society of Labor Lawyers.

The evidence relied upon as suggesting a party political issue affecting decision-making among councillors of the City is not sufficient, without more, to draw an inference of party political involvement or influence in decision-making in the City.

The statements in the State Parliament referred to are not evidence of the truth of the matters asserted: *Parliamentary Privileges Act 1891* (WA), Section 1; *R v Turnbull* [1958] Tas SR 80; *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522. Hansard can be used for the limited purpose of proving what was said, but no inference can be drawn from it: Browne J in the *Church of Scientology* case; *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435; *Munday v Askin* [1982] 2 NSWLR 369; *Amman Aviation Pty Ltd v Commonwealth* (1988)

81 ALR 710. Mere general assertions, without any supporting evidence, by Ministers, whether in the Parliament or in the media are not probative, without more, of the matters asserted.

The fact that suspended Mayor Carlos may have endorsed a political candidate for election to the Federal Parliament, suggests that Mr Carlos has political opinions in relation to matters of representation in the Federal Parliament. He is entitled to, indeed obliged to, form such views in order to exercise his compulsory voting responsibilities under the *Electoral Act 1907* (WA), Section 45. That, by itself, does not support any inference of misuse of his discretionary power as a councillor, on the basis of party political affiliation or otherwise.

Suspended Mayor Don Carlos had given evidence by 17 January 2005 (which was yet to be the subject of cross-examination). His evidence (at Ts pp 979-80, 981, 983-4, 996 and 997) included that there was that:

- (a) there was a “Carlos team”; and
- (b) other councillors were in a faction.

Suspended Councillor Alison Walker gave evidence that she was not a member of the “Carlos team”, as she was running against him for Mayor<sup>3</sup>. Suspended councillors Caiacob, Hart and Nixon gave evidence that they joined the “Carlos team”. The explanations given by each of those persons of their understanding of the “Carlos team” did not suggest that the “team” had any party political affiliations.

The evidence, which is before the Inquiry, in the form of a tape recording and transcript of an Annual Meeting of Electors of Cr Baker’s response to the suggestion that he or any other councillor was involved in a political faction at Council level is, in the absence of any evidence to the contrary, an explanation as to why that is not so of him or any other councillor, despite the fact that they may legitimately be members of political parties. He said:

Cr Baker:

*...Well first of all there is only one faction that I am aware of on Council, and that is the faction that the Mayor has described as his team,... In terms of party political factions, I don't believe there are any party political factions on Council....*

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<sup>3</sup> Evidence later emerged in the Inquiry that Ms Walker had been a One Nation Party candidate in a State election prior to becoming involved in local government.

*...I received a call from a QC....who said the Minister was on the radio alleging that there was a Liberal faction on Council, or something like that. It was nonsense...*

Mr Reason:

*So can I ask Cr Baker another question? So then you are not representing any political party in your position of a Councillor?*

Cr Baker:

*No absolutely not, definitely not.*

Mr Reason:

*You are not a member of any political party?*

Cr Baker:

*Yes I am. To my knowledge two of the other Councillors are...The Mayor is not a member of any political party, but he is affiliated with people who may be and, of course that may create the perception that he is. No to be fair the same could be said of other Councillors here as well. That is the perception that is being created, and it is simply not true...*

*Mr Baker, like all other residents of the State, is obliged to hold political opinions in relation to State and Federal matters (to the extent of being able to exercise his vote). As an extension of that obligation, he is entitled to engage in political communication and join, and actively participate in the affairs of, a political party. There is no evidence presently before me that Cr Baker's membership or participation in the affairs of a political party has had any impact upon the decisions he has made as a Councillor of the City of Joondalup<sup>4</sup>.*

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<sup>4</sup> Tom Stevens MLA, then the Minister for Local Government, said in evidence to this Inquiry that he gave no political significance to the fact that Mr Baker was a Liberal and that, as he said, he "was described to me as a leader of the group that had become known as a faction by a number of people" (1.4.05, p 8062). Mr Stephens conceded that it was not necessary to mention politics at all in that context (1.4.05, p 8070) and "nothing hung upon the issue of whether it was Liberal led or not" (1.4.05, p 8073)

Liam Bartlett in his evidence (18.4.05, p 9078) described Mr Steven's statement as a "cheap political point" and indicated that he did not discern a political flavour to the issue. Bartlett (18.4.05, p 9078) drew that conclusion from the fact that Baker was the only member of the Liberal Party on the Council and there was "a Labor member [O'Brien] who was... supposedly part of his group, his support base for Smith in this so-called faction"

Cr Hollywood, who was not a member of the Carlos “team” has given evidence to the Inquiry which is consistent with his evidence to the Standing Committee. His evidence is that he is a member of the Labor Party (p 26.10.04, 2393). However, he voted with all other councillors except Cr Carlos in favour of the motion on 18 February 2003 endorsing the job being done by Denis Smith. His evidence is reflective of a person who endeavoured to vote on his assessment of the merits of the issues, independently of any dictation by others arising out of party political affiliation. The fact that on subsequent occasions he voted in the opposite way to the councillors mentioned above on related issues indicates again his independent assessment of the merits of the issues at the time (whether or not his judgment was reasonable or appropriate is a separate issue).

Cr Nixon was in the majority on the CEO issue, although he supported Carlos for Mayor.

There is no convincing evidence that any groupings or factions (however defined) of Council were based upon affiliation to any political party which may operate at State or Commonwealth level in Australia.

In any event, my past membership of the Society of Labor Lawyers is an insufficient basis for reasonably associating me with or attributing to me the views or opinions expressed by Members of Parliament which were cited or indeed for attributing to me the views of any political party or of a political party member. I am not a member of any political party to which any Member of Parliament may belong. The Society of Labor Lawyers is effectively a lobby group for law reform, which focuses its efforts on the ALP. There is no reasonable basis for identifying any member of that Society, on the basis of that membership alone, with the views of the ALP or members of the ALP.

There is insufficient basis to give rise to a **reasonable** apprehension in another of bias in a decision-maker merely because the decision-maker may be believed to have political opinions or to have associated with others on the basis of political opinions. Every individual has a right to form political opinions. Indeed an individual has a duty to form a political opinion in order to exercise the duty under the *Electoral Act 1907* (WA), Section 45 and the *Commonwealth Electoral Act 1918*, (Cth) Section 101 to vote in State and Federal elections.

That right and duty of each individual in the State to participate in the formation of political opinions in the State and Federal arena is distinguishable from the conduct of local government in which electoral voting is not compulsory.

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The fact that an individual may have opinions or associations relevant to State or Federal politics, without more, could not properly found a reasonable apprehension of bias in relation to individuals or events in a local government district. That is so, even though there may be evidence that certain individuals in the district have opinions or associations in relation to politics at State or Federal level. It could not be otherwise if those individuals are to exercise their rights and perform their duty of participation in the State and Federal electoral process.

There is nothing to suggest that opinions of the members of the various political parties at a State or Federal level differ significantly in relation to local government. Successive State Governments of different political persuasions have regulated local government with the common desire to enhance the provision of good government at the local level. The current *Local Government Act 1995* (WA) was introduced into Parliament by a Liberal Minister for Local Government, the Honourable Paul Omodei on 31 August 1995 (Second Reading Speech, Hansard, 31 August 1995, pp. 7547 *et seq*). It provides at Section 3.1 that:

The general function of a local government is to provide for the good government of persons in the district.

Section 1.3(2) provides that:

This Act is intended to result in:

- (a) better decision making by local governments;
- (b) greater community participation in the decisions and affairs of local government;
- (c) greater accountability of local governments to their communities; and
- (d) more efficient and effective local government.

In his Second Reading Speech Mr Omodei described the intent of the Bill in the terms set out in Section 1.3(2). He said:

“[T]he new legislation... will bring about significant benefits for the efficiency and effectiveness of local governments and will improve the management structures. However, there will be many checks and balances. In particular, the public will be given more information about the operation of their local government and have many opportunities to

participate in and influence the decision making process. The Government will have power to ensure that local governments operate appropriately in all areas.”

A Labor Minister appointed me to preside over this Inquiry under the same legislation. There are only minor amendments being proposed by the current Government to the legislation. Some of those arise out of matters to which I drew attention in my report to the same Minister following my Inquiry into the City of South Perth. It can be inferred from that, that there is no difference of opinion between the major political parties as to the manner in which local government should be conducted. As Aristotle said:

Every art and every investigation, and likewise every practical pursuit or undertaking, seems to aim at some good: hence it has been well said that the good is that at which all things aim.<sup>5</sup>

Therefore the good of man must be the end [i.e. objective] of the science of politics.<sup>6</sup>

There is nothing in the evidence before me to suggest that any political party is seeking anything other than ‘good government’ in the City of Joondalup.

If political opinion or association on the basis of political opinion at the State level alone was sufficient to found a reasonable apprehension of bias in a decision-maker, then it would be impossible for any State Minister (being a member of a political party) to exercise his statutory function under the *Local Government Act* to make a decision in relation to a local government, particularly under Part 8, where there was a suggestion that those participating in the local government had differing political party affiliations. It would not matter to which political party the Minister may belong, if the differing State and Federal political affiliations *per se* of individuals who participate in local government was regarded as tainting the Minister’s capacity to make a decision affecting them, then no decision of the Minister could ever be free of that defect. That demonstrates the fact that an apprehension of bias cannot be reasonably so based.

If that is so, then there is significantly less basis for concluding that a decision-maker, such as myself, as the Presiding Member of the Panel Inquiry in this instance, could be reasonably apprehended as being affected by bias. As Presiding Member, I have been appointed by the Minister to make recommendations to him. Whether or not I might have some similar opinions to him on some political issues cannot serve to disqualify me from that task.

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<sup>5</sup> *Nicomachean Ethics* bk 1, 1094a 1-3.

<sup>6</sup> *Nicomachean Ethics* bk 1, 1094b 6-7.

I am not a member of a political party. I have not been a member of the Australian Labor Party other than for the periods 1976/77 and 1987/88 (which membership Counsel for Councillors Kimber, O'Brien and MacIntosh, at least has indicated is something he would not rely upon in support of his contentions). In 1987 I attended a general meeting of the Kuranda Branch of the party, which I recall may have been attended by no more than two or three people. One of those people was elected as President and I was elected Vice-President, Secretary and Treasurer. I did not attend any other meeting of the Branch and now have considerable doubt as to whether the elections purported to be held were valid, for lack of a quorum. In any event, I did not further participate in the affairs of that Branch and have held no other office in any political party.

I have been a member and Executive Committee member of the WASLL since 1988. I was President in 1998/99, and Vice-President in 1999/2000 and attended the meetings at which the present rules were debated and adopted. I gave notice of my resignation from membership of the WASLL on 15 November 2004, a scheduled date of a meeting of the Executive Committee (which had previously last met on 5 July 2004).

The WASLL has the following objects and principles:

(1) The objects of the Society are –

- a. To promote law reform in accordance with the Society's principles;
- b. To promote critical discourse within the legal profession and the public about legal issues;
- c. To liaise with the WA Branch of the Australian Labor Party and the State and Federal Parliamentary Labor parties including State and Federal Attorney Generals and Shadow Attorney General; and
- d. To liaise and cooperate with other organisations with principles and objects similar or complementary to the Society including societies of Labor Lawyers of other jurisdictions.

(2) The Society is founded on the general principle that the substance, practice and enforcement of the law should be fair and just. In particular, the principles of the Society are (in no particular order):

## APPENDIX 1

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- a. All members of the community should have full and equal opportunity of access to legal services;
- b. The administration of justice should treat all people equally regardless of their financial or cultural position and be sensitive to social and economic change;
- c. Those wishing to become lawyers should have proper and equal access to appropriate education and training;
- d. International human rights principles should be respected and reflected in domestic legislation and administration;
- e. Western Australia should have a fully free and democratic electoral system that is reflective of one vote one value;
- f. Australia should be a Republic;
- g. The administration of the criminal justice system by the executive should be carried out legally, fairly and without bias;
- h. Subject to appropriate consultation, to develop and then refine an appropriate model, Australia and Western Australia should enact a Bill of Rights;
- i. The environment should be protected by appropriate laws;
- j. There should be legislative and administrative action aimed at the elimination of discrimination on the grounds of gender, race, sexuality, marital status, family responsibilities, creed, ethnicity, citizenship, homelessness, disability or political affiliation;
- k. Government should be open and accountable subject to restrictions in respect of national security and personal privacy;
- ...
- t. The Judiciary should be independent and remain free from political interferences; and
- u. The rule of law should be respected and protected.

The principle set out at paragraph (k) that Government should be open and accountable is applicable to all levels of government and is consistent with the provisions of the *Local Government Act* referred to above, which has been administered by State governments of different political parties. It reflects a principle upon which the political parties are agreed and is consistent with the Aristotelian notions referred to above.

While liaison with the ALP is included with the “objects” clause of the Society, a proper interpretation of the clause would recognise that the act of liaison is not an object in itself, but sets a focus for the Society in the implementation of the objects set out in paragraphs (a) and (b), in accordance with its principles, set out in sub-clause (2).

Prior to the amendment to the Rules of the WASLL on or about 1 May 2004 the Principles and Objects of Association were in slightly different form. They did not include the provisions about liaison set out in the current objects. Significantly, in relation to the present matter, by an amendment resolved upon 15 December 1993, the Society added to the list of matters the Society aimed to promote to include the promotion and protection of fundamental human rights and freedoms including the right to free speech, the freedom of assembly, the freedom of association and legislative and administrative action by the Western Australian Government to eliminate discrimination on various grounds, including politics.

Evidence of the manner of implementation of its objects is to be found in the statement by me on radio, referred to above, which criticised retrospective legislation introduced by Ministers of the current Labor Government. That statement illustrates that the Association is not formed to adopt or support the views of the ALP.

The identification of the nature of the association of members of the WASLL with the ALP, by way of liaison, is significant. That liaison cannot, consistently with the objects of the WASLL, be in pursuit of any interest of the ALP. As an incorporated body, the WASLL can only act in accordance with its objects, and can only associate with the ALP in order to pursue the objects of the WASLL. Those objects are properly to be determined by the “general principle”, which the WASLL is said in its objects clause to be “founded on”, that is, “that the substance practice and enforcement of the law should be fair and just”.

The WASLL is an association formed to engage in the process of political communication. Engagement in that process is not a foundation for a reasonable apprehension of bias in its members. If anything, it suggests the contrary.

It would therefore matter not whether I, as the decision-maker, may have different views on some matters of political opinion than those whom might be providing evidence to me, as the decision-maker. It would not be reasonably apprehended, in the absence of some other evidence in support of the proposition, that the decision-maker would be biased against a witness or otherwise lack impartiality in dealing with the evidence of that witness merely because that witness may hold some different political opinions or affiliations to the decision-maker.

In *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 Gleeson CJ, McHugh Gummow and Hayne JJ said -

...There are many possible forms of association, personal, social, financial, or ideological, that might exist between a judge and a litigant, or someone concerned in litigation. Such association may, or may not, have the potential to bring into question the independence or impartiality of the judge. It may, or may not, give rise to a suggestion that a judge has an interest in the outcome of proceedings...

The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed...

It is not only association with a party to litigation that may be incompatible with the appearance of impartiality. There may be a disqualifying association with a party’s lawyer, or a witness, or some other person concerned with the case. In each case, however, the question must be how it is said that the existence of the “association” or “interest” might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits. As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an “association” will not suffice to answer the relevant question.

In *Webb v The Queen* (1993-19994) 181 CLR 74, Deane J described four categories of disqualification by reason of the appearance of bias, saying, inter alia:

The third category is disqualification by association. It....consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with the person or persons interested in, or otherwise involved in, the proceedings.

In *Stolley v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519, it was said that the test of reasonable apprehension of bias “does not, of course, warrant fanciful and extravagant assertions and demands”. The “suspicions of the ultra-sensitive, paranoid or cynical” do not set the legal standard of impartiality: *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 a 374 per Kirby P.

Mason J in *Re Renaud; Ex parte CJL* (1986) 60 ALJR 528 at 531-532 said:

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially...[and not] that he will decide the case adversely to one party... Although it is important that justice be seen to be done, it is equally important that judicial officers discharge their duty to sit, and not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of the judge they will have their case tried by someone thought to be more likely to decide the case in their favour.

Street CJ<sup>7</sup> added in *R v George* (1987) 9 NSWLR 527 at 536:

It is plain from the law as stated in [**Renaud**] that...judges should not too readily respond to protests advanced on the basis that they may not be able to discharge their duties properly ... The reasonable apprehension of bias, which is the core of the test, turns very much upon the adjective ‘reasonable’<sup>8</sup>. It is not enough that there be some apprehension of some uniformed and uninstructed persons.

As Tadgell J in *Gascor v Elliot* [1977] 1 VR 332 at 342 said:

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<sup>7</sup> With whom Yeldham and Finlay JJ agreed.

<sup>8</sup> See *Najjar v Haines* (1991) 25 NSWLR 224, and G Kelly “Reviewing the Observer of Bias” (1993) 67ALJ 340

It is a reasonable and not fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is ‘fair minded’ – which means ‘reasonable’.

A finding of apparent bias is not to be lightly made: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553; *Re Shaw; Ex parte Shaw* (1981) 55 ALJR 12 at 14. A tribunal member ought not too readily disqualify himself: *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 445; *Sankey v Whitlam* [1977] 1 NSWLR 33. Morling J in *Higgins v Craig*, (1984) 7 IR 86 at 93, put it appositely as follows:

As was said by the High Court in *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554, the requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before a tribunal or in the minds of the public that the tribunal or a member of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. The evidence in this case does not establish any such submission.

See also *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655; *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

The circumstances in relation to these applications are significantly distinguishable from those in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; [1999] 1CHRL 3 (15 January 1999). In that case one of the Law Lords who heard an appeal was the Director and Chairperson of Amnesty International Charity Limited (AICL), a registered charity incorporated to undertake Amnesty International’s charitable purposes. Amnesty International (AI) was granted leave to intervene in the appeal. The case turned on the fundamental principle that a judge will not sit as a judge in his own cause; resulting in his automatic disqualification from hearing the case. The Court found that AI had an interest in the litigation. AI was joined to the appeal to argue for a particular result. It was promoting a cause, which was to achieve the trial and possible conviction of Senator Pinochet for crimes against humanity, on the basis that he was not immune from conviction as an ex-Head of State. The Court

also found that AICL was a constituent part of AI (an unincorporated association) wholly controlled by the members of AI and AICL shared the objects of AI which caused it to be joined to the appeal.

In the present instance, the ALP is not joined to the Inquiry and there is no cogent evidence to support a conclusion that the ALP has an interest in the result of the Inquiry. In any event, the WASLL is not a constituent part of the ALP and is not in any way controlled by the ALP or its members. There is no suggestion that there is any evidence that the WASLL has any interest in the result of the Inquiry.

## **Conclusions**

These applications founder at the threshold. The circumstances established by the evidence are several steps removed from providing a proper foundation for reaching a conclusion as to a reasonable apprehension of bias in any person the subject of this Inquiry:

1. The overwhelming weight of the evidence, including the evidence presented for the purposes of the apprehension of bias applications and the evidence of the eight suspended councillors who have been examined by Counsel Assisting which is consistent with that of Suspended Councillor Baker, who gave evidence on 18 and 19 January 2005, suggests that any groupings, teams or factions which may have existed in the Council of the City of Joondalup are not on a party-political basis. Various individuals have party political associations. However, any combinations of individuals for the purpose of voting on Council include individuals from a variety of political associations. On a crucial issue to this Inquiry, for example, there is some variation over time of the groupings of individuals, with a variety of political associations within any group, who have voted in support of or against the Chief Executive Officer.
2. The evidence referred to for the purposes of this application as suggesting a party political issue affecting decision-making among Councillors of the City is not sufficient, without more, to draw an inference, for the purposes of this application, of party political involvement or influence in decision-making in the City. An inadequate factual foundation, therefore, exists for the primary state of affairs from which it is said that an apprehension of bias may arise.

- 2.1 There is an insufficient connection between executive membership of the WASLL and any faction which may exist on the basis of a party political foundation or label in the City of Joondalup to establish any association between the Presiding Member and any factions of the City of Joondalup which would lead to a reasonably based apprehension of bias.
  - 2.2 There is insufficient evidence of an association of myself, as Presiding Member, with a party or person with an interest in the matter.
  - 2.3 There is no evidence that any political party, per se, has any interest in the matter.
  - 2.4 Insufficient evidence exists that any interested party's association with any political party is material to any matter in the Inquiry.
  - 2.5 There is insufficient evidence of any relevant association between myself, as Presiding Member of the Inquiry, and the ALP in any event.
3. It is not reasonable to conclude that because I, as the Presiding Member of the Inquiry, and the persons being inquired into may hold some ideological views in common or may have some disparate ideological views that I, as the Presiding Member, may be biased in favour or against such persons in reporting as to their conduct in providing or failing to provide good government to the City of Joondalup.
4. Even if it could be said that there is a properly identified issue concerning political party involvement in decision-making in the City (which I conclude there is not), membership of the WASLL and engagement in the affairs of that association is not a sufficient foundation for a reasonable apprehension of a bias against any individual the subject of the Inquiry, such as to render the Inquirer incapable of determining impartially the matters the subject of the Inquiry, including an issue of party political involvement in City decision-making. The WASLL is not formed to adopt or support the views of the ALP or any other political party or the persons who are members of any political party. Its members may be engaging in the process of political communication, as they are entitled to do. There is no evidence that its members have ever engaged in or intended to engage in any process of political communication in relation to any local authority, including the City of Joondalup.

5. There is insufficient basis to give rise to a **reasonable** apprehension in another of bias in a decision-maker merely because the decision-maker may be believed to have political opinions or to have associated with others on the basis of political opinions.

I concluded on 17 January 2005 that, given the considerable time which had been occupied in my conducting this Inquiry to that date, it was important in the public interest, including the public interest in the proper expenditure of public funds, that I discharge my duty to continue to sit where in my view a fair minded observer would not form a reasonable apprehension that I would be biased in deciding any matter which was before me. The authorities to which I have referred make it clear that I had an obligation to not too readily move to disqualify myself. In all the circumstances, having carefully considered the matter, I declined to recuse myself from further investigating the matter which has been assigned to me. Further applications of a similar kind were made by the same parties on similar grounds. Those applications did not raise any further matters of substance and did not persuade me to alter the view taken on 17 January 2005. Nothing which has transpired in the Inquiry since that time has done other than confirm me in the view then taken.

Ms Archer, on behalf of Mr Reynolds, on 2 March 2005 made an application that I disqualify myself on the basis of a reasonable apprehension of bias arising out of the content of questions put to witnesses, which, it was contended, indicated a pre-judgment of matters in relation to her client. Those matters are fully canvassed and the reasons for rejecting the application are sufficiently set out at pages 6494 to 6521 of the transcript.



## APPENDIX 2

### Chronology of Council Decisions

#### Decision not to renew Lindsay Delahaunty's Contract – 13 March 2001

On 27 February 2001 Council considered the issue of renewing Lindsay Delahaunty's contract.

##### **C09-02/01 CHIEF EXECUTIVE OFFICER'S ANNUAL REVIEW AND CONTRACT EXTENSION – [02154] [08122]**

MOVED Cr Barnett, SECONDED Cr Wight that Council NOTES that:

1. on 29 December 2000, the City entered into an agreement with Mr Delahaunty to extend his existing contract of employment until 4 September 2001 and to extend the time limit for conclusion of discussions about a new contract of employment until 28 February 2001, in order to enable further information to be received by the City;
2. due to events beyond the control of the City, that information has not been received. Accordingly, the Council has not been able to have meaningful discussions with Mr Delahaunty in light of that information;
3. in light of the above, and with the concurrence of Mr Delahaunty, Council resolves that:
  - (a) the Mayor, Deputy Mayor and Councillor Barnett have further discussions with Mr Delahaunty during the period 27 February 2001 until 9 March 2001 and that they report back to Council at the next meeting after 9 March 2001;
  - (b) without prejudice to the further discussions with Mr Delahaunty, the Manager Human Resources does provides to the next meeting of Council a report on the process of identifying a new Chief Executive Officer, identifying four Human Resource Consultants qualified to assist in the process of selecting a new Chief Executive Officer, should the need arise.

The Motion was Put and **CARRIED**

On 13 March 2001 Council decided not to enter into a new contract of employment with Lindsay Delahaunty.

##### **C12-03/01 CHIEF EXECUTIVE OFFICER'S ANNUAL REVIEW AND CONTRACT EXTENSION – [02154] [08122]**

MOVED Cr Magyar, SECONDED Cr Carlos that Council NOTES:

- (a) Discussions have been held with the Chief Executive Officer concerning the possibility of the City entering into a new contract of employment with the Chief Executive Officer. That proposal is not acceptable to the City. As a result, the City and the Chief Executive Officer have not come to an agreement concerning further employment. In addition, the City has considered a proposal from the Chief Executive Officer as per his further employment.
- (b) Absent any agreement, the Chief Executive Officer's contract of employment will come to an end on 4 September 2001 by agreement of the parties, in accordance with the terms of the contract of employment and the agreement between the Chief Executive Officer from the City recorded in the letter dated 29 December 2000.

In light of the above the Council resolves that:

1. the City not enter into a further contract with Mr Delahaunty extending his existing contract of employment.

2. the Council further consider, at its next meeting, the most appropriate means by which the most suitable candidate for the position of Chief Executive Officer after 4 September 2001 could be identified.

3. Mr Lindsay Delahaunty be invited to apply for the position of Chief Executive Officer once the selection process has been determined.

The meeting was ADJOURNED at 2110 hrs and RESUMED at 2118 hrs.  
Discussion ensued.

**The Motion was Put and CARRIED**

## Recruitment of a New CEO – 27 March 2001

### **CJ071 - 03/01 SELECTION PROCESS FOR A NEW CHIEF EXECUTIVE OFFICER - [99115] [12879]**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

1. ESTABLISHES a Chief Executive Officer's committee consisting of:  
Mayor Bombak

Cr P Kadak	Deputy – Cr L Ewen-Chappell
Cr D Carlos	Deputy – Cr S Magyar
Cr A Nixon	Deputy – Cr J Hollywood
Cr G Kenworthy	Deputy – Cr A Patterson
Cr A Walker	Deputy – Cr P Rowlands
Cr T Wight	Deputy – Cr T Barnett
Cr J Hurst	Deputy – Cr C Mackintosh.

Discussion ensued, with the Mayor calling for a show of hands of those Councillors that wished to be appointed to the Committee.

The Motion was Put and **CARRIED BY AN ABSOLUTE MAJORITY**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

2. SETS a quorum of 4 members.

AMENDMENT MOVED Cr Kenworthy, SECONDED Cr Patterson that the words "quorum of 4" be amended to read "quorum of 5". Discussion ensued.

The Amendment was Put and **CARRIED**

The Original Motion, as amended, BEING that Council:

1. SETS a quorum of 5 members.

Was Put and **CARRIED BY AN ABSOLUTE MAJORITY**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

3. NOTES that the Manager Human Resources will provide professional advice to the committee when required.

The Motion was Put and **CARRIED**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

4. AGREES to outsource the recruitment process to an external human resource consultant.

The Motion was Put and **CARRIED**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

5. INVITES Gerard Daniels, Lyncroft and Recruiters Australia Ltd to provide a presentation to the next Briefing Session to be held on Tuesday 3 April 2001.

Discussion ensued.

The Motion was Put and **CARRIED**

MOVED Cr Patterson, SECONDED Cr Nixon that Council:

6. ALLOCATES costs associated with the recruitment of a Chief Executive Officer be charged to Account No 11.10.11.111.4201.0001 – CEO Administration – Consultancy.

Discussion ensued.

The Motion was Put and **CARRIED**

MOVED Cr Patterson, SECONDED Cr Nixon that:

7. A report be provided by the Director Resource Management to the next Council meeting on the cost so far of this recruitment process for the period 30 September 2000 to 31 March 2001.

Discussion ensued.

The Motion was Put and **TIED**

There being an equal number of votes, the Mayor exercised his casting vote and declared the Motion **LOST**

MOVED Cr Patterson, SECONDED Cr Nixon that:

8. Given the potential cost of this recruitment process, a report be provided at each Council meeting on the total cost of the process to date.

Discussion ensued.

The Motion was Put and **LOST**

### Appointment of Recruiters Australia Ltd & Warren Reynolds – 10 April 2001

#### **CJ092 - 04/01 SELECTION PROCESS FOR A NEW CHIEF EXECUTIVE OFFICER - [20006] [91115] [12879]**

MOVED Cr Ewen-Chappell, SECONDED Cr Wight that Council:

1. ENGAGES Recruiters Australia Ltd to assist the City in the process to recruit select and appoint a new Chief Executive Officer with Mr Warren Reynolds overseeing the assignment;
2. ALLOCATES costs associated with the recruitment of a Chief Executive Officer to Account No 11.10.11.111.4201.0001 – CEO Administration – Consultancy.

**The Motion was Put and CARRIED BY EN BLOC RESOLUTION NO 1**

### New Councillors on Committee to Select a New CEO – 7 May 2001

On 7 May 2001 at a Special Council meeting, following the Council elections new councillors were appointed a position within the committee to select a new CEO as either a delegate or a deputy.

**JSC04-05/01 COMMITTEE TO SELECT A NEW CHIEF EXECUTIVE OFFICER – [12879]**

MOVED Cr Walker, SECONDED Cr Kadak that Council:

1. ESTABLISHES a Committee to oversee the selection of a new Chief Executive Officer;
2. APPOINTS the following delegates to the Committee:

Delegate	Deputy
Mayor J Bombak	-
Cr P Kadak	Cr P Kimber
Cr D Carlos	Cr C Baker
Cr A Nixon	Cr J Hollywood
Cr G Kenworthy	Cr A Patterson
Cr A Walker	Cr P Rowlands
Cr M O'Brien	Cr T Barnett
Cr J Hurst	Cr C Mackintosh

3. SETS a quorum for the Committee of 5 members.

**The Motion was Put and CARRIED BY AN ABSOLUTE MAJORITY**

### Advertising Advice & Interstate Interviews – 12 June 2001

**C44-06/01 RECRUITMENT OF NEW CHIEF EXECUTIVE OFFICER - [20006] [91115] [12879]**

MOVED Cr Barnett, SECONDED Cr Baker that Council:

1. the Council AUTHORISES Mr Reynolds from Recruiters Australia and the Manager Human Resources to travel interstate in the week commencing 25 June 2001 for the purpose of conducting preliminary interviews with candidates who have registered an interest in the position of Chief Executive Officer;
2. the expenditure in (1) above estimated at \$10,000 be charged to Account Number 11.10.11.111.4201.0001 – CEO Administration - Consultancy.

The Motion was Put and **CARRIED**

### Perth Interviews – 24 July 2001

**C74-07/01 RECRUITMENT OF NEW CHIEF EXECUTIVE OFFICER - [20006] [91115] [12879]**

MOVED Cr Carlos, SECONDED Cr Hurst that:

1. the Chief Executive Officer Recruitment Committee be AUTHORISED to conduct interviews for the position of Chief Executive Officer;
2. the expenditure associated with interstate candidates attending interviews in Perth be AUTHORISED;
3. the expenditure in (2) above be charged to Account Number 11.10.11.111.4201.0001 – CEO Administration – Consultancy;
4. Mr John Turkington, Director Resource Management be APPOINTED Acting Chief Executive Officer from 5 September 2001 until the new Chief Executive Officer commences;
5. the confirmed minutes of the Committee to Select a new Chief Executive Officer held on 11 June 2001, be NOTED;

6. the unconfirmed minutes of the Committee to Select a new Chief Executive Officer held on 16 July 2001, be NOTED.

**The Motion was Put and CARRIED**

### Further Discussions with Top Three Candidates – 14 August 2001

#### **C80-08/01 RECRUITMENT NEW CHIEF EXECUTIVE OFFICER - [20006] [91115] [12879]**

MOVED Cr Patterson, SECONDED Cr O'Brien that the:

1. Council AUTHORISES Mr Warren Reynolds to undertake further discussions with Candidates A, B and C in that order of preference (as identified in the confidential report of Mr Reynolds marked Appendix 1) with a view to finalising an appointment to the position of Chief Executive Officer;
2. remuneration package for the position be in the range of \$220,000 to \$230,000.

Discussion ensued.

**The Motion was Put and CARRIED**

### Appointment of Denis Smith – 28 August 2001

#### **C89-08/01 APPOINTMENT OF NEW CHIEF EXECUTIVE OFFICER – [20006] [91115] [12879]**

MOVED Cr Rowlands, SECONDED Cr Kimber that:

1. Council APPOINTS Candidate A to the position of Chief Executive Officer of the City of Joondalup on a 5 year performance based contract on a commencing total annual remuneration package of \$225,000;
2. the Mayor, Deputy Mayor and Mr John Turkington, Director Resource Management be authorised to finalise the contract documentation;
3. Council APPROVES the payment of up to \$20,000 towards the cost of relocation expenses subject to a written agreement requiring:
  - (a) 100% of the Council's contribution to be repaid if Candidate A does not complete 12 months of service;
  - (b) 50% of the Council's contribution to be repaid if Candidate A does not complete 24 months of service;
4. Council AGREES to provide a furnished apartment in Joondalup for a period of 8 weeks at the City's expense and a further 8 weeks on the basis of the City contributing 50% and Candidate A 50% of the rental costs;
5. the expenditure in items (3) and (4) be charged to Budget Item CEO – Salaries.

The Motion was Put and **CARRIED**

In **favour** of the Motion: Mayor Bombak, Crs Hurst, Kenworthy, Patterson, Rowlands, Hollywood, Baker and Kimber

**Against** the Motion: Crs Carlos, Nixon and Barnett

### Vote of Confidence in Denis Smith – 9 October 2001

MOVED Cr Baker, SECONDED Cr Kenworthy that the elected members of the City of Joondalup reaffirm their decision to appoint Mr Denis Smith as the new Chief Executive Officer of the City of Joondalup.

The Motion as Moved by Cr Baker, Seconded by Cr Kenworthy was Put and **CARRIED**

In **favour** of the Motion: Mayor Bombak, Crs Mackintosh, Hurst, Kenworthy, Patterson, O'Brien, Rowlands, Walker, Hollywood, Baker and Kadak

**Against** the Motion: Crs Barnett, Nixon and Carlos

### Vote of Confidence in Denis Smith – 17 December 2002

#### C181-12/02 NOTICE OF MOTION NO 1 – CR ANDREW NIXON

MOVED Cr Nixon, SECONDED Cr Baker that the elected Council of the City of Joondalup hereby declare their strong support for and full confidence in Mr Denis Smith and his dedicated attitude, work ethic and values to the City of Joondalup.

The Motion was Put and **CARRIED** (12/1)

**In favour of the Motion:** Mayor Bombak, Crs Baker, Barnett, Hurst, Kadak, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Rowlands, Walker. **Against the Motion:** Cr Carlos.

### Cr Carlos Motion – 18 February 2003

#### C10-02/03 CONFIDENTIAL - NOTICE OF MOTION NO 6 – CR D CARLOS - [02154]

MOVED Cr Baker SECONDED Cr Hurst that Cr Carlos no longer be heard in relation to his email message until he nominates the author of the message.

The Motion was Put and **CARRIED** (11/3)

**In favour of the Motion:** Mayor Bombak, Crs Mackintosh, Hurst, Kenworthy, Patterson, O'Brien, Barnett, Rowlands, Baker, Kadak, Kimber.

**Against the Motion:** Crs Walker, Hollywood, Carlos.

The Confidential Motion as Moved by Cr Carlos and Seconded by Cr Hollywood was Put and **LOST** (2/12)

Details of the motion:

1. That the elected Council of the City of Joondalup immediately stands down Mr Denis Smith from his position as Chief Executive Officer until such time as the Council has received and considered a report from an independent investigator into allegations made against Mr Denis Smith.
2. That Mr Eric Cousens, retired Assistant Commissioner WA Police, be appointed to investigate the following allegations made against Mr Denis Smith:
  - (a) The allegation that the information regarding Denis Smith's academic qualifications which he provided to Recruiters Australia were false.
  - (b) The allegation that Mr Smith does not hold any academic qualifications and determine what actual qualifications he does hold.

- (c) the allegation that Mr Denis Smith advised Recruiters Australia he was on a salary package of \$225,000 and he was prepared to accept the appointment of CEO City of Joondalup on the same salary. Whereas, it is alleged Mr Smith was only on a salary package of \$210,000.
- (d) the allegation that whilst he was General Manager for Warringah Council there were 195 complaints made to the NSW Department of Local Government about the management of the Council. The allegation that Warringah was found to be NSW's most complained about Council.
- (e) Determine if all the complaints to the Warringah Council have been resolved and if there are outstanding matters which relate to the conduct or professional ability of Mr Denis Smith.
- (f) The allegation that Warringah Council whilst Mr Smith was the General Manager was "notorious for its lack of transparency, abuse of process, culture of cronyism, lack of accountability and failure to adequately consult".
- (g) The alleged criticism made by Judge Judith Gibson that Mr Denis Smith's conduct over his inquiry into statements made by Ruth Sutton. The Judge is alleged to have concluded that rather than act as an honest broker he has been party to "a political exercise acting in concert with Jones and Moxham". The Judge also said "the explanation that he might have participated in some kind of continuing education course or other non-degree/non-diploma courses does not explain why he claimed in his curriculum vitae that he obtained specific diplomas, certificates and degrees in specific years. This is not a simple mistake but an inability to record accurately his entire university career".
- (h) The allegation that Mr Denis Smith withheld information from Councillors on 17 Dec 2002 which was crucial to their deliberations regarding the matter of the Wanneroo basketball Association. The Hon Cheryl Edwards sent to Mr Smith a FAX at 12.06pm on 17<sup>th</sup> Dec 2002 which requested him to "ensure that the Mayor and all elected members received a copy of the attached letter before tonight's meeting". The letter was not delivered to Councillors until 19 December 2002 after they had passed a motion on the night of 17<sup>th</sup> Dec and this has now resulted in a rescission motion being raised to rectify the matter.
- (i) Investigate the reason why a number of highly qualified senior staff have left the employment of the City of Joondalup since the arrival of Mr Denis Smith.
- (j) Investigate why the ratepayers have been gagged when asking questions about the formal university qualifications of Mr Denis Smith and why he is unable or unwilling to answer the questions to clear his name.
- (k) Investigate if Mr Smith provided certified copies of his qualifications to Recruiters Australia? If not, what did Recruiters Australia do about obtaining copies of the qualifications?
- (l) Investigate the allegation that whilst he was General Manager of Warringah Council the auditors said they were consistently presented with accounts that were "incomplete, unsubstantiated and unbalanced. The Warringah Council was also six months late in submitting its annual report, thereby breaching the Local Government Act.
- (m) The allegation that whilst at Warringah Council Mr Smith had a secrecy clause in the general manager's contract preventing councillors from accessing it. There is also an allegation that a same clause appears in the contract with the City of Joondalup. If this allegation is correct, determine why this clause was included in the Joondalup contract.
- (n) The allegation that Mr Smith could be investigated by the New South Wales Independent Committee Against Corruption for his handling of a development application which involved a serving Councillor.

3. That the Investigator Mr Cousens be paid a flat rate of \$300.00 per day plus all expenses and that he submit a progress report every seven days to all Councillors until the investigation

is complete or until the full Council terminates the investigation.

**In favour of the Motion:** Crs Walker, Carlos.

**Against the Motion:** Mayor Bombak, Crs Mackintosh, Hurst, Kenworthy, Patterson, O'Brien, Barnett, Rowlands, Hollywood, Baker, Kadak, Kimber.

## Motion of Confidence in CEO, Censure of Cr Carlos & Legal Advice – 18 February 2003

MOVED Cr Kimber, SECONDED Cr Mackintosh that:

1. Cr Carlos be and is hereby formally censured for his ongoing and repeated attacks on our CEO, current and former Council staff and the Mayor, and for his ongoing attempts to bring the City of Joondalup into disrepute.

The Motion was Put and TIED (7/7)

There being an equal number of votes, the Mayor exercised his casting vote and declared the Motion **CARRIED**

**In favour of the Motion:** Mayor Bombak, Crs Baker, Hurst, Kenworthy, Kimber, Mackintosh, Rowlands.

**Against the Motion:** Crs Barnett, Carlos, Hollywood, Kadak, O'Brien, Patterson, Walker.

MOVED Cr Kimber, SECONDED Cr Mackintosh that:

2. the Councillors of the City of Joondalup hereby again reaffirm their full confidence in our City's CEO and congratulate him on his many achievements including but not limited to:
  - (a) that the City of Joondalup is one of the lowest taxing local government bodies in Western Australia;
  - (b) for the restructuring of the City's administration resulting in substantial savings to our ratepayers;
  - (c) his thoroughly professional administration of our City.

The Motion was Put and **CARRIED** (13/1)

**In favour of the Motion:** Mayor Bombak, Crs Baker, Barnett, Hollywood, Hurst, Kadak, Kenworthy, Kimber, Mackintosh, O'Brien, Patterson, Rowlands, Walker.

**Against the Motion:** Cr Carlos.

AMENDMENT MOVED Cr Baker, SECONDED Cr Hurst that the following Point 3 be added to the Motion:

"3 the Council AUTHORISES the CEO to seek and obtain legal advice from Blake Dawson Waldron, Solicitors or another recognised legal firm, in relation to the allegations made by Cr Don Carlos in his Notice of Motion submitted to Council on 18 February 2003, and other media articles concerning the CEO published in the West Australian newspaper and the Community News given the significant damage being caused to the image and reputation of the City and its senior officers. That Council places an upper limit of expenditure not exceeding \$5,000."

The Amendment was Put and TIED (7/7)

There being an equal number of votes, the Mayor exercised his casting vote and declared the Amendment **CARRIED**

**In favour of the Amendment:** Mayor Bombak, Crs Baker, Hurst, Kenworthy, Kimber, Mackintosh, Rowlands.

**Against the Amendment:** Crs Barnett, Carlos, Hollywood, Kadak, O'Brien, Patterson, Walker.

The original motion, as amended, was Put and **CARRIED**

### Payment of CEO's Legal Expenses – 29 April 2003

#### **C65-04/03 CONFIDENTIAL – LEGAL EXPENSES – BLAKE DAWSON WALDRON - [95357] [20006]**

MOVED Cr Rowlands, SECONDED Cr Kenworthy that:

1. Council AUTHORISES the payment of an additional amount of \$6,109.32 excluding GST associated with the Chief Executive Officer obtaining legal advice from Blake Dawson Waldron;
2. the expenditure in (1) above be charged to budget item 11.10.11.4201.0001

The Motion was Put and **CARRIED** (12/3)

**In favour of the Motion:** Mayor Bombak, Crs Baker, Barnett, Hollywood, Hurst, Kadak, Kenworthy, Kimber, Mackintosh, Nixon, Patterson and Rowlands

**Against the Motion:** Crs Carlos, O'Brien and Walker

### Motion to Appoint Freehills – 20 May 2003

“MOVED Cr Hollywood SECONDED Cr Walker that:

1. Council APPOINTS Freehills to act as the City's legal advisors in connection with matters relating to the *employment* of Denis Ian Smith as Chief Executive Officer of the City of Joondalup;
2. the expenditure associated with (1) above be charged to account 11.10.11.111.4020.0001;
3. it be noted that account 11.10.11.111.4020.0001 has been fully expended however the over expenditure can be funded from account 11.10.11.111.3320.0001.”

The Motion as Moved by Cr Hollywood and Seconded by Cr Walker was Put and **LOST** (6/8)

**In favour of the Motion:** Mayor Carlos, Crs Caiacob, Hart, Walker, Hollywood and Nixon

**Against the Motion:** Crs Gollant, Kenworthy, O'Brien, Rowlands, Brewer, Baker, Kimber and Prospero.

#### **JSC62-05/03 MATTERS PERTAINING TO THE CHIEF EXECUTIVE OFFICER'S CONTRACT OF EMPLOYMENT AND RELATED ISSUES**

MOVED Cr O'Brien SECONDED Cr Baker:

1. That the Council hereby APPOINTS Freehills Lawyers, as the City's legal representative, to present a detailed report to Council for its further consideration, concerning the following matters:

- (a) The CEO's legal obligations under the terms of his contract of employment and any body of applicable law to provide the Mayor and/or any Councillor when directed or requested to do so, documentary proof of all or any qualifications that the CEO currently holds or held at the date upon which he was employed by the Council as the City's CEO;
- (b) The potential legal liability of the City and the Quantum of any such liability, if any, under the terms of the CEO's contract of employment with the City, and any body of law, should the City purport to terminate the CEO's said contract as a consequence

of the CEO's alleged refusal, failure or neglect to provide the documentary proof as described in paragraph 1(a) hereof;

- (c) The potential legal liability of the City to date, if any, arising out of the City's performance of its obligations under the said contract and any body of law;
- (d) Detailed reasons for the potential legal liability of the City described in 1(a) and 1(c) hereof;
- (e) Detailed advice to Council in response to the matters raised in the letter dated 15 May 2003 addressed to Mayor/Councillors, City of Joondalup, from Blake Dawson Waldron Lawyers their reference AOD:09 1336 5842 re: Mr Denis Smith;

2. That the CEO's legal representative be at liberty to make submissions to the City's aforementioned legal representative in response to each of the terms of reference, during the preparation of the said report;

3. That the expenditure associated with (1) above be charged to account 11.10.11.111.4020.0001 with a limit being placed at Twenty Thousand Dollars (\$20,000.00) with any further expenditure requiring the approval of Council;

4. That it be noted that account 11.10.11.111.4020.0001 has been fully expended however the over expenditure can be funded from account 11.10.11.111.3320.0001;

5. That the CEO continues to carry out his duties to the best of his ability in accordance with the terms of his contract with the City, pending Council's consideration of the said report.

The Motion as Moved by Cr O'Brien and Seconded by Cr Baker was Put and **CARRIED** (12/2)

**In favour of the Motion:** Mayor Carlos, Crs Caiacob, Gollant, Kenworthy, O'Brien, Hart, Rowlands, Nixon, Baker, Brewer, Kimber and Prospero

**Against the Motion:** Crs Hollywood and Walker

## Motion to Replace Freehills with Minter Ellison – 27 May 2003

### **C75-05/03 EMPLOYMENT OF THE CHIEF EXECUTIVE OFFICER OF THE CITY OF JOONDALUP – [75666]**

MOVED Cr Baker, SECONDED Cr Kimber that:

1. the Council hereby APPOINTS Minter Ellison Lawyers, in place of Freehills Lawyers, as the City's legal representative, to present a detailed report to Council for its further consideration, concerning the following matters:

- (a) The CEO's legal obligations under the terms of his contract of employment and any body of applicable law to provide the Mayor and/or any Councillor when directed or requested to do so, documentary proof of all or any qualifications that the CEO currently holds or held at the date upon which he was employed by the Council as the City's CEO;
- (b) The potential legal liability of the City and the Quantum of any such liability, if any, under the terms of the CEO's contract of employment with the City, and any body of law, should the City purport to terminate the CEO's said contract as a consequence of the CEO's alleged refusal, failure or neglect to provide the documentary proof as described in paragraph 1(a) hereof;
- (c) The potential legal liability of the City to date, if any, arising out of the City's performance of its obligations under the said contract and any body of law;
- (d) Detailed reasons for the potential legal liability of the City described in 1(a) and 1(c) hereof;
- (e) Detailed advice to Council in response to the matters raised in the letter dated 15 May 2003 addressed to Mayor/Councillors, City of Joondalup, from Blake Dawson Waldron Lawyers their reference AOD:09 1336 5842 re: Mr Denis Smith;

2. the CEO's legal representative be at liberty to make submissions to the City's aforementioned legal representative in response to each of the terms of reference, during the preparation of the said report;
  3. the expenditure associated with (1) above be charged to account 11.10.11.111.4020.0001 with a limit being placed at Twenty Thousand Dollars (\$20,000.00) with any further expenditure requiring the approval of Council;
  4. it be noted that account 11.10.11.111.4020.0001 has been fully expended however the over expenditure can be funded from account 11.10.11.111.3320.0001;
  5. the CEO continues to carry out his duties to the best of his ability in accordance with the terms of his contract with the City, pending Council's consideration of the said report.
- The Motion was Put and **CARRIED UNANIMOUSLY** (14/0)

**In favour of the Motion:** Mayor Carlos, Crs Caiacob, Gallant, Kenworthy, O'Brien, Hart, Rowlands, Walker, Hollywood, Nixon, Baker, Brewer, Kimber and Prospero.

### Vote of Confidence in Denis Smith Postponed – 4 June

**JSC65-06/04 CONTRACT OF EMPLOYMENT FOR THE CHIEF EXECUTIVE OFFICER AND RELATED ISSUES/NOTICE OF MOTION – CR G KENWORTHY – VOTE OF CONFIDENCE IN MR DENIS SMITH – [75666]**

MOVED Cr Prospero SECONDED Cr Baker that the matters detailed within the purpose of tonight's agenda being:

1. Contract of employment for the Chief Executive Officer and related issues;
2. That the Councillors of the City of Joondalup hereby yet again declare their support for the City's CEO, Denis Smith and congratulate and thank him for his professional administration of the City be DEFERRED pending the outcome of the report being prepared by Minter Ellison lawyers, as per the resolution of the Council at its meeting held on 27 May 2003.

The Motion was Put and **CARRIED UNANIMOUSLY** (14/0)

**In favour of the Motion:** Mayor Carlos, Crs Prospero, Baker, Brewer, Nixon, Hollywood, Walker, Rowlands, Hart, O'Brien, Kenworthy, Gollant, Mackintosh and Caiacob.

### Minter Ellison Verbal Advice – 17 June 2003

**CJ139 - 06/03 EMPLOYMENT OF THE CHIEF EXECUTIVE OFFICER OF THE CITY OF JOONDALUP – [70544]**

MOVED Cr Kenworthy SECONDED Cr Kimber that Council:

1. NOTES the interim verbal report presented by Minter Ellison and accepts this verbal report as the detailed report referenced to in the Council Resolution of 27 May 2003;
2. REQUESTS Minter Ellison to provide a written summary of its interim report, including its recommendations for the proposed adjourned meeting of Council;
3. AGREES to the expenditure of a further \$15,000 from Account No 11.10.11.111.4020.0001 to finalise the matter.

The Motion was Put and **CARRIED UNANIMOUSLY** (15/0)

**In favour of the Motion:** Mayor Carlos, Crs Baker, Brewer, Caiacob, Gollant, Hart, Hollywood, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Prospero, Rowlands, Walker

MOVED Cr Baker, SECONDED Cr Rowlands that in order to better secure the confidentiality of the legal advice provided to the City this evening, the tapes relating to this advice be secured in safe custody by Minter Ellison, Lawyers.

The Motion was Put and **CARRIED UNANIMOUSLY (15/0)**

**In favour of the Motion:** Mayor Carlos, Crs Baker, Brewer, Caiacob, Gollant, Hart, Hollywood, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Prospero, Rowlands, Walker

### Payment of CEO's Legal Expenses – 17 June 2003

**C95-06/03 CEO REQUEST – REIMBURSEMENT OF LEGAL COSTS - [95375]**

MOVED Cr Baker SECONDED Cr Kimber that Council AGREES to the request submitted by the CEO for payment of legal expenses to Blake Dawson Waldron amounting to \$9,933.94 excluding GST, the funds to be expended from the appropriate account.

The Motion was Put and **CARRIED**

**In favour of the Motion:** Crs Baker, Brewer, Caiacob, Gollant, Hart, Hollywood, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Prospero, Rowlands and Walker **Against the Motion:** Mayor Carlos

### Minter Ellison Written Advice – 24 June 2003

**C98-06/03 EMPLOYMENT OF THE CHIEF EXECUTIVE OFFICER OF THE CITY OF JOONDALUP – [70544]**

MOVED Cr Brewer SECONDED Cr Kimber that Council:

1. NOTES AND ACCEPTS the advice and recommendations of Minter Ellison contained in its report dated 24 June 2003 in response to the resolutions of Council on 27 May and 17 June 2003;
2. NOTES AND ACCEPTS, in particular, the advice from Minter Ellison in relation to:
  - (a) the nature and effect of legal professional privilege, its relevant for the City in this context, and the consequent need for confidentiality;
  - (b) the nature of the claims made concerning the selection and appointment of the Chief Executive Officer ("CEO");
  - (c) the extent to which these matters were relied on by the Council in the selection and appointment process;
  - (d) the limitations of any non-judicial inquiry or investigation and the fact that only a Court, with powers to compel the production of evidence and to test the credibility of evidence by taking evidence on oath or affirmation, and through cross-examination, would be able to make definitive findings of fact about these matters;
  - (e) the potential legal significance and effect of these matters on the interests of the City, having regard to precedent;
  - (f) the costs, financial and otherwise, to the City of pursuing or defending legal proceedings in respect of these matters, the length of time that legal proceedings may take, and the alternative priorities for the City's use of its resources for the good governance of the City; and

- (g) the conclusion that the Council would be acting lawfully and properly in deciding not to question or pursue any further, issues relating to the selection and appointment of the CEO, including his qualifications;
3. DETERMINES that it is in the interests of the City, including the good governance of the City, that:
- (a) issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;
  - (b) the Mayor and individual Councillors should make no further public statements in relation to these issues;
  - (c) the Mayor and the CEO each act in a way that allows them to carry out, and facilitates them in carrying out, individually and jointly, their functions in the best interests of the City;
  - (d) a copy of these resolutions be provided to the Department of Local Government and Regional Development; and
  - (e) Minter Ellison with City officers, provide an oral briefing to senior officers of the Department of Local Government and Regional Development – to the extent that this can be done without affecting the City’s legal professional privilege;
4. REITERATES its previously expressed strong support for and full confidence in Mr Denis Smith as the City’s CEO (see resolutions of 17 December 2002 and 18 February 2003);
5. AGREES that, in the interests of the City and to ensure that the City’s legal professional privilege that applies to it is retained, Minter Ellison’s report of 24 June 2003 is to remain confidential and must not be disclosed except in the form of the confidential oral briefing to the Department of Local Government and Regional Development referred to in paragraph 3(e).

The Motion was Put and **CARRIED** (12/3)

**In favour of the Motion:** Crs Mackintosh, Caiacob, Gollant, Kenworthy, O’Brien, Rowlands, Walker, Nixon, Brewer, Baker, Kimber and Prospero **Against the Motion:** Mayor Carlos, Crs Hart and Hollywood.

MOVED Cr Baker SECONDED Cr Gollant that:

1. all copies of the written legal advice provided by Minter Ellison, Lawyers, concerning the CEO’s contract of employment and related issues be returned at the conclusion of tonight’s discussion regarding this item and any copies of the legal advice not so returned to Minter Ellison, Lawyers, be noted;
2. in order to better secure the confidentiality of the legal advice provided to the City this evening, the tapes relating to this advice be secured in safe custody by Minter Ellison, Lawyers.

The Motion was Put and **CARRIED** (11/3)

**In favour of the Motion:** Crs Caiacob, Mackintosh, Kenworthy, Gollant, Rowlands, Walker, Hollywood, Kimber, Brewer, Baker, Prospero **Against the Motion:** Mayor Carlos, Crs O’Brien and Hart

## Payment of CEO’s Legal Expenses – 24 June 2003

### CJ183-07/03 CONFIDENTIAL – REIMBURSEMENT OF LEGAL EXPENSES – CHIEF EXECUTIVE OFFICER

The Original Motion, as amended, and as Moved Cr Baker and Seconded Cr Kimber being:  
That Council AUTHORISES:

1. payment of the account submitted by the CEO for legal expenses provided by Blake

Dawson Waldron amounting to \$11,408.06 excluding GST;  
2. additional advice being sought in relation to the FBT liability, if any, associated with the legal expenses associated with Blake Dawson Waldron and expenditure up to \$5,000 to obtain this advice be approved, such expenditure to be charged to CEO's Legal Expenses account.  
Vas Put and **CARRIED** (8/3)

**In favour of the Motion:** Crs Baker, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero, Rowlands.  
**Against the Motion:** Crs Caiacob, Hart, Walker.

### Cr Baker Motion re Mayor Carlos Chairing of Meeting – 29 July 2003

Cr Baker gave notice of his intention to move a motion at the meeting on 29 July 2003 which read:

“That in view of the appalling manner in which Mayor Carlos chaired the ordinary council meeting on Tuesday 8 July 2003, the Mayor be stood down from chairing all future ordinary council meetings until such time as he has had the benefit of tuition in respect of his role as a chairperson by either an Officer of the Director General of Local Government or a representative from the Local Government Association.”

A report was provided to Council with an officer's comment that according to the *Local Government Act* in order for the Mayor to no longer preside at Council meetings he would have to be unavailable, unwilling or unable to do so and if so then the Deputy Mayor should preside. It was also said that the Council may not have authority to make such a decision. This item was deferred until the next meeting of Council on 19 August 2003.<sup>1</sup>

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<sup>1</sup> page 1796.040 exhibit 0111DSC74

### Approval for CEO to Attend Logan Conference

#### **CJ181-07/03 CONFIDENTIAL – CHIEF EXECUTIVE OFFICER'S ATTENDANCE AT LOCAL GOVERNMENT CHIEF OFFICER'S GROUP MEETING AND REQUEST FOR ANNUAL LEAVE**

MOVED Cr Baker, SECONDED Cr Kenworthy that Council:

1. APPROVES the attendance of the Chief Executive Officer at the Local Government Chief Officers' Group conference in Logan, Queensland, from 6-8 August 2003;
2. APPROVES the future attendance of the CEO at Local Government CEO's conferences during the term of his contract;
3. APPROVES the expenditure to be incurred with this attendance to be charged to account no. 1.1110.3302.0001.9999;
4. NOTES that the Chief Executive Officer will be taking an additional three days leave upon finalisation of the above conference;
5. APPROVES the appointment of the Director Planning & Community Development as Acting CEO during the period 11-13 August 2003.

MOVED Cr Rowlands that the Motion be Now Put.

Mayor Carlos ruled that the Motion **NOT BE ACCEPTED**

#### **PERSONAL EXPLANATION – CR PROSPERO**

In accordance with Clause 4.5 of the City's Standing Orders Local Law, Cr Prospero requested to make a personal explanation.

Mayor Carlos ruled that this request was **OUT OF ORDER**.

MOVED Cr Prospero SECONDED Cr Baker that the Council DISSENTS with the ruling of the Mayor.

Discussion ensued.

This Motion was not acknowledged by Mayor Carlos.

Mayor Carlos **DECLARED THE MEETING CLOSED**, the time being 0041 hrs.

The Chief Executive Officer advised that Mayor Carlos did not have the ability to close the Meeting.

The Manager Marketing Communications and Council Support provided information on:

- Clauses 4.7 and 5.7 of the City's Standing Orders Local Law – Serious Disorder and Closure of Meeting and;
- Sections 5.34 and 5.35 of the Local Government Act 1995.

#### **APPOINTMENT OF ACTING CHAIRMAN**

As a result of the Mayor and Deputy Mayor declining to preside at the meeting, the Chief Executive Officer advised that, in accordance with the Local Government Act 1995, elected members were now required to elect one of themselves to preside at the Meeting.

Cr Rowlands nominated Cr Baker for the position of Acting Chairman. Cr Baker declined the nomination.

Cr Baker nominated Cr O'Brien for the position of Acting Chairman. Cr O'Brien accepted the nomination.

MOVED Cr Baker SECONDED Cr Mackintosh that Council APPOINTS Cr O'Brien as Acting Chairman.

*Mayor Carlos and Cr Hollywood left the Chamber at this point, the time being 0050 hrs.*

The Motion was Put and **CARRIED** (8/3)

Discussion resumed.

MOVED Cr Baker, SECONDED Cr Gollant that the Motion BE NOW PUT.

The Procedural Motion was Put and **CARRIED** (10/1)

**In favour of the Procedural Motion:** Crs Baker, Caiacob, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero, Rowlands, Walker. **Against the Procedural Motion:** Cr Hart. The Motion as Moved by Cr Baker and Seconded by Cr Kenworthy was Put and **CARRIED** (9/2)  
**In favour of the Motion:** Crs Baker, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero, Rowlands, Walker. **Against the Motion:** Crs Caiacob, Hart.

### Cr Walker Rescission Motion re Payment of CEO's Legal Expenses – 19 August 2003

**C175-08/03 CONFIDENTIAL - NOTICE OF MOTION – CR A WALKER – REIMBURSEMENT OF LEGAL EXPENSES – CHIEF EXECUTIVE OFFICER**

**Call for Support of one-third of members of the Council**

Mayor Carlos called for the support of five elected members in relation to this Motion. Support for this motion was indicated by a show of hands.

MOVED Cr Walker, SECONDED Cr Hart that Council, BY AN ABSOLUTE MAJORITY, RESCINDS its decision of 29 July 2003 – Item CJ183-07/03 Reimbursement of Legal Expenses – Chief Executive Officer, viz:

“That Council AUTHORISES:

1. payment of the account submitted by the CEO for legal expenses provided by Blake Dawson Waldron amounting to \$11,408.06 excluding GST;
2. additional advice being sought in relation to the FBT liability, if any, associated with the legal expenses associated with Blake Dawson Waldron and expenditure up to \$5,000 to obtain this advice be approved, such expenditure be charged to CEO's Legal Expenses account.”

And REPLACES it with:

“That Council:

1. DOES NOT reimburse the CEO for payment of legal expenses to Blake Dawson Waldron amounting to \$11,408.06;
2. AUTHORISES the additional advice being sought in relation to the FBT liability, if any, associated with the legal expenses associated with Blake Dawson Waldron and expenditure up to \$5,000 to obtain this advice be approved, such expenditure be charged to CEO's Legal Expenses account.”

The motion as moved by Cr Walker, seconded by Cr Hart was Put and **LOST** (5/10)

**In favour of the Motion:** Mayor Carlos, Crs Caiacob, Hart, Hollywood and Walker. **Against the Motion:** Crs Baker, Brewer, Gollant, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Prospero and Rowlands.

### Mayor Carlos' Media Comments – 9 September 2003

**C186-09/03 EMPLOYMENT OF THE CHIEF EXECUTIVE OFFICER OF THE CITY OF JOONDALUP**

MOVED Cr Brewer, SECONDED Cr Baker that Council:

1. NOTES that at its meeting on 24 June 2003, the Council, by majority of 12-3, resolved (in part) that it:

'DETERMINES that it is in the interests of the City, including the good governance of the City, that:

(a) issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;

(b) the Mayor and individual Councillors should make no further public statements in relation to these issues;

REITERATES its previously expressed strong support for and full confidence in Mr Denis Smith as the City's CEO (see resolutions of 17 December 2002 and 18 February 2003).

2. NOTES that on various occasions since then, contrary to the formal resolution of the Council:

(a) the Mayor has made public statements on issues relating to the selection and appointment of the CEO, including his academic qualifications; and

(a) the Mayor's public statement, in relation to these issues, promote his own personal views which are directly and fundamentally opposed to the lawfully and properly expressed determination of the Council, which is the City's decision making body.

3. NOTES AND ACCEPTS the City's legal advice that the Mayor, by making these public statements, has exceeded his statutory powers and is in breach of his duties of office that he undertook to fulfil in his formal declaration upon being elected to the position of Mayor.

4. NOTES AND ACCEPTS, on the basis of the City's legal advice, that the Mayor's repeated failures to act in accordance with the Council decision of 24 June 2003:

(a) are deliberate refusals to accept the lawful and proper exercise of the Council's decision-making powers;

(b) undermine the lawful authority of the City's duly elected Council;

(c) have adversely affected the City's reputation;

(d) have adversely affected, and continue to adversely affect, the functioning of the City; and

(e) have exposed and, if repeated, will continue to expose the City to a risk of legal liability for damages to the extent that the Mayor's statements and actions can or might be attributed to the City.

5. NOTES AND ACCEPTS the City's legal advice that it is imperative, in the interests of the City, that the Council takes prompt and decisive action to distance itself from the Mayor's statements and actions that are inconsistent with the Council resolution of 24 June 2003.

6. CENSURES the Mayor for his public statements that are in breach of the Council's resolution of 24 June 2003.

7. REAFFIRMS the terms of its resolution of 24 June 2003.

8. DIRECTS the Mayor and individual Councillors to comply with their statutory obligations and their duties of office and, therefore, to comply with the terms of this resolution and the Council's resolution of 24 June 2003.

9. NOTES that any future public statements or actions of the Mayor or a Councillor on this issue would be unauthorised, contrary to the interests of the City, and in breach of the statutory duties and duties of office of the Mayor or the Councillor;

10. REQUESTS Minter Ellison to prepare a public statement outlining the reasons for Council's decision.

The Motion as Moved by Cr Brewer, Seconded by Cr Baker was Put and **CARRIED** (9/5)

**In favour of the Motion:** Crs Baker, Brewer, Gollant, Kenworthy, Mackintosh, Nixon, O'Brien, Prospero, Rowlands. **Against the Motion:** Mayor Carlos, Crs Caiacob, Hart, Hollywood, Walker.

## Minter Ellison Representation at the Standing Committee on Public Administration & Finance – 30 September 2003

**C203-09/03 STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE – [24549 00561 58527 70544]**

MOVED Cr Baker, SECONDED Cr Mackintosh that Council:

1. APPOINTS Minter Ellison to represent the City and any current or former elected members or employees other than the CEO, who require representation, appearing before the Standing Committee on Public Administration and Finance Inquiry into the Local Government Act 1995;
  2. AUTHORISES an amount of up to \$5,000 for the CEO to engage Blake Dawson Waldron to represent him in connection to the Standing Committee on Public Administration and Finance Inquiry into the Local Government Act 1995.
- The Motion was Put and **CARRIED UNANIMOUSLY** (12/0)

**In favour of the Motion:** Mayor Carlos, Crs Baker, Brewer, Caiacob, Hart, Hollywood, Kenworthy, Mackintosh, Nixon, Prospero, Rowlands, Walker.

### Payment of CEO's Legal Expenses – 30 September 2003

#### **C204-09/03 CEO REQUEST - PAYMENT OF LEGAL COSTS – [95375]**

MOVED Cr Baker, SECONDED Cr Mackintosh that Council AUTHORISES payment in response to the request submitted by the Chief Executive Officer for legal expenses to Blake Dawson Waldron amounting to \$12,722.66 excluding GST.  
The Motion was Put and **CARRIED** (8/5)

**In favour of the Motion:** Crs Baker, Brewer, Kenworthy, Mackintosh, Nixon, O'Brien, Prospero, Rowlands.

**Against the Motion:** Mayor Carlos, Crs Caiacob, Hart, Hollywood, Walker.

### Censure of Mayor Carlos

#### **CJ247 - 10/03 CONFIDENTIAL – LEGAL ADVICE ON PUBLIC COMMENTS RELATING TO THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE AND CHIEF EXECUTIVE OFFICER EMPLOYMENT RELATED MATTERS**

MOVED Cr Kimber, SECONDED Cr Baker that the Council:

1. NOTES that at its meeting on 9 September 2003, the Council reaffirmed the terms of its resolution of 24 June 2003 which stated, in part, that it:

'DETERMINES that it is in the interests of the City, including the good governance of the City, that:

(a) issues relating to the selection and appointment of the CEO, including his academic qualifications, should not be questioned or pursued any further;

(b) the Mayor and individual Councillors should make no further public statements in relation to these issues;

REITERATES its previously expressed strong support for and full confidence in Mr Denis Smith as the City's CEO (see resolutions of 17 December 2002 and 18 February 2003).'

2. NOTES that, also at its meeting on 9 September 2003, the Council formally:

(a) directed the Mayor and individual Councillors to comply with their statutory obligations and the duties of their offices and, therefore, to comply with the terms of the Council's resolutions of 24 June 2003 and 9 September 2003; and

(b) noted that any future public statements or actions of the Mayor or a Councillor on this issue would be unauthorised, contrary to the interests of the City, and in breach of the statutory duties and the duties of office of the Mayor or the Councillor.

3. NOTES that, despite these clear directions by the Council, on behalf of the City:

(a) the Mayor has continued to make public statements on issues relating to the selection and

appointment of the CEO, including his academic qualifications; and

(b) the Mayor's public statements, in relation to these issues, promote his own personal views which are directly and fundamentally opposed to the lawfully and properly expressed determination of the Council, which is the City's decision making body.

4. NOTES AND ACCEPTS the City's legal advice that the Mayor, by making these public statements, has exceeded his statutory powers and is in breach of his duties of office that he undertook to fulfil in his formal declaration on being elected to the position of Mayor.

5. NOTES AND ACCEPTS, on the basis of the City's legal advice, that the Mayor's repeated failures to act in accordance with the Council's resolutions of 24 June 2003 and 9 September 2003:

(a) are deliberate refusals to accept the lawful and proper exercise of the Council's decision-making powers;

(b) undermine the lawful authority of the City's duly elected Council;

(c) have adversely affected the City's reputation;

(d) have adversely affected the functioning of the City; and

(e) have exposed and, if repeated, will continue to expose the City to a risk of legal liability for damages to the extent that the Mayor's statements and actions can or might be attributed to the City.

6. NOTES AND ACCEPTS the City's legal advice that it is imperative, in the interests of the City and its ratepayers, that the Council takes prompt and decisive action to distance itself from the Mayor's statements and actions that are inconsistent with the Council resolutions of 24 June 2003 and 9 September 2003.

7. CENSURES the Mayor for his public statements that are in breach of the Council's resolutions of 24 June 2003 and 9 September 2003.

8. REAFFIRMS the terms of its resolution of 9 September 2003.

9. DIRECTS the Mayor and individual Councillors to comply with their statutory obligations and their duties of office and, therefore, to comply with the terms of this resolution and the Council's resolutions of 24 June 2003 and 9 September 2003.

10. APPOINTS and AUTHORISES Cr O'Brien:

(a) to speak on behalf of the City on all matters relating to the employment of the CEO; and

(b) to ensure that, on any future occasion on which Mayor Carlos, or a Councillor, makes a public statement relating to the employment of the CEO, the media is to be informed:

(ii) of the text or substance of the relevant Council resolutions; and

(iii) that the offending statement is made without authority, contrary to the interests of the City, and in breach of the statutory duties and the duties of office of the Mayor or the Councillor concerned.

11. APPOINTS AND AUTHORISES Cr O'Brien to constitute a delegation to the Premier and the Minister for Local Government and Regional Development to explain the City's position on these matters.

AUTHORISES City officers to forward to the Standing Committee on Public Administration and Finance a copy of the transcripts of the Mayor's media comments made on 7 and 8 October 2003, for the Committee's information and to enable it to take whatever action it considers to be necessary.

The Motion Moved by Cr Kimber and Seconded by Cr Baker was Put and **CARRIED** (9/6)

**In favour of the Motion:** Crs Baker, Brewer, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero, Rowlands.

**Against the Motion:** Mayor Carlos, Crs Caiacob, Hart, Hollywood, Nixon, Walker.

### Payment of CEO's Legal Expenses – 21 October 2003

**C221-10/03 CONFIDENTIAL - STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE - LEGAL EXPENSES**

MOVED Cr Baker, SECONDED Cr Kimber that Council APPROVES the request submitted by the CEO, seeking an additional amount of \$8,404.12 excluding GST for legal expenses associated with his attendance at the Standing Committee on Public Administration and Finance Inquiry, particularly in circumstances where Councillors have had the benefit of legal representation, including the Mayor.

The Motion Moved by Cr Baker and Seconded by Cr Kimber was Put and **CARRIED** (9/5)

**In favour of the Motion:** Crs Baker, Brewer, Gollant, Kenworthy, Kimber, Mackintosh, O'Brien, Prospero, Rowlands.

**Against the Motion:** Mayor Carlos, Crs Caiacob, Hart, Hollywood, Walker.

### Rescission Motion re CEO's Legal Expenses – 21 October 2003

At midnight on 21 October 2003 a rescission motion was lodged by councillors Hollywood, Walker, Hart, Caiacob and Mayor Carlos. The rescission motion related to the 21 October decision to pay \$8,404.12 for Mr Smith's legal expenses at the Standing Committee on Public Administration and Finance.<sup>2</sup>

### Working Group on CEO's Employment – 11 November 2003

**C236-11/03 CONFIDENTIAL – EMPLOYMENT CONTRACT OF THE CHIEF EXECUTIVE OFFICER AND RELATED MATTERS**

The Motion, as amended with the approval of Cr Kimber as Mover and Cr Baker as Seconder, Being: That Council:

1. NOTES the oral report provided by Neil Douglas of Minter Ellison dealing with his communications with Blake Dawson Waldron, solicitors for Denis Smith;
2. EXPRESSES its concern and regret that:
  - (a) the responses by the Council and individual elected members to issues associated with the employment of the CEO have had, and are continuing to have, serious consequences for the City; and
  - (b) these consequences have adversely affected, and continue to adversely affect - to the detriment of the City, its ratepayers and residents:
    - (i) the ability of staff and elected members to perform their functions; and
    - (ii) the reputation and functioning of the City;
    - (iii) the City's legal liability
3. ESTABLISHES a Working Group:
  - (a) to consider and assess these existing and potential consequences; and
  - (b) to report to the Council by the second Council meeting in December 2003, on options to avoid, or limit the impact of, these consequences.

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<sup>2</sup> page 2112.094/01 exhibit 1503KBR37

4. DETERMINES that the Working Group is to comprise of Crs Walker Hollywood, Baker, Nixon, Caiacob, Kimber and Brewer and is to be assisted by Mark Loader, Manager Human Resources;
5. AUTHORISES Mark Loader, Manager Human Resources to obtain legal advice, including if he considers it necessary, the advice of Senior Counsel, in relation to the City's legal liability.
6. RECOGNISES AND RESPECTS the confidentiality that must be maintained, in the interests of the City and the CEO, throughout this process.

Was Put and **CARRIED** (14/0)

**In favour of the Motion:** Mayor Carlos, Crs Baker, Brewer, Caiacob, Gollant, Hart, Hollywood, Kenworthy, Kimber, Mackintosh, Nixon, O'Brien, Rowlands, Walker.

### Vote on Suspension of Council – 2 December 2003

#### **C252-12/03 REQUEST TO MINISTER TO EXERCISE POWERS UNDER THE LOCAL GOVERNMENT ACT 1995**

[MOVED Cr Baker, SECONDED Cr Nixon that the Council:]

The Original Motion, as amended, being:

That Council:

1. NOTES that the Minister has informed the Council that unless it 'has achieved a satisfactory resolution of the underlying issues at the City' by 4 December 2003, the Minister 'will use the powers available to [him] under the Local Government Act 1995';
2. NOTES AND ACCEPTS the City's legal advice from one of this State's leading Local Government Lawyers, Mr Neil Douglas of Minter Ellison, lawyers, and now confirmed by advice from independent Senior Counsel, Mr Kenneth Pettit SC, the SC appointed by the State Government to assist the Royal Commissioner in the WA Police Royal Commission:
  - (a) there are no grounds on which the City can lawfully terminate the CEO's employment unilaterally; and
  - (b) any forced termination of the CEO's employment is likely to require a significant payment, by the City, to the CEO - although this payment may be recoverable by the City from the Mayor in his personal capacity;
3. DETERMINES that it is not in the City's interests for the Council to terminate, or agree to the termination of, the employment of the CEO because, in view of the Mayor's conduct, the departure of the CEO is unlikely to result in the return of good governance to the City;
4. DETERMINES that the underlying cause of the City's disharmony is the Mayor's repeated and consistent failures to act in accordance with his responsibilities under the Local Government Act 1995, the City's Standing Orders, the City's Code of Conduct and the Mayor's declaration of office;
5. REAFFIRMS that the Mayor's repeated and consistent failures to act in accordance with his obligations:
  - (a) are deliberate refusals to accept the lawful and proper exercise of the Council's decision making powers;
  - (b) undermine the lawful authority of the City's duly elected Council;
  - (c) have adversely affected the City's reputation;
  - (d) have adversely affected the good governance and the functioning of the City;
  - (e) have exposed the City to a risk of legal liability for damages to the extent that the Mayor's actions might be attributed to the City; and
  - (f) have resulted in, and are continuing to result in, great harm and cost to the City and its ratepayers;
6. DETERMINES that, given the harm that the Mayor is causing to the City, the legal incapacity of the City to prevent the Mayor so acting, and the Council's wish to avoid

further harm being inflicted on the City, the Council requests the Minister to exercise his power to suspend the Council in order to enable:

- (a) the public to be properly informed; and
- (b) good governance to be restored to the City.

7. DELEGATES Councillors O'Brien, Gollant, Nixon, Prospero, Mackintosh and Brewer seek a meeting with the Minister for Local Government to inform him of Council's decision;

8. AUTHORISES Minter Ellison to respond to the correspondence to Blake Dawson Waldron on behalf of the CEO relating to the CEO's employment with the City.

was Put and **CARRIED** (8/4)

**In favour of the Motion:** Crs Baker, Brewer, Gollant, Kimber, Mackintosh, Nixon, O'Brien, Prospero.

**Against the Motion:** Mayor Carlos, Crs Caiacob, Hollywood, Walker.

### Cr Hart Censure – 2 December 2003

**C264-12/03 NOTICE OF MOTION NO 7 – CR J GOLLANT – CODE OF CONDUCT – CENSURE**

MOVED Cr Gollant, SECONDED Cr Kimber that:

- 1. in view of Cr Hart's behaviour in the City's Administration Building on 6 November 2003 being a serious breach of our Councillors' Code of Conduct, and the previous resolutions of Council concerning the CEO's contract of employment:
  - (a) Cr Hart be hereby formally censured by Council;
  - (b) Cr Hart be hereby requested to apologise in writing to our City's CEO, his staff and her fellow Councillors, within seven (7) days of today's date;
  - (c) Cr Hart have all her Councillors' Dining Room privileges revoked for six (6) months from today's date, in the event that she does not comply with paragraph (b);
  - (d) Cr Hart be hereby requested to repeat her Councillor Induction Program and WALGA Training, in particular, insofar as it relates to the roles and functions of a Councillor, the CEO and Council's administration;
- 2. Council requests that the CEO give consideration to Cr Hart being excluded from entering the City's Administration Building (save for areas open to the public) without the express prior written consent of the CEO;
- 3. Council requests that a full investigation be carried out to determine whether criminal charges can be laid pertaining to the breach of security and misuse of Council property, and further selects lawyers Minter Ellison for this purpose;
- 4. Council hereby requests that the Minister for Local Government and Regional Development, consider pursuant to Section 9.13(A) of the Local Government Act 1995, whether Cr Hart's actions constitute contravention of the Act, specifically Sections 5.103. (1), 5.93 and 8.35(2) and if so whether he intends to use his powers under the Act to give notice to Cr Hart to further cease such behaviour and/or pursuant to Section 9.14(a) issue a fine of \$5000.

The Motion Moved Cr Gollant, Seconded Cr Kimber was Put and **CARRIED** (8/4)

**In favour of the Motion:** Crs Baker, Brewer, Gollant, Kimber, Mackintosh, Nixon, O'Brien and Prospero

**Against the Motion:** Mayor Carlos, Crs Caiacob, Walker and Hollywood

## APPENDIX 3

### Staff List

#### Permanent Inquiry Staff

NAME	TITLE
John Staude	Counsel Assisting
Brendan Peyton	Executive Officer
David Morris	Senior Investigations Officer
Samantha Allan	Graduate Law Clerk
Geoff Corlett	Document Control Officer (Resigned)
Anne Webb	Administration Officer/Financial Analysis

#### Short Term Contract Staff

NAME	TITLE
Gail Prgomet	Document Control Officer
Terry Dobson	Private Investigator
Linda Temperton	Document Control Officer
Karen Szuprytowski	Administration Assistant
Clive Spiring	Private Investigator
Ron Back	Auditor/Accountant
Julie Cooper	Administration Assistant