

**MURRAY SHIRE COUNCIL
PUBLIC INQUIRY**

REPORT

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EXECUTIVE SUMMARY

The terms of reference for this Inquiry generally related to whether the Murray Shire Councillors and the GM could continue to work together to ensure that the Council was able to effectively operate and fulfil its functions and responsibilities as a council.

The Inquiry was convened in January 2016 because of the serious division between the majority and minority councillors and also between the minority councillors and the GM who had been appointed by the Council in April 2014.

Public hearings took place in April 2016.

On 12 May 2016 Murray Shire Council and Wakool Shire Council were dissolved and the areas of these two councils were merged to form the new Council, Murray River Council.

The councillors from each of the former councils were no longer councillors and an administrator was appointed for the new Council.

In these circumstances there was no utility in proceeding to analyse the evidence and report on the first three terms of reference other than to comment that there was clearly a deep division between the majority and minority councillors and between the minority councillors and the GM and that it was unlikely that this situation could have or would have improved.

However, arising from the factual circumstances considered in this Inquiry, there are three areas of council administration worthy of comment as follows:

- a) complaints by a general manager of bullying and harassment by individual councillors towards the general manager,
- b) operational issues of the Model Code and Procedures, and
- c) the extent of confidentiality about a general manager's contract of employment.

There are recommendations about these matters which, in summary, suggest that there be amendments to the Model Code and Procedures and an amendment to the Guidelines.

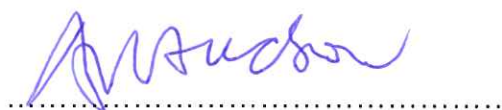
The circumstances of the Inquiry involved for the first time complaints and issues raised by a general manager about allegations of bullying and harassment by individual councillors towards a general manager. While this particular issue is unlikely to be a regular occurrence the recommendation is that the Model Code and Procedures be amended to specifically address this situation including the early involvement of OLG given the pivotal role of the general manager in a council.

Other recommendations made in the report about changes to the Procedures are:

- a) provision for an initial screening or review process undertaken by the general manager or complaints coordinator to ensure that only complaints that meet the criteria of the definition of code of conduct complaint are referred to reviewers,
- b) there be a limited review process undertaken by the general manager or complaints coordinator to ensure that recommendations in a flawed report are not referred to the council or implemented,
- c) councils be given some discretion not to impose sanctions where a reviewer's report is flawed, and
- d) the OLG have the power to consider more than procedural matters in a review process.

The discussion about the investigation of certain complaints in the report leads to a suggestion that these examples be used for the purposes of training and education of complaints coordinators and conduct reviewers.

Finally, a recommendation is made that the Guidelines be modified to provide guidance on changes to a general manager's contract being properly negotiated and agreed to by the council and that any changes be made known to all councillors.



Anthony Hudson

10 November 2016

1 INTRODUCTION

This is my report as Commissioner concerning the Inquiry held under s438U of the LG Act into the Council and is presented to the Minister (abbreviations used in this report are set out in the dictionary).

1.1 Terms of Reference

The terms of reference authorised for the Inquiry are:

"The inquiry will have a particular regard to:

- 1. Whether the elected representatives and staff have, since the appointment of the current General Manager, complied with applicable laws, codes, administrative procedures and policies and have fulfilled its and their duties, powers and functions particularly in relation to the relationships between councillors, the General Manager and senior and other staff of Council.*
- 2. Whether the Council has, since the appointment of the current General Manager, complied with its work, health and safety obligations as the General Manager's employer.*
- 3. Whether the elected representatives have been and will continue to be in a position to direct and control the affairs of Council in accordance with the Local Government Act 1993 and other relevant Acts, so that Council may fulfil its charter, the provisions of the Local Government Act 1993 and otherwise fulfil its statutory functions and obligations;*
- 4. Any other matter that warrants mention, particularly those that may impact on the effective administration of Council's functions and responsibilities or the community's confidence in the Council being able to do so*

The Commissioner may make such recommendations as the Commissioner sees fit having regard to the outcomes of the Inquiry.

1.2 Assistance to the Commissioner

I authorised Mr Angus Broad and Ms Nikole Scholes to assist in the conduct of the Inquiry under the provisions of s12(2) of the *Royal Commissions Act 1923*.

1.3 Merger of Murray Shire Council with Wakool Shire Council

On 12 May 2016 Murray Shire Council and Wakool Shire Council were dissolved and the areas of these two councils were merged to form the new Council, Murray River Council.

The councillors from each of the former councils were no longer councillors from 12 May 2016 and David Shaw was appointed as the administrator of the new Council.

Ms Margo Stork was appointed as the interim general manager of the new Council. There will be nine councillors in the new Council and the first election will be held on 9 September 2017.

Clause 7(3) of the proclamation creating the new Council provided that this public inquiry may be continued and completed as if Murray Shire Council had not ceased to exist.

In these circumstances it is not necessary for me to consider recommending that civic offices be declared vacant or that a performance improvement order be issued in respect of a former council.

The first three terms of reference of this Inquiry are directly concerned with the duties, powers, functions and obligations of the Councillors of the Council and the operation of the Council as a statutory corporation.

In the circumstances of the Council being dissolved (which means the Councillors are no longer councillors of any council) it is unnecessary and there is no utility to proceed to analyse the evidence and report on the first three terms of reference.

In the circumstances of the new Council it is not necessary to make any recommendations about the conduct of individual Councillors. There has been more than enough analysis to-date of the conduct of the Councillors in the numerous code of conduct reports prepared in the last few years.

It was clear to me that there was a serious division between the majority and minority councillors and between the minority councillors and the GM. It was unlikely that this situation could have or would have improved.

Briefly, factors contributing to this situation included:

- a) the minority councillors did not have confidence in the previous council and part of their election platforms was to right the asserted wrongs of the previous council and to bring about change,
- b) they were frustrated in their attempts to bring about any changes or achieve what they thought should be achieved because of a 5:4 voting pattern,
- c) the minority councillors seemed to overly emphasise and act on their councillor role of representing the interests of residents and ratepayers without appreciating and acting in their other councillor role to be a member of the governing body providing input to the corporate environment and dealing with Council's allocation of resources, policies and the delivery of services,
- d) the minority councillors did not fully appreciate the role and obligations of councillors under the LG Act especially in relation to the interaction between councillors and staff members and, in the case of Clr Moon, the extent to which this environment had changed since he had been a councillor at a time prior to the commencement of the LG Act in 1993,
- e) at the same time the GM came to the general manager's role with robust professionalism and efficiencies in a way which perhaps failed to properly gauge the impacts of these changes on a rural council,
- f) the constant use of code of conduct complaints by all parties to the point where it was almost a misuse of the Procedures which in turn had an impact on the quality of the code of conduct reports that were prepared,
- g) a large amount of leaking to the press,

- h) a change of policies which further isolated the Councillors from the GM and the staff and in particular, the change in the interaction policy to require all communications from Councillors to be to an admin email,
- i) some Councillors and the GM taking the unusual step of making arrangements between the Council and the return to work of the GM confidential from all of the Councillors and this only served to increase the already existing division within the Council, and
- j) the change of allegiance of Mayor Weyrich (which cannot be criticised because it is part of the democratic process) brought about a potential change in voting patterns and this then led to the majority councillors looking to avoid meetings where matters may be addressed contrary to their group's interests particularly in relation to the GM.

The point was made on a number of occasions by witnesses that while the Council may have been demonstrating these dysfunctional attributes the Council got through its business and decisions were made including the usual planning decisions.

Even though this may have been occurring, the level of acrimony occurring between the majority and minority councillors and between the minority councillors and the GM was causing and would continue to cause the Council to be a dysfunctioning council. The prospects of this improving were remote to say the least.

As former Clr Weyrich succinctly put it there was a giant clash of personalities and it was a train wreck waiting to happen.¹

Finally, it was a common theme from all the witnesses that OLG should have stepped in earlier and got involved and assisted or resolved the problem.

There are two points to make about that. First, OLG did attend at the Council and indicate its concerns in a strongly worded letter (the Orr letter).² Secondly, OLG's intervention program is designed on the basis that councils are set up to operate and regulate themselves and any intervention from OLG would be a last resort. So the

¹ Weyrich transcript: p282:6-8

² Letter from OLG: 3 October 2014

extent of requests to OLG in a relatively early period of the Council and the inability of the Council to address its own problems even with the OLGs involvement (even if it was only a minor involvement) is only indicative of the extent of dysfunction that was occurring at the Council.

1.4 Three General Matters for Comment

The final term of reference has an element of a general term of reference by the reference to reporting "on any matter that warrants mention".

While this term of reference also makes reference specifically to impacts on the effective administration of the Council's functions and responsibilities or the community's confidence in the Council being able to do this, there were three broad issues in the factual circumstances giving rise to the Inquiry which are worthy of comment for the effective administration of councils generally (and the community's confidence in the operation of a council). These three areas relate to:

- a) complaints by a general manager of bullying and harassment by individual councillors towards the general manager,
- b) operational issues of the Code and Procedures, and
- c) the extent of confidentiality about a general manager's contract of employment.

The next three sections of this report address these matters.

I note that there have been recent changes to the LG Act by the *Local Government Amendment (Governance and Planning) Act 2016*. This report has been prepared based on the LG Act prior to any of these changes coming into force.

3 BULLYING AND HARASSMENT OF THE GENERAL MANAGER

3.1 Introduction

The GM gave evidence that almost from the commencement of her employment she was, in effect, under attack by minority councillors.³ The thrust of the complaint was that minority councillors, to varying degrees, engaged in ongoing or repetitive behaviour towards the GM which amounted to bullying and harassment.

In approximately the two year period from May 2014 until February 2016, the GM attempted to address her situation in the following ways:

- a) contact with and complaints to the OLG and the Minister,
- b) two complaints to SafeWork about an unsafe work environment,
- c) the instigation of a number of code of conduct complaints,
- d) implementing changes to council policies as recommended by SafeWork and OLG,
- e) the taking of sick leave under medical advice,
- f) renegotiating a return to work under confidential (from councillors generally) terms,
- g) a complaint to Fair Work Australia,
- h) making a workers' compensation claim,
- i) making compensation claims under the *Privacy and Personal Information Protection Act 1998*,
- j) attending an attempted *issues meeting* with Councillors (the 24 November 2014 meeting), and
- k) making public interest disclosures under the *Public Interest Disclosures Act 1994*.

The GM gave evidence that she was aware of similar situations for other general managers but in those cases the general managers had elected to leave the council.

³ Stork transcript:p799 – 800: p799-800: 29-23, see also Stork submission: p7

However, the GM said in evidence that she chose not to leave and to *dig in and fight*.⁴

At the same time the GM also acknowledged that the role of the general manager in the operation of the Council was critical, that a general manager's environment can be tough and that her situation was a difficult situation for the Council and herself.⁵

It was also difficult for the OLG and SafeWork.

Evidence was given by Mr Tim Hurst of the OLG and Mr Dunphy of SafeWork that the complaints and issues raised by the GM about allegations of bullying and harassment by individual councillors (towards a general manager) had not been previously addressed by these organisations and that this was the first time that the issue had formally arisen for consideration.⁶

Further, while the OLG and SafeWork did work together, understandably in this unique situation there was some reluctance for each of the organisations to solely and authoritatively take on the issue by planning and executing a course of action.

At this stage a few remarks are required as to why a general manager is in a different position from any other staff member of the council about claims of bullying and harassment from councillors.

3.2 Pivotal role of the General Manager

The everyday actions of the councillors, the general manager and other senior staff involve work, health and safety considerations and obligations towards council staff (including the general manager and senior staff). For example, if the council passed a resolution or failed to pass a resolution that caused an unsafe workplace (especially in terms of physical matters) then the council may be breaching work

⁴ Stork transcript:p896:12-14

⁵ GM's letter to OLG 25 July 2014

⁶ Hurst transcript p58:25

health and safety obligations because the council is deemed to be a person conducting a business or undertaking.⁷

However when individual councillors engage in actions amounting to bullying or harassment towards the general manager the work health and safety obligations of the council, as a body, become blurred and difficult to define because of the pivotal role that the general manager takes in the operation and organisation of a council within the current legislative framework of the LG Act and the WHS Act.

To explain this, take for example a complaint by a director of a council that a number of councillors were persistently contacting and pressuring that officer, making snide remarks, making direct or indirect criticisms, questioning actions taken by that officer in writing and/or verbally, all of which the director asserts is bullying and harassment. The question then is how would this usually be addressed?

The most likely action to be taken by the director would be to make a complaint to the general manager. The complaint could be a direct complaint to the general manager to address the conduct and/or to make a formal complaint in terms of the council's code of conduct.

The general manager in this situation would be required to take the necessary action which may include, for example, speaking to individual councillors or putting a report to the council about access between councillors and staff etc. The general manager would also take whatever action was required if the complaint was also a formal complaint under the code of conduct and this would be addressed under the code procedures including any ultimate actions by the council (and potentially the OLG).

However, where the difficulty arises is when the officer making the bullying/harassment complaint is the general manager. A consideration of the relevant provisions of the LG Act and the WHS Act demonstrates this position.

⁷ Section 5 WHS Act

The council is a body politic (s220). The councillors are the governing body of the corporation (s222) and they have the responsibility of directing and controlling the affairs of the council (s223) in accordance with the LG Act.

Councillors have a dual role under s232 of the LG Act. The first role of the councillors is a role as a member of the governing body and in this role the councillor:

- provides civic leadership,
- directs and controls the affairs of the council,
- participates in the optimum allocation of council's resources,
- plays a key role in the creation and review of council's policies and objectives and criteria relating to the exercise of the council's regulatory functions, and
- review the performance of the council and its delivery of services and the delivery program and revenue policies of the council.

The second role of a councillor is a role as an elected person in which the councillor:

- represents the interests of the residents and ratepayers,
- provides leadership and guidance of the community, and
- facilitates communications between the community and the council.

The council employs the general manager and the other staff of the council. The general manager's contract cannot be for more than five years.⁸

The councillors as the council engage and appoint the general manager. The council cannot delegate the function of appointing the general manager.⁹ The council can also terminate the general manager's contract at any time (subject to the payout provisions such a standard 38 week payout).¹⁰

The role of the general manager is pivotal to the functioning of the council as specifically set out in s335 of the LG Act as follows:

⁸ Section 338(2) of the LG Act

⁹ Section 377(1)(a) of the LG Act

¹⁰ Standard contract clause 10.3.5

- (1) *The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of the council.*

- (2) *The general manager has the following particular functions:*
 - *to assist the council in connection with the development and implementation of the community strategic plan and the council's resourcing strategy, delivery program and operational plan and the preparation of its annual report and state of the environment report*

 - *the day-to-day management of the council*

 - *to exercise such of the functions of the council as are delegated by the council to the general manager*

 - *to appoint staff in accordance with an organisation structure and resources approved by the council*

 - *to direct and dismiss staff*

 - *to implement the council's equal employment opportunity management plan.*

- (3) *The general manager has such other functions as may be conferred or imposed on the general manager by or under this or any other Act.*

In summary the general manager is the critical link between the councillors and the council staff, and the critical link to ensure that council's decisions are implemented by the council staff (including the general manager). The council cannot function without a general manager (even if the general manager is acting in a temporary role).

Under the WHS Act a council is referred to as a local authority and is defined to mean a council under the LG Act.

This means that the council (referred to as a local authority in the WHS Act) is a person conducting a business or undertaking as defined in s5 of the WHS Act, this being a pivotal section of the WHS Act that gives rise to various health and safety duties under the WHS Act. However, under s5(5) a councillor (referred to as an

elected member of a local authority) does not in that capacity conduct a business or undertaking.

Workers and officers (as defined under the WHS Act) also have health and safety obligations and duties to be exercised in the workplace.

The general manager of a council would be a *worker* and an *officer* under the WHS Act however, importantly, a councillor (referred to as an elected member of a local authority) is specifically excluded from the definition of *officer* (s4) and therefore the relevant health and safety obligations and duties imposed on an officer.

The effect of these exclusions for councillors from these duties and obligations means that the actions of individual councillors do not represent or equate to the actions of the council as a statutory corporation.

The individual councillors may technically be in breach of s29 of the WHS Act but any such breach would be as individual councillors or individual persons and these breaches would not be breaches by the council.

A primary duty of care in the WHS Act under s19 requires the council to ensure, so far as is reasonably practicable, the health and safety of council staff which would include the general manager.

Section 18 of the WHS Act defines what is reasonably practicable as follows:

“18. What is “reasonably practicable” in ensuring health and safety

In this Act, “reasonably practicable”, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring, and*
- (b) the degree of harm that might result from the hazard or the risk, and*

- (c) *what the person concerned knows, or ought reasonably to know, about:*
 - (i) *the hazard or the risk, and*
 - (ii) *ways of eliminating or minimising the risk, and*
- (d) *the availability and suitability of ways to eliminate or minimise the risk, and*
- (e) *after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.”*

Also relevant is s27 of the WHS Act which provides that if the council has a duty or obligation under the Act an *officer* of the council must exercise due diligence to ensure that the council complies with those duties or obligations.

Also relevant is s17 *management of risk* which provides that a duty imposed on the council to ensure health and safety requires the council to eliminate risks to health and safety, so far as is reasonable practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

The consideration by a council of ensuring the health and safety of council staff, of managing and eliminating risks and determining what is reasonably practicable would effectively be overseen by the general manager who would be the primary “*officer*”¹¹ of the council for the purposes of the WHS Act.

At the same time, as noted above, individual councillors are exempt from work health and safety duties and obligations.

Returning then to the situation where the general manager is the subject of the alleged bullying and harassment actions by councillors, the obvious difficulties and complications for the general manager and the council as a body are exposed.

¹¹ An officer of a public authority is defined in s252 of the WHS Act as follows:

“A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority is taken to be an officer of the public authority for the purposes of this Act.”

The general manager on the one hand is the complainant and on the other hand is intimately tied to the council and the manner in which the council will need to respond to the general manager's complaints.

There will be difficult discretionary considerations involved in considering what is reasonably practicable and in considering concepts such as exercising due diligence and managing and eliminating risks when the workplace involves the political environment of the council.

These matters will need to be considered within a normal local political environment including councillor and general manager interaction which, to mention a few, could or will involve:

- a) robust political debate,
- b) new and experienced councillors wanting to achieve their political goals which will pull and push at expenditure requests and decisions,
- c) minority v majority voting patterns leading to political frustrations,
- d) constant requests for more or better information and reporting,
- e) councillor discussions and gossip,
- f) media discussion, speculation and gossip,
- g) limited staff resources,
- h) state government policies, and
- i) all within the raft of numerous legislative provisions that regulate councils.

This will be a tough working environment which calls for a general manager to have a certain level of robustness, thickness of skin and a practical approach to balancing and steering ever-changing and competing interests.

In the face of continuing issues between the minority councillors and the GM, Council adopted an interaction policy¹² in October 2014. This policy was later amended in March 2015. While there is some doubt about the manner in which the policy was

¹² Councillor Access to Information and Interaction with Staff Policy

formally amended,¹³ the policy sought to distance the GM (and to a lesser extent senior staff) from the Councillors by providing a substantial restriction in the way that Councillors could contact the GM and members of staff. The policy required that all requests be by email addressed to *admin@murray.nsw.gov.au*.

Its effect was to deny direct access by Councillors to the GM and the other senior members of staff. It was to become a focus of the divide between the minority councillors and the GM. It was also to become a divide between the minority councillors and the majority councillors, with the minority councillors regarding the policy as not applied in an even handed manner and only affecting their relationship with the GM.¹⁴ Cllr Moon described it as a *very cumbersome way of running a council*. The policy did not achieve its goals. It fuelled the existing rift between the minority councillors and the GM.

However, when the interaction between one or more councillors and the general manager goes from reasonable as measured in this environment to bullying and harassment then, as the GM stated in her evidence, a general manager needs a firm and clear pathway to address and protect against this behaviour.

The events at the Council demonstrate that there needs to be some reforms to meet this situation in the future.

The ad hoc and numerous actions taken by the GM over an extended period to address her situation were unsatisfactory to both her and the Councillors and the general operation of the Council.

Further, these actions isolated and polarised the parties and deepened the divide which only fuelled the problems.

Finally, of particular concern was the excessive use of the code of conduct complaints which had the effect of weakening the respect for and purposes of the Code and the Procedures.

¹³ Stork transcript p821-824: 3-14

¹⁴ Cllr Campbell submission 017: p5

3.3 Addressing these problems

It was clear from the evidence of Mr Hurst and Mr Dunphy (both very experienced officers) that they had given these matters considerable consideration and with the benefit of hindsight, my impression of their evidence was that their collective experiences suggest that this type of matter should be handled primarily by the OLG. I agree with this position.

In my opinion it is necessary to develop an agreed policy position in relation to these types of complaints by a general manager regarding behaviour of individual councillors in the future.

In summary, recommendations for addressing this problem in the future are as follows:

- a) recognition that there is a special relationship between councillors and the general manager, which needs to be separately addressed,
- b) recognition that bullying and harassment of a general manager by one or more councillors should be primarily the responsibility of the OLG,
- c) amending the Model Code to provide recognition that s5 of the WHS Act excludes councillors from certain duties under that Act,
- d) amending the Model Code to create a new category of breach involving bullying and harassment of a general manager by one or more councillors,
- e) amending Part 3.6 of the Model Code to recognise bullying as being a breach of the code (whether affecting a general manager or otherwise),
- f) amending the Procedures to facilitate referral of claims that one or more councillors have bullied or harassed the general manager to the OLG,
- g) the development of a memorandum of understanding and a consultative role between SafeWork and the OLG to facilitate investigation of complaints involving bullying of a general manager by one or more councillors, and
- h) the adoption by the OLG of a complaints pyramid in similar terms to that adopted by SafeWork, in relation to bullying and harassment of a general manager by one or more councillors.

4 OPERATIONAL ISSUES AFFECTING THE CODE OF CONDUCT

4.1 Background

While councils had generally adopted internal codes of conduct, the *Local Government Amendment (Discipline) Act 2004* prescribed the adoption of a model code of conduct applicable to councillors, members of staff of councils and delegates of councils. Since that time, there have been a number of iterations of the Model Code.

Collaterally, the *Local Government Amendment (Conduct) Act 2012* made provision for a model procedure to be adopted in dealing with complaints under the code of conduct.

The Inquiry has reviewed a number of conduct complaints that have proceeded under the provisions of Council's Code as adopted on 15 January 2013¹⁵ and the Procedures.

In its submission to the Inquiry, the OLG indicated that the Model Code prescribes ethical standards that apply to council officials.¹⁶ This point was taken up in the public hearings and Mr Hurst acknowledged that the Model Code was a very personal issue and difficult to oversee externally.¹⁷ Ultimately, the code's utility is dependent upon the willingness of all parties to acknowledge that it is the standard that governs their behaviour.

4.2 The Context

Councils are required to report the number and cost of conduct complaints annually.

¹⁵ While there have been some limited changes to the Model Code subsequently, those changes do not bear on the matters dealt with in this part

¹⁶ OLG submission 1: p2

¹⁷ Hurst transcript: p17: 15-23

In the period 1 September 2014 to 31 August 2015 Council reported that it had received 111 conduct complaints and had incurred \$125,249.00 in dealing with conduct complaints in that year. The number of complaints was the highest in New South Wales and the expenditure ranked third in the State.

While there has been some debate in the way in which Council calculated the total number of complaints,¹⁸ both the gross number of complaints and the associated costs were significantly above other councils in the region and the great majority of other councils in the State.¹⁹

Councillors variously described the number and amount as an “*obscene*” amount, *entirely inappropriate*, an *appalling outcome* and *absolutely unacceptable*, a *disgrace*, *absolutely obnoxious*²⁰ and *outrageous*.²¹

While Cllr Weyrich speculated that 95 of them were just trivial matters, the issue remains that there were a very significant number of complaints, with significant costs.

This point was emphasised by the GM who acknowledged that the amount of \$125,000 did not represent all of the costs. In doing so, she acknowledged that there had been other costs in undertaking the training recommended by the reviewers.²²

The rider to all of the complaints was an overwhelming view by the Councillors and the GM that no purpose had been achieved in the making of and the outcomes of the complaints.²³

¹⁸ Hurst transcript: p33: 4-30

¹⁹ Statistics provided by OLG

²⁰ Mackenzie transcript: p458: 18-19

²¹ Murphy transcript: p724: 17-22

²² Stork transcript: p898: 16-26

²³ See generally the evidence of Councillors at the public hearings

4.3 What constitutes a conduct complaint?

The Procedures define a code of conduct complaint as being *a complaint that alleges conduct on the part of a council official acting in their official capacity that on its face, if proven, would constitute a breach of the standards of conduct prescribed under the council's code of conduct.*

It will be seen from the definition that a conduct complaint necessarily involves the following elements:

- an allegation about the behaviour of a specific council official,
- while acting in their official capacity,
- which taken at face value,
- would, if proven, breach the code of conduct.

Complaints not satisfying this definition may not be treated as a code of conduct complaint.²⁴

This definition becomes important in reviewing a number of the complaints that were made and that were the subject of subsequent investigations and reviewer's reports. In turn, the code of conduct reinforces this definition, emphasising that the code of conduct only applies to persons carrying out their functions as council officials.²⁵

Complaints that do not fall within the definition are investigated in accordance with a council's general complaints procedures.

A person alleging a breach of the code of conduct would normally be expected to provide some substantiation of the complaint. While the onus is not on a complainant to prove or disprove the issues in contention, it is reasonable to expect that they must do more than make bold allegations. It is a misconception to suggest that the onus of proof lies with the reviewer to prove what are otherwise unsupported allegations.

²⁴ Procedures: Part 4.2

²⁵ Code: Introduction and Parts 2, 3.1 and 3.2

4.3.1 Identification of the official

It is common ground that there were a number of leaks involving confidential information. Particularly, these related to the leaking of the Janice McLeay report and leaking of information regarding the GM's injury claim.²⁶

Each of these matters was the subject of a conduct complaint.

The conduct complaint relating to the leaking of the Janice McLeay report did not seek to identify any councillor as responsible.²⁷ While the GM attributed the leak of her claim to Clr Mackenzie, there was no evidence supporting this allegation. Given the journalists' code of ethics, it was unlikely that the source would be discovered.

Notwithstanding the lack of identification of the Council official, a fundamental element of a code of conduct complaint, both complaints were referred to conduct reviewers.

4.3.2 Acting in an official capacity

On 11 August 2015, the GM lodged a conduct complaint in relation to statements made by Clr Campbell to her work colleagues. While the complaint sought to suggest otherwise, the conversation was little more than gossip.

While the content was derogatory, it was apparent that Clr Campbell was not acting in an official capacity as a councillor. Despite this, the matter was referred to a conduct reviewer.²⁸

The initial reviewer dismissed the complaint, however in doing so, the reviewer did not appear to consider whether the complaint met the requirement that the person

²⁶ Complaints 6 and 15

²⁷ It might be noted that some time later, evidence became available that suggested Clr Weyrich was responsible, but this was denied by Clr Weyrich

²⁸ Complaint 22

alleged to have breached the Code was acting in an official capacity. While the reviewer dismissed the complaint, it did not see the end of the matter.²⁹

On 27 July 2015 Cllr Weyrich lodged a code of conduct complaint relating to a conversation between Cllr Campbell and his wife.³⁰ The allegations were purely personal. The complaint speculated:

I assume she (sic. Cllr Campbell) wants to try and use them as leverage to get me to stand aside as Mayor in her favour.

Despite it being quite obvious that Cllr Campbell was not acting in an official capacity, the matter was likewise forwarded to a conduct reviewer.³¹

4.3.3 Evidence of the breach

On 20 February 2015 the GM lodged a lengthy complaint alleging numerous breaches of the code of conduct by a number of Councillors. Amongst them was a complaint that Cllrs Mackenzie had disseminated information provided to him (in an email sent by a member of the public to all Councillors) in his role as a councillor, *which given its nature, should have been kept confidential.*³² While the email made adverse comments about staff, there was nothing to suggest that the email was in anyway confidential.

While the Code imposes obligations to maintain the confidentiality of documents, it does not define what may be regarded as confidential.

The question of what may be regarded as confidential is not directly addressed in the Act, Regulations or the Model Code other than as part of the consideration whether a meeting should be closed to the public. More widely, the concept of confidentiality is addressed in the *Government Information (Public Access) Act 2009 (GIPA)*,³³ which

²⁹ This will be referred to later in this part

³⁰ Complaint 20 – see below for further detail

³¹ This issue was not explored by the reviewer

³² Part of complaint 8

³³ GIPA: s4 expressly extends the operation of that Act to local councils

emphasises that providing that access to government information is restricted only when there is an overriding public interest against disclosure.³⁴

It is difficult to understand how it could be said that there was an overriding public interest against disclosure.

There will be particular circumstances where confidentiality is required by an official as part of the general duties of acting carefully and diligently or in accordance with the code of conduct but this was not apparent in the email. As there was no direct or indirect confidentiality issue with the email there was no breach on its “face” so the breach could never be proven.

4.3.4 Overview

While complaint 8 dealt with a significant number of complaints, the costs of the other referrals totalled \$23,232.50.

The Procedures provide for the appointment of a complaints coordinator, whose role is to coordinate the management of conduct complaints, to provide administrative support to conduct reviewers, to liaise with the OLG and to arrange the annual reporting of complaint statistics. However, there is no initial review role of the complaint given to the complaints coordinator or the general manager (cl 5.18 and 5.19 assume the complaint meets the requirements of a proper code of conduct complaint).

Part 6.1 of the Procedures provides:

The complaints coordinator must refer all code of conduct complaints about councillors or the general manager submitted to the complaints coordinator within 21 days of receipt of a complaint by the general manager or the Mayor

In the current instance, this is what appears to have taken place.

³⁴ GIPA: s3(1)(c)

While the conduct reviewer must determine to take no action on a complaint that is not a code of conduct complaint, an initial review by the general manager or the complaints coordinator would save the referral costs to the conduct reviewer.³⁵

There needs to be an initial screening or review process undertaken by the general manager or complaints coordinator to ensure that only complaints that properly meet the criteria of a code of conduct complaint are referred to reviewers (for example clause 5.18 of the Procedures could be expanded to include a similar requirement to clause 6.15).

4.4 Investigation of complaints

Having received a conduct complaint, a conduct reviewer is required to undertake a preliminary assessment of the complaint for the purposes of determining how the complaint is to be managed.

The reviewer may adopt a number of alternatives at this stage, including taking no action, resolving the complaint by alternative means, referring the matter to another agency or investigating the matter.

Before any determination to investigate a matter the reviewer must be satisfied that the complaint is a "code of conduct complaint"; that the alleged conduct is, prima facie, sufficiently serious to warrant investigation and that the matter is one that could not or should not be resolved by alternative means.

While not expressed in the Procedures, it is accepted that the standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336 should be applied to determine a complaint. This requires that the evidence supporting the findings be of high probative value.

³⁵ Parts 6.15 and 6.27 of the Procedures

The Inquiry considered the reviewer's reports in relation to a number of complaints. It concluded that the evidence available to the reviewer in a number of the reports fell short of the evidentiary standard required. An evaluation of some of the reports is set out below.

4.4.1 Documents provided to the reviewer

In order for any reviewer to conduct either a preliminary assessment of the complaint or to undertake an investigation, it is necessary that all relevant information be provided to the reviewer.

The Procedures set out the criteria to be considered when undertaking a preliminary assessment of a complaint. Amongst them is a consideration of whether the conduct complained of forms part of a pattern of conduct.³⁶

Council prepared a document titled "Issues at Murray Shire in 2014 and 2015" ("the issues document"). The content of the document is set out below.

During 2014 and 2015 the Council has had to deal with a significant number of issues, these have included:

- *Two Code of Conduct matters relating to the process about recruitment of the new General Manager and the release of Confidential Information. Councillors were required to undertake equal employment and anti-discrimination training and Code of Conduct training.*
- *Vote of no Confidence in the Mayor which was defeated;*
- *Council was placed on an improvement program by the Office of Local Government. This included the requirement to undertake training on meeting practice and procedures, the Mayor to undertake leadership training, all councillors to participate in mediation, implement a councillor/staff interaction policy;*
- *Two Workcover Authority Improvement Notices were served on the Council due to alleged serious workplace bullying. One of these required the undertaking of an independent investigation on workplace bullying;*

³⁶ Part 6.27 of the Procedures

- *There are various Code of Conduct investigations at present underway in relation to alleged Workplace Bullying, alleged breaches of Confidentiality and alleged breaches of Councillors and Staff Interaction Policy.*

The complainant believes that there is a “pattern of behaviour” at Murray Shire Council that the Code of Conduct Reviewer needs to be aware of.

The above information is provided to assist you in the reviews and if you require any further information please do not hesitate to contact me.

This document did not meet the requirement to establish a pattern of behaviour about any particular person, yet it brought with it a significant risk of prejudice.

The risk of prejudice is demonstrated by the inclusion of the document in documents provided to the reviewer appointed to investigate a complaint by Clr Moon.

In an email dated 5 October 2015 Clr Moon lodged a complaint against the Mayor and GM, alleging a breach of Council's interaction policy and the arrangements made for the GM's return to work.

At the hearings, Clr Moon was asked whether he had attached a copy of the issues document to the complaint. He advised that he had not, nor had he seen that document before.³⁷

The inclusion of the issues document was entirely inappropriate because it did not purport to relate to any pattern of behaviour involving the Mayor and the GM. More importantly, it purported to have been Clr Moon's opinion.

What the issues document may have lacked in specifics, additional material provided to the reviewer made up for. The material provided to the reviewer contained a media article from the Riverine Herald dated 1 May 2015. The article contained a photo of Clr Moon watermarked “BULLY”. It contained a short quotation as follows:

³⁷ Moon transcript: p640-641: 25-4

It is Cr Moon's credibility that is in question ... Cr Moon's words and conduct are frequently aggressive and accusative ... INDEPENDENT INVESTIGATOR

The media article continued to discuss the findings of the McLeay report.

Again, Clr Moon was asked whether he had attached the extract from the Riverine Herald. He responded that he had not done so.³⁸

The obvious inference for including this additional material was to influence (even prejudice) the consideration of the complaint (presumably against the complainant).

The inclusion of this material was wholly inappropriate.

As Mr Hurst emphasised in his evidence,³⁹ the Code prescribes ethical standards. Such standards also apply to the information provided to reviewers.

In relation to the complaint lodged by Clr Moon, those standards were not adhered to.

In fact the inclusion of this type of document in any complaint seems inappropriate.

4.4.2 Consideration and investigation of complaints

The quality of consideration of conduct complaints was considered by the Inquiry and it became clear that there were significant qualitative issues in relation to the investigation of some of the complaints. Examples of the concerns are set out below.

³⁸ Moon transcript: p 641: 9-18

³⁹ OLG submission: p2, Hurst transcript: p17: 8-23

4.4.2.1 Deep Creek

On 16 March 2015 Clrs Mackenzie, Campbell, Moon and Burke attended a site meeting at the Deep Creek Marina. The meeting arose from concerns over a pollution risk stemming from the use of a tank adjacent to the Murray River to hold untreated sewage.

While Councillors had received a confidential briefing in February 2015 about complex legal proceedings that had been brought against the Council by the developers of the Deep Creek development, this was not relevant to the issue. This was made clear in an email sent by Clr Mackenzie on 17 March 2015. In that email, Clr Mackenzie had sought advice where to go with his concerns. Council staff did not provide the advice. Rather, the matter became elevated to a fundamental dispute between Clr Mackenzie and staff

What Clr Mackenzie saw as a pollution risk, Council staff saw as threatening the litigation. As the matter progressed staff response became more strident. Ultimately, it was to be the subject of a conduct complaint lodged by the GM against all of the Councillors who had attended the meeting.

The complaint asserted:

- Councillors attended Deep Creek contrary to express advice not to do so,
- Clr Mackenzie made a number of serious allegations regarding the operation of sewerage services at Deep Creek,
- Clr Mackenzie made a notification to the EPA regarding Council operations,
- Councillors refused to provide details of who they had met at Deep Creek, and
- a belief that Clr Mackenzie had contacted the Melbourne Herald and made allegations that sewage was flowing into the Murray River.

On the basis of this information, the GM alleged that the code of conduct had been breached by:

- 1) discussing contents of a confidential report,
- 2) failing to ensure that a member of Council's staff was present at the meeting,
- 3) discussing a matter that was the subject of court proceedings,

- 4) Clr Mackenzie's failure to advise other Councillors of the advice not to attend the meeting,
- 5) disclosing confidential information to a reporter,
- 6) behaving in a manner designed to bring the Council into disrepute,
- 7) failing to provide information requested by the GM, and
- 8) placing Councillors and Council at the risk of losing its insurance cover.

The complaint was significantly flawed, particularly as:

- there was no provision in the Code that constrained the councillors from attending the meeting,
- there was no underlying confidentiality,
- while the report on the litigation purported to be confidential, there was no underlying confidentiality in relation to its content, as it merely reported on the nature of the litigation⁴⁰ (and this was subsequently acknowledged by the GM in her evidence),⁴¹
- there was no evidence to suggest that the councillors had risked Council's insurance,
- Clr Mackenzie's refusal to supply information to the GM was predicated on him providing the information to Council's lawyers,
- there was no evidence that Clr Mackenzie had disclosed confidential information to a reporter,⁴²
- despite the GM's contention, there was no requirement that the councillors be accompanied by a member of Council's staff at the meeting as the matter was neither a "planning matter",⁴³ nor was there a provision in Council's policy for interaction with staff to attend, and
- again, there could be no suggestion that the actions of the councillors were designed to bring the Council into disrepute.

A careful review of the evidence would have elicited this view.

⁴⁰ The claim had been filed in the court and was a public document.

⁴¹ Stork transcript p825: 21-26

⁴² GM's note of conversation with Trent Hornemann: 20 March 2015 at 4:10 pm

⁴³ Stork transcript p833-834: 17-6

The reviewer was given a full brief of evidence, excluding the Access to Information & Interaction Policy. The reviewer did not seek a copy of this policy.

While acknowledging the standard required in the decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, the report fell well short of obtaining evidence to this standard.

While the reviewer quoted parts of Clr Mackenzie's email of 17 March 2015, the reviewer failed to report the actual concerns raised by Clr Mackenzie, i.e. the pollution risk associated with the sewage tank adjacent to the Murray River. While the reviewer quoted Clr Mackenzie's email indicating that his major concern did not relate to the legal proceedings the reviewer did not in any way engage with or discuss the contents of the email. The reviewer appears to have ignored that there was no evidence to support the view that the report to Council's meeting on 17 February 2015 had been discussed at the meeting. In doing so, the reviewer ignored Clr Mackenzie's statement that it had not been discussed.

Having ignored the content of Clr Mackenzie's emails the reviewer speculated:

*"While it may be possible that that there was no discussion as such but merely a one-way flow of views and information on that occasion, that is unlikely to have been the case when Mackenzie returned to Deep Creek with Councillors Burke, Moon and Campbell. We quote Mackenzie's email of 17/3/15 once more where he says: "On Monday (16/3/2015) afternoon **along with** Councillors Moon, Burke and Campbell **we all returned** to the complex, where I attempted to show them, (the 3 Councillors) some of the ratepayers and my concerns"[Our emphasis]. This is certainly implies that concerns about Deep Creek were discussed by Mackenzie in the presence of other parties including ratepayers. Were Mackenzie wanting to discuss his concerns purely with the other three Councillors, why would he return to the site with the Councillors as well as ratepayers? He would have been at liberty to go back to Deep Creek with only the Councillors." ⁴⁴*

Despite this clear speculation, the reviewer concluded:

⁴⁴ Reviewer's report 8 July 2015 p30

*"We find it highly unlikely that matters pertaining to the Deep Creek development were not discussed with the third parties present."*⁴⁵

This conclusion is clearly flawed especially as the legal proceedings related to a matter about how various approvals had been given and implemented and about the actions of the Council generally regarding the Deep Creek development. The concern of Cllr Mackenzie was a simple immediate concern about sewerage being too close to the river in a relatively uncontrolled environment. This is confirmed or supported by the Council's subsequent action to relocate an environmentally secure tank at a more appropriate site.

In dealing with the complaint, the reviewer quoted parts of Cllr Mackenzie's email of 20 March 2015 that was sent at 14:59. In doing so, the reviewer failed to acknowledge Cllr Mackenzie's offer to provide information to Council's solicitors. The effect of the foregoing was to give a slanted view of the issues and of the evidence.

Having failed to consider Cllr Mackenzie's emails in relation to the matter discussed at the meeting at Deep Creek, the reviewer considered the report to Council's meeting of 17 February 2015 to be the operative issue. In doing so, the reviewer speculated what might have been discussed.

"The meeting was clearly held at Deep Creek to discuss the sewage plant. It was held over a period of some hours. There were third parties, including likely parties to the litigation, present. The Supreme Court action includes a number of claims related to the sewage plant. Therefore, in our view, it is highly unlikely that matters related to the litigation and brought to a confidential meeting of Council could or would have been avoided.

*Further, the discussions were clearly not sanctioned by Council."*⁴⁶

The reviewer's subsequent findings were flawed because it was not to discuss "sewerage plant" which was part of the litigation.

⁴⁵ Reviewer's report 8 July 2015 p31

⁴⁶ Reviewer's report 8 July 2015 p33

Again, having ignored the actual concerns raised by Cllr Mackenzie, the reviewer addressed the potential for the actions to have been designed to bring the Council into disrepute. The reviewer concluded that there was insufficient evidence to determine whether this was the underlying intent. However the reviewer found the actions in refusing to provide information were designed to bring the Council into disrepute.

This finding is interesting because it is largely baseless. There had been no request to Cllrs Campbell, Moon or Burke to provide any information. The request for Cllr Mackenzie to provide information had been traversed by his offer to provide information to Council's lawyers.

The above comments also apply to the reviewer's separate consideration of whether the councillors had breached the code of conduct by failing to provide information.

The reviewer's finding that:

"In our view, Cr. Campbell⁴⁷ has had ample opportunity to provide the requested information, had a clear responsibility to do so, and therefore has breached her responsibilities of a councillor in failing to provide information reasonably requested by the general Manager, and the Director of Environmental Services for that matter, in order to properly manage litigation on behalf of the Shire."⁴⁸

is also flawed.

In dealing with the question whether the councillors had risked the loss of insurance cover, the reviewer considered two actions, the attendance at Deep Creek and the failure to provide information. The latter aspect has already been dealt with. While expressing the view that the attendance was imprudent, the reviewer did not make an adverse finding.

⁴⁷ And likewise the other councillors who had attended

⁴⁸ Reviewer's report 8 July 2015 p38

Ultimately the reviewer made four substantive findings and that those findings constituted breaches of a number of parts of the Code. The reviewer also found that the councillors had breached s439(1) of the LG Act which provides:

Every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.

While the reviewer purported to find that the councillors had breached Schedule 6A of the LG Act, this could not constitute an operative breach because it relates to the provisions that may be in a code of conduct.

Despite all of the failings in the investigative process, the report recommended that the councillors be censured and that the matter be referred to the OLG for further action under the misconduct provisions of the LG Act.

In summary, there was no proper basis for the conduct complaint. In conducting the investigation, the reviewer failed to carefully consider the events that had occurred and to apply the requisite standard of proof. In the end the complaint and the investigation were unnecessary which seems to have wasted time and resources.

4.4.2.2 Councillor Weyrich's complaint of 27 July 2015

On 27 July 2015 Cllr Weyrich lodged a conduct complaint against Cllr Campbell. The complaint related to a conversation between his estranged wife and Cllr Campbell.

The complaint arose from information conveyed by a third party, the essential elements of which were that Cllr Campbell alleged that Cllr Weyrich was having an affair. Cllr Campbell had taken some photos that she wanted to show his wife. His son had informed him that Cllr Campbell intended to use them against him in the forthcoming mayoral election. The complaint suggested that Cllr Campbell was stalking him. At best the evidence was hearsay.

There was no suggestion that Cllr Campbell had been acting in an official capacity when speaking to Mrs Weyrich. Despite this fundamental flaw, the complaint was referred to a reviewer.

The reviewer's report indicates that, in addition to the complaint, the issues document (see section 3.4.1) together with the Code were provided to the reviewer. The report also indicates that the reviewer obtained the WorkCover Improvement Notice dated 18 February 2015, media clippings relating to the release of the McLeay report and the Procedures.

It is difficult to understand the relevance of some of the material provided to the reviewer, particularly the issues document, the WorkCover notices and the media clippings.

While the reviewer acknowledged the provisions of s440 of the LG Act, the reviewer failed to consider whether Cllr Campbell was carrying out her functions as a councillor.

Having ignored this most fundamental fact, the reviewer went on to consider possible breaches of the *Crimes Act*, including blackmail and making demands with menaces. Having considered these aspects, the report went on to note that Cllr Campbell's actions were *part of a pattern of conduct including harassing the Mayor and the General Manager*. In doing so, the reviewer purported to rely on the issues document, the WorkCover Improvement Notice requiring an investigation of the bullying allegations and issues relating to the leaking of the Ms McLeay's report.

While the report acknowledged weaknesses in the evidence then available the reviewer still recommended that the matter proceed to investigation. However the lack of willingness of witnesses to provide statements and Cllr Weyrich's indication that he did not wish to pursue the complaint, led to a decision not to pursue the complaint.

Council spent \$6,500.00 on this process.

4.4.2.3 The “Mathoura Cartel” comments

At Council’s meeting on 2 June 2015 Clr Mackenzie made allegations that Council was being run by a “Mathoura Cartel”, naming certain councillors as forming a cartel. The comments were subsequently picked up by the local newspaper and further comments were attributed to Clr Mackenzie. The matter was the subject of a conduct complaint that alleged he had breached Council’s media policy⁴⁹ when speaking to the media.

Council’s media policy provided:

Councillors may provide media comment, provided they preface such comments with a statement that the comments are their personal opinion and does (sic) not represent the official position of the Council.

While aspects of the statements evince clear breaches of the code of conduct, it is the reviewer’s consideration of the media policy that bears review.

Self-evidently, Clr Mackenzie’s comments were an expression of his personal views and it is difficult to see how there could be a need for the acknowledgement referred to in the policy. Despite this, the reviewer adopted a rather literal approach putting form over substance in the analysis of the issue.

The report contains the statements attributed to Clr Mackenzie, with emphasis added:

*Embattled Murray Shire councillor [sic] Geoff Mackenzie has taken aim at five fellow councillors **and the organisation**...*

Cr Mackenzie said he felt he and other councillors – Ian Moon, Gen Campbell and Gavin Burke – were being left in the dark on issues...

*Cr Mackenzie said he would not apologise for his comments, saying he **only had a responsibility to the ratepayers**, not his fellow councillors...*

“The good Lord has sent me to annoy this council,” he said...

⁴⁹ Media and Public Relations Policy adopted 11 November 2014

Cr Mackenzie failed to advise the newspaper that the comments he made were personal comments thereby breaching the Murray Shire Media Policy.

In analysing the complaint, the reviewer accepted (in the absence of a retraction) that Clr Mackenzie had made the comments. The reviewer provided the following analysis of the allegation that Clr Mackenzie had breached Council's media policy:⁵⁰

There is no reference in the Riverine Herald article to Cr Mackenzie advising the newspaper/reporter that he was making personal comments. If he had made that clear and it was not reported, he had a responsibility to ensure a correction to that effect in the subsequent edition of the newspaper. No such correction was made.

*We find that, on the balance of probabilities, Cr Mackenzie did fail to advise the newspaper that the comments he made were personal comments; and he consequently breached section 5.2 of the Murray Shire Media Policy. The allegation is **substantiated**.*

The media policy did not require that the media article contained the acknowledgement.

The reviewer did not record any attempt to contact the newspaper to see whether Clr Mackenzie had provided the required acknowledgement.

Even if there was no specific acknowledgement by Clr Mackenzie that his views were his own personal views, the obvious fact was that these views could not be anything other than this and they were obviously not the official position of the Council. Clr Mackenzie was a minority councillor expressing his own observations about his position. Whether he was being unreasonable or whether he was justified in these views is irrelevant, the views clearly were personal.

In concluding that Clr Mackenzie had breached the media policy, the reviewer simply ignored the more obvious position that the comments were nothing more or less than Clr Mackenzie's personal views.

⁵⁰ Reviewer's report dated 23 September 2015: p19

Interestingly, having received no assistance, or more relevantly an admission from Clr Mackenzie, the reviewer came to a positive finding, without making further inquiry.

The approach taken by the reviewer failed to meet that standard of proof required and in the circumstances the finding was flawed and clearly not supportable.

A significant portion of the \$7,454.00 cost of the investigation appears unwarranted.

4.4.3 Overview

This part has considered the review and investigative processes undertaken in three complaints. It is considered that the reviews disclose significant shortcomings in such processes. Most importantly, the investigation into Deep Creek demonstrates significant errors, both in relation to the Code and in relation to the investigative processes. The shortcomings are particularly significant.

Similarly, the investigation into Clr Campbell's comments at her workplace and the "Mathoura Cartel" comments demonstrate significant weaknesses in considering and analysing complaints.

The above discussion on investigation of complaints provides examples of issues that need to be checked and understood by general managers, complaints coordinators and importantly conduct reviewers. The issues highlighted in this section of the report provide examples for the ongoing education (including any checklists or manuals prepared for conduct reviewers) and general guidance for conduct reviewers.

4.5 Internal review of reviewer's reports

There are two aspects in the review processes affecting reviewer's reports. This part considers what role staff should undertake on receiving a report, before putting it to councillors for their consideration.

Ordinarily, it would be expected that a council officer, most obviously the complaints coordinator, would undertake a review to ensure that the conclusions reached in the report are sound. This does not appear to have been done, at least in relation to the Deep Creek report.

In that matter, a significantly flawed report, recommending that sanctions be imposed, was placed before the Councillors for their consideration.

The Procedures do not provide for an internal review process by way of quality check.⁵¹

It is considered that there should be a limited review process undertaken by the general manager or complaints coordinator (or mayor if the general manager is the subject of the complaint) to ensure that recommendations in an obviously flawed report are not reported to the council or implemented.

4.6 Review by councillors

In order to focus on the adequacy of the review processes, the Inquiry explored both Council's and the Councillors' processes in dealing with the Deep Creek matter.

Councillors were asked about their processes in reviewing the reviewer's report. Their evidence suggested that little regard was had to the detail of the report.

While Cirs Pocklington, Bilkey and Weyrich all accepted that the issue related to the tank rather than the litigation, each took issue with the way that the matter was handled by the minority councillors. In doing so, they aligned themselves with the stance taken by staff.⁵² While C/r Bilkey described C/r Mackenzie's stance as antagonistic, he described Mr Arkininstall's approach as *perhaps not holistic in its*

⁵¹ Parts 8.40-43 of the Procedures

⁵² Ref: Bilkey transcript: p237:3-27, Pocklington: p133 :12-19, p145: 6- 12, p152: 6:21 Weyrich: p237: 3-27

approach to the matter.⁵³ In his submission in reply, Clr Anderson also accepted that the issue related to the tank.⁵⁴

Despite their acceptance that the issue did not relate to the litigation and that there were evidentiary issues in the conduct reviewer's report, Councillors accepted the veracity of the conduct reviewer's report.⁵⁵

Clr Weyrich indicated his approach to dealing with the reviewer's report in the following terms:

Look, I – it's probably difficult for people to understand but the whole thing just – it annoyed me and I had to deal with it and I didn't want to deal with it because it just could have been fixed so easily, and I was beginning to think that there were other motives behind all of this. You know, grown up adults don't conduct themselves like this, certainly not councillors, and it was clear that something else was going on and I was on the peripheral, I was – you know, look, I was aware of it, I knew about it, I just couldn't understand why this was happening, you know, like "Let's just deal with it and be done with it". Look, I would have read it, parts of it, I can't recall which parts, but – yeah. You know, and look, when you have someone who you have a conversation with who records each and every word that you say, and I'm not like that, that's just not me, this is how you wind up with things like this, because I say lots of things all day every day, some are relevant, some are not, it just was – the whole thing's been taken out of context.

The reviewer's report was considered at Council's meeting on 14 August 2015. Despite the views expressed by Clrs Bilkey, Pocklington, and Weyrich, in relation to the underlying issue and their acceptance of the evidentiary issues, they adopted reviewer's findings and recommendations.

While Clrs Mackenzie, Campbell, Moon and Burke had the right to seek a review of the reviewer's report, none exercised this right.⁵⁶ Clr Mackenzie ascribed his reasons for not responding in the following terms:

⁵³ Bilkey transcript: p241: 14-31

⁵⁴ Clr Anderson submission: 12 May 2016

⁵⁵ Bilkey transcript: p244 7 245: 18-23 , Pocklington: p154 -156: 8-28, Weyrich: p280-281: 31-24

⁵⁶ Campbell transcript: p382: 13-15 p384 11-22, Mackenzie transcript: p505: 4-6, Moon transcript: p686-687: 30 - 4

Q: So you took the view that you couldn't defuse that conduct complaint?

A: No way. No way. I believe the general manager by the evidence, which was later confirmed, was already trying to grind an axe to execute me and with assistance from the conduct reviewer. I didn't trust the conduct reviewer.⁵⁷

Clr Moon gave the following evidence:

Q: I am trying to confine myself to the events of the night, I think it was 6 October 2015. Following the imposition of the sanction, did you seek a review of the report by the Office of Local Government?

A: No, I don't think so, no. Might I say, we're at the stage, Mr Commissioner, we've been loaded up with everything, I think we're getting to the stage of saying "Well, damn it all", you know.

Q: You'd had enough?

A: Lucky I did not live in Bali, I would have been shot perhaps. They don't have any executions out here now in the country. It was just the way I was feeling. And of course, I had as I addressed on Friday, enormous amount of emotional distress about the whole thing that was going on in local government and code of conducts.⁵⁸

While Clr Moon had not challenged the reviewer's report, he expressed a view at the meeting on 14 August 2015 that the report was wrong.⁵⁹

Clr Campbell indicated that it was made up of misinformation.⁶⁰ Clr Mackenzie described the report as *Ridiculous*.⁶¹ Clr Moon expressed the view that it was well and truly off the mark. This report was taking retaliative action, retaliative action against the general manager by going out there to have a look. It was absolutely ridiculous.⁶²

Ultimately, Council's resolutions were forwarded to the OLG for consideration of the councillors' behaviour under the misconduct provisions of the LG Act.

⁵⁷ Transcript p514: 20-25

⁵⁸ Transcript Moon p688-689: 26-8

⁵⁹ Transcript p686 – 688: 30-24

⁶⁰ Transcript Campbell: p382; 5-6

⁶¹ Transcript Mackenzie: p512: 28

⁶² Transcript Moon: p686: 8-29

Whether driven by an underlying mistrust of Clrs Campbell, Mackenzie and Moon or otherwise, the other councillors failed to adequately review the reviewer's report. Given the significant flaws, it demonstrates a fundamental lack of diligence.

Regrettably, the path open to councillors where there are fundamental flaws in a reviewer's report are not clear. The Procedures state:

*The role of the council in relation to a final investigation report is to impose a sanction where an investigator determines that there has been a breach of the code of conduct and makes a recommendation in their final report under clause 8.35, paragraphs (d) to (h).*⁶³

Despite this obvious mandate, the Procedures provide that council is not obliged to adopt the investigator's recommendation/s and may impose a different sanction.⁶⁴

While the Council may ask the reviewer to make additional enquiries and/or provide additional information or to seek an opinion from the OLG,⁶⁵ the path is not clear where a report is so significantly flawed that it has no probative value.

The Procedures should be amended to give controlled discretion to the Council not to impose sanctions where a reviewer's report is obviously flawed. The discretion needs to be controlled to avoid voting majority blocks voting down proper reports about a member of the majority. This may involve seeking advice from the OLG.

4.7 External review of reports

There is a limited opportunity for external review by the OLG for a person the subject of a sanction imposed by a council.⁶⁶

⁶³ Procedures Part 8.44

⁶⁴ Procedures Part 8.57 and 8.58

⁶⁵ Procedures Part 8.50

⁶⁶ Procedures Part 9.6, see also Hurst transcript:p18-22: 29-3

The Procedures make clear that the review is merely a procedural review, limited to circumstances where:

- the reviewer has failed to comply with a requirement under the procedures, or
- the reviewer has misinterpreted or misapplied the standards of conduct prescribed by the Code, or
- where there has been a procedural failure in imposing a sanction.⁶⁷

Relevantly, such review does not appear to involve a consideration whether the complaint meets the criteria to be a conduct complaint, nor does it appear to involve consideration whether the standard of proof has been met.

There are clear weaknesses in this narrow approach, highlighted by the nature of the concerns considered earlier in this part.

There is no provision for a complainant or other person to seek a review. The Procedures provide that where any person (and this would include a councillor) believes that a person has failed to comply with a requirement prescribed under the procedures, they may, prior to the council's consideration of the final report, raise their concerns in writing with the OLG.⁶⁸ It might be noted that this right must be exercised prior to consideration of the reviewer's report by the council. Conversely, the review rights of the person the subject of a sanction can only be exercised after consideration of the reviewer's report by the council.

On 29 October 2015 the reviewer provided a preliminary assessment report in relation to the GM's complaint regarding statements made by Cllr Campbell to her work colleagues. The reviewer concluded that the complaint did not disclose prima facie evidence of any breach of the Code and recommended that no action be taken on the complaint.

⁶⁷ Procedures Part 9.7

⁶⁸ Procedures Part 9.1

On 30 October 2015, the GM raised concerns with the OLG that the reviewer had not properly considered the complaints assessment criteria.⁶⁹ The request was considered by the OLG.

In reviewing the complaint, the OLG dealt with it as though it was undertaking a review in terms of Part 9.7 of the Procedures. Part 9.7 makes clear that it only applies to a request for review under Part 9.6. In undertaking the review, the OLG did not appear to have considered whether Clr Campbell was acting in an official capacity.⁷⁰ Having ignored this, the OLG wrote to the GM recommending that the matter be referred to another reviewer.

It is considered that this approach was both simplistic and flawed. Ultimately it will come at a further cost to the Council.

4.7.1 Overview

In conducting an external review, the OLG should be able to undertake an adequate consideration whether the complaint meets the requirements to be a “conduct complaint” and whether there is prima facie evidence to support for the findings. Importantly, the OLG should not shut its eyes to the evidence and focus only on procedural matters. This procedure can be framed in such a way that it does not allow a full rehearing of the merits of the complaint.

4.8 Dealing with dysfunction – the role of the OLG

The current chapter has considered issues relating to the operation of the Code and procedural aspects arising.

In providing a conclusion to this chapter it needs to be acknowledged that there are instances where the Code does not provide a sufficient outcome to bring about a

⁶⁹ Procedures Part 6.7

⁷⁰ See Part 1 above

change in behaviour. In those circumstances it is anticipated that the misconduct provisions contained in part of the LG Act would be invoked.

While it has not been necessary to consider whether a recommendation should be made recommending the dismissal of the Councillors, the whole of the evidence suggests that some considerable time before the Inquiry was convened, the Council had become dysfunctional.

In coming to this conclusion, the Inquiry emphasises that the relationship issues between the minority and majority councillors has broken down. Likewise, the relationship between the GM and minority councillors had also broken down. While it is not easy to put a date when such relationships had broken down, it is possible that the relationship between the Councillors had broken down prior to the appointment of Ms Stork as general manager. It is likely that the relationship between the minority councillors and Ms Stork had broken down about the time of the meeting on 24 November 2014. The subsequent alignment of Cllr Weyrich with the minority councillors, following the election of Cllr Pocklington as mayor, provided clear evidence that the dysfunction was irreparable. There is little doubt that the failed meeting on 19 January 2016 gave a foretaste of the dysfunction that would ensue.

While the OLG's intervention sought to find ways to resolve the issues, it is apparent that events escalated following the mediation conducted in November 2014, perhaps most relevantly with the release of the McLeay report.

With the benefit of hindsight it is apparent that a more significant intervention was required in the particular circumstances of the involvement of the GM.

While it is acknowledged that the intervention policy respects the democratic mandate of councils, the importance of council driven outcomes and voluntary nature of the intervention process, it is equally important to intervene early and escalate action appropriately and promptly in proportion to the situation.⁷¹

⁷¹ Improvement and Intervention Framework in relation to NSW Councils

On 3 October 2014 the OLG wrote to the Council indicating its concerns regarding a number of issues centring on the relationships between the Councillors. The letter emphasised that the then planned mediation process should take place. While the mediation took place shortly after the letter, the outcomes agreed between the councillors broke down almost immediately. Cllr Campbell, while convinced that it was a beneficial process, remained convinced that it would fail. During the hearings, she gave the following evidence:

The mediation was directed to all councillors and I considered it very beneficial. I did however have issues signing off on it with the mediator, that's why there's a little four next to my signature because I said much as I applauded the concept and was a hundred per cent committed to that document I advised him that it would be four minutes or four hours before it was breached.

Cllr Pocklington regarded it as doomed, saying:

It was – it was an unfortunate circumstance that the mediation occurred just after the former mayor made a statement that was inflammatory in the press and it went to mediation, signed this agreement and it was doomed to failure because it was – there was – the goodwill had evaporated. If there was – if there was any goodwill there before it had evaporated.

With the benefit of hindsight it is apparent that with the breakdown of the mediation process and in the light of a widening in the rift between the majority and minority councillors and the rift between the minority councillors and the GM, more significant intervention processes were required. While the OLG considered the misconduct complaints arising from the McLeay report, it did not take other action that might break the deadlock that existed.

Mr Hurst gave an insight into the issues that were emerging:

I came into the role relatively recently. There was a long history to this matter and I'd only been in the job for a short period of time when I became aware that there were significant and ongoing issues with the operation of Murray Shire Council. It was - at that time, there were some investigations that were underway, misconduct investigations under 440G, and the - a number of those reports were prepared in a - in a draft form. And as I was reviewing that material, and during this

period of time, there continued to be further complaints made to the Office of Local Government about aspects of the operation of Murray Shire Council that I began to delve into more detail about exactly how the misconduct provisions work, how those provisions were being used or able to be used, particularly in cases of allegations of bullying or harassment, and what sanctions were available to the office for individual misconduct in situations like that. So in November, the - the first of three misconduct reports were provided to me, and in reading those reports and coming to my understanding about the - the decision of the report on breach and the options available for penalty, I realised that the way that the Act and the Code operate, particularly with regard to harassment, which by its nature is a repeated series of events, meant that we were limited to investigating virtually on a case-by-case basis individual occurrences, and that it was very difficult for the way that our investigations were undertaken to deal with matters that were, by definition, repeated in their nature. It was also clear that there were more complaints coming in than we were able to deal with expeditiously, and that when it had taken more than six months for the first three misconduct matters to make it to the chief executive, that I was concerned that the further matters which were still being referred to the office at that time were going to take quite some time to resolve.

While intervention may be seen as a high level response, it is equally important to give effect to its intent that intervention be undertaken early, when councils are experiencing problems, in order to strengthen their capacity to meet their obligations.⁷²

Throughout 2015 the rift had both widened and became more entrenched. Collaterally, there had been no resolution to the bullying allegations. It is clear, with the benefit of hindsight, that neither the Code nor the misconduct provisions of the LG Act could address the underlying rift. Absent a circuit breaker, there could be no doubt that the underlying issues would continue to manifest themselves and the Code could no longer provide a meaningful solution.

Having considered the events that occurred and the significance of the underlying issues, it must be said that the OLG failed to appreciate the extent of the problem and adopt a quicker intervention strategy that might have operated as a circuit breaker.

⁷² Improvement and Intervention Framework in relation to NSW Councils - Policy Statement

It is considered that the OLG could review its intervention framework and include key performance criteria to assess council responses to the type of issues referred to in this report together with timeframes to guide any determinations as to whether strategies are working to address the issues and whether further intervention processes are warranted.

Again, with the benefit of hindsight, it is considered that the OLG should give serious consideration to implementing the strongest options where the council is clearly indicating its unwillingness to comply with any relevant early intervention or warning.

5 ISSUES RELATING TO GENERAL MANAGER'S CONTRACT

5.1 Confidentiality

The question of what may be regarded as confidential is not directly addressed in the LG Act, other than in relation to the closure of meetings.⁷³ In dealing with the closure of meetings, the LG Act expressly acknowledges that personnel matters concerning particular individuals (other than councillors) should be considered as attracting confidentiality.⁷⁴

This concept generally reflects the information protection principles in Part 2 of the *Privacy and Personal Information Protection Act 1998*.

The Model Code recognises that certain information should be treated as confidential. However, in doing so, it differentiates between information available to the councillors and that otherwise available.⁷⁵ The Model Code emphasises that councillors should have sufficient information to enable them to carry out their civic office functions.⁷⁶

5.2 Issues involving the General Manager's performance and the return to work agreements

5.2.1 The deferral of the performance review

Councillors are required to appoint a person as general manager of the council.⁷⁷ Councillors are jointly responsible for supervision of the general manager and this is achieved through a performance based contract.⁷⁸

⁷³ Section 10A of the LG Act

⁷⁴ Section 10A(2)(a) of the LG Act

⁷⁵ Code: parts 7.7-7.10

⁷⁶ Code part 7.2

⁷⁷ Section 334 of the LG Act

⁷⁸ Section 338 of the LG Act

In order to assist both parties, the OLG has prepared the Guidelines. In turn, the Guidelines contain a standard contract for the employment of a general manager.

The standard contract provides for a performance based contract with agreed performance criteria. The standard contract also imposes an ongoing obligation on the councillors to ensure that the general manager's performance is reviewed at least annually.⁷⁹

Despite this requirement, the GM's contract was not reviewed in the first annual period of her contract (April 2014 – April 2015). Ultimately, it was not until 8 January 2016 that a performance review was undertaken.

The GM gave evidence that there was a written agreement signed by the Mayor Weyrich and the then Deputy Mayor, Cllr Bilkey that there would be no performance review until 30 June 2015.⁸⁰ Cllr Weyrich provided the following reasons why the review did not occur:⁸¹

Well, this is where I get into trouble. I was well aware that a performance review was due, and indeed I was well aware that it was overdue. Given the circumstances and my concerns for the GM's wellbeing and she'd had considerable time off. She was not well and I didn't - I just knew she wasn't well. That was obvious and I didn't have a groundswell of councillors asking me to perform the performance review and I felt that one of two things would happen. No one would realise that she was due for a performance review and I'd get to the end of the four year term and que sera, sera, or we'd wind up in this situation.

In doing so, Mayor Weyrich failed to refer to the agreement that had been reached. While the matter was not explored directly with Cllr Bilkey, there was no suggestion by either of them that:

- other Councillors had been consulted about the proposal,
- their approval sought to the proposed agreement,
- they had direct authority to negotiate the agreement, or
- the agreement had been circulated to the other Councillors.

⁷⁹ Standard contract clause 7.5

⁸⁰ Stork transcript: p872-873: 17-7

⁸¹ Weyrich transcript: p305-306:28-8

Importantly, the agreement does not appear to have been ratified at a subsequent meeting.

Absent an appropriate delegation to the Mayor and Deputy Mayor, or ratification at a meeting, the agreement could have no effect.

If this had been a single event, it may not have been considered in this report. However it is symptomatic of an ongoing failure by Councillors to keep their fellow councillors fully informed of matters relevant to their role and their obligations as councillors in relation to the GM.

5.2.2 The first return to work agreement

In the latter part of 2014 tensions between the minority and majority councillors had intensified. The appointment of the GM had added another dimension and a secondary rift developed between the minority councillors and the GM. That rift manifested in a number of ways, most relevantly, in a compensation claim brought by the GM and periods of compensatory leave.

The first period of leave commenced on 30 March 2015.

Thereafter, the then Mayor, Cllr Weyrich, negotiated an agreement for the GM to resume her duties.

In her statement to StateCover Mutual, the GM set out the details of her resumption of duties, indicating that she had prepared an agreement for her return to work. She also indicated that on Monday 13 April 2015 Cllrs Weyrich and Bilkey, Ms Stephens (Council's Human Resources Manager) and she had signed the agreement.⁸²

⁸² Stork: statement to StateCover Mutual: 27 April 2015

There does not appear to have been a discussion amongst the Councillors regarding the terms on which the GM would resume her duties. Again, there is no suggestion that:

- other Councillors had been consulted about the proposal,
- their approval sought to the proposed agreement,
- Clr Weyrich and/or Clr Bilkey had authority to negotiate the agreement, or
- the agreement had been circulated to the other Councillors

Importantly, the agreement does not appear to have been ratified at a subsequent meeting.

Again, it appears that the signed agreement was not provided to the Councillors. Clr Pocklington, who was a staunch supporter of the GM, gave evidence that he had been informed of the decision by the Mayor Weyrich and gave the following view on the status of the agreement.⁸³

Q: So it wasn't a matter where you were personally involved as a decision-maker?

A: The decision was informed to me by the mayor and I concurred with his decision at the time.

Q: You talk about decisions being made by the mayor at the time and certainly it seems to be a bit of an issue as to the authority of a mayor to make decisions. In what circumstances do you regard the mayor as having power to make decisions that bind council?

A: The mayor has under the Office of Local Government Act, the Local Government Act, has very little more authority than a councillor.

COMMISSIONER:

Q: Has very more authority did you say?

A: Hardly any more authority.

Q: Hardly any more. Sorry.

A: Sorry.

⁸³ Pocklington transcript: p167:11-31

Q: *No, that's all right?*

A: *In emergency cases he can undertake to do certain activities if there's not time to call a council to make a decision, but that is very limited and (indistinct) communications that'd be a problematic use for exercising his power. The only real power a mayor has got above a councillor, and a councillor has got no power between council meetings, is when the mayor is delegated authority.*

Absent an appropriate delegation to the Mayor and Deputy Mayor to negotiate and to enter into the agreement or its subsequent ratification at a meeting, the agreement could have no effect.

5.2.3 The second return to work agreement

On 15 August 2015 the GM commenced a further period of leave.

In the turmoil associated with the change of Mayor from Clr Weyrich to Clr Pocklington, the circumstances of the GM's departure were not clear.⁸⁴ Clr Pocklington described in his evidence his involvement in the negotiations leading to the GM's return to work.

While the Councillors had delegated authority for the Mayor (Pocklington) and the Deputy Mayor (Clr Campbell) to deal with the issues,⁸⁵ in the face of the GM's demand, Clr Campbell was excluded from any involvement in any part of the negotiations.⁸⁶

While Mayor Pocklington had the authority to represent the Council in negotiations relating to the GM, the resolution did not contain express power for him to enter into an agreement on behalf of the Council.⁸⁷

⁸⁴ Pocklington transcript: p168:17-22

⁸⁵ Minutes of meeting 15 September 2015

⁸⁶ Pocklington transcript: p168-174

⁸⁷ Minutes of meeting 29 September 2015, although Clr Bilkey gave evidence that he regarded it as a complete authority: Bilkey transcript: p250-251:20-6

Ultimately an agreement was reached providing for a resumption of the GM's duties.⁸⁸ The agreement was signed by Mayor Pocklington and Clr Bilkey, on behalf of themselves and the Council. Clr Pocklington acknowledged he been taken to task for keeping the agreement secret, he took the view that it was an agreement between himself and the GM. While the agreement placed personal responsibility on Mayor Pocklington and Clr Bilkey, it bound Council more widely.⁸⁹

Fundamentally, both Mayor Pocklington and Ms Stork regarded the agreement as confidential⁹⁰ and were at pains to ensure that it was neither released to other councillors nor released publicly. Ultimately, this quest for confidentiality subsumed proper governance processes.

In the lead up to signing the agreement, Mayor Pocklington neither reported to nor consulted with the other Councillors (perhaps other than Clr Bilkey who was a signatory to the agreement).

Again, having signed the agreement, Mayor Pocklington did not:

- seek to have the agreement ratified by the council, or
- provide a copy of the agreement to the Councillors, or
- disclose its terms to other councillors.⁹¹

Despite his awareness that it was an issue of concern among Clr Weyrich and the minority councillors, Clr Pocklington steadfastly refused to provide access to, or details of the agreement.⁹²

While Clr Bilkey acknowledged that most of the agreement should have been ratified by Council,⁹³ he sought to excuse this behaviour, giving the following evidence.⁹⁴

⁸⁸ Pocklington transcript: p178-180

⁸⁹ Stork transcript: p870:6-18

⁹⁰ Stork transcript: p869:24-27, Pocklington transcript:p106:26-28, p178:6-11

⁹¹ Pocklington transcript: p178 et seq, Murphy transcript: 737-738:25-4

⁹² Pocklington transcript:p180-182:21-23, Murphy transcript: p737-738:25-4

⁹³ Bilkey transcript p210:5-21

⁹⁴ Bilkey transcript: p235:5-26

MR BROAD:

Q: *Councillor Bilkey. Just to commence, I briefly reviewed the return to work agreement overnight and in that agreement there was an obligation imposed on you and the Mayor to meet with the general manager on a weekly basis to discuss certain aspects of her return to work agreement. My question to you is whether to your knowledge, that was communicated to other councillors?*

A: *I don't believe so.*

Q: *There is a reason for that?*

A: *I believe that document was deemed to be a private document on legal advice, and that as such, wasn't shared.*

Q: *That of course provided an interaction beyond the limited scope permitted under the Interaction Policy that had been previously agreed to by councillors?*

A: *Yes, but I do believe it was an agreement that had been sanctioned by the Safe Work office.*

COMMISSIONER:

Q: *That legal advice would have been the advice from the solicitors acting for the council in relation to the whole return to work issue presumably?*

A: *I couldn't - - -*

Q: *You (indistinct) know?*

A: *No, I don't know where that legal advice came from.*

5.3 Overview

Councillors operate as a collegiate body, making their decisions democratically, by majority view. Cllr Weyrich described the relationship between Councillors and the GM in the following manner:

This council - this council employs one person and that's the general manager and everybody else is employed by the general manager. I don't employ the general manager, Mayor Pocklington doesn't employ the general manager. She's employed by the council and anything

*that has to do with the general manager in respect of her employment, should come to the council.*⁹⁵

The mayor does have important additional roles beyond that exercised by the councillors in the decision-making process, through the exercise of a determinative vote in limited circumstances and, in cases of necessity, the policy-making functions of the councillors between meetings. However beyond this the mayor's role is the same as a councillor.

In the instances that are considered in this part, both Mayor Weyrich and Mayor Pocklington unilaterally purported to bind the Council. In such instances they did not ensure they had the requisite authority, inform their fellow councillors of their actions or have their actions ratified.

In providing this comment, it must be acknowledged that their decisions were made against a backdrop of extreme division within the Council. There is no doubt that the decisions were underwritten by the division between the majority and minority councillors and the further rift that existed between the minority councillors and the GM. However, neither provides an excuse. It is reasonably clear that, in all three instances a motivating factor was to use their status as part of the majority faction of Council to secure the outcome that they were seeking. While not having a primary role, Cllr Bilkey was also intertwined in such processes.

A fear that sensitive or confidential information might be leaked, or that they might be criticised for their actions, is not a sufficient excuse for what were fundamental breaches.

While he may have seen his actions as altruistic, there is no doubt that Cllr Pocklington's failure to provide information in relation to the second return to work agreement only fuelled further bitterness within both factions of Council. That

⁹⁵ Weyrich transcript: p298-299: 31-8

bitterness underlay the subsequent motion of no confidence in the GM⁹⁶ and was manifested in the evidence given by the minority councillors during the hearings.⁹⁷

Ultimately, the matters considered in this part were yet another indication of the underlying dysfunction within the Council.

Additional guidelines should be included in the Guidelines to address changes to a general manager contract (for whatever reason) being properly negotiated and agreed to by the council or one or more councillors with the appropriate delegated authority of the council and that any changes be made known to all councillors.

⁹⁶ Notice of motion by Clrs Mackenzie and Moon: 8 January 2016, Moon transcript: p666-669:19-9

⁹⁷ Campbell transcript: p334:10-22, Mackenzie transcript: p550: 4-13, Moon transcript: p666:23-9

6 INQUIRY PROCEDURAL MATTERS

The Inquiry emphasised its role as a public inquiry and has, so far as possible, made its processes open and transparent.

The terms of reference called upon the Inquiry to obtain an overview of and to form an opinion on aspects relating to the governance of the Council.

In so doing, the Inquiry was directed to inquire into certain matters associated with the conduct of the Councillors, both in relation to the GM and in relation to the other Councillors.

In order to do so, the Inquiry has reviewed information provided by the OLG, the Council and SafeWork and reviewed various Council files relating to:

- conduct complaints,
- Council codes and policies,
- reports to and minutes of Council meetings.

6.1 Notice

The public notice of the Inquiry was published in the Riverine Herald on 5 February 2016 and on 12 February 2016 and in the Deniliquin Pastoral Times and Southern Riverina News on 12 February 2016. The notice included the terms of reference and invited submissions relevant to the terms of reference. Copies of the notice were also made available at Council's offices at Mathoura, the Mathoura Visitor and Business Centre, Council's library at Mathoura and the Echuca library.

A Notice of Hearings was subsequently advertised in the Riverine Herald on 23 March 2016 and Deniliquin Pastoral Times and Southern Riverina News on 18 March 2016. Copies of the notice were also made available at Council's offices at Mathoura, the Mathoura Visitor and Business Centre, Council's library at Mathoura and the Echuca library.

Information relating to the Inquiry was published on a dedicated website. The information included the Inquiry's terms of reference, the Notice of Hearings, the Information Paper and the publicly available submissions. Following completion of the public hearings, the transcripts were also made available.

6.2 The suspension and merger

On Wednesday, 10 February 2016 the Councillors were suspended by the Minister under s438W of the LG Act and Mr David Shaw was appointed as administrator. This did not affect the conduct of the Inquiry.

On 12 May 2016 the Governor announced the amalgamation of the Council with Wakool Shire Council. Part 7(3) provided that a public inquiry in relation to a former council or members of a former council commenced before but not completed at the time of the amalgamation may be continued and completed. Accordingly, the Inquiry has remained on foot. However it removed the necessity to consider whether any recommendation for dismissal of the Councillors should be made as referred to in this report.

6.3 Submissions

Letters were sent to each of the Councillors, the GM and senior staff inviting them to make a submission in relation to the terms of reference of the Inquiry. A further letter was sent to the GM inviting staff to make a submission. Mr Burke, a former councillor, was also invited to make a submission.

In view of the involvement of the OLG and SafeWork, each was invited to provide a submission to the Inquiry. Other bodies, representing staff, were also invited to provide a submission.

The Inquiry received 22 submissions in total. Redacted versions of the majority of these were made available on the website during the period of the public hearings and the time for submissions in reply.

Those submissions that fell within the terms of reference were published on the Inquiry's webpage. Copies of the published submissions were also made available for inspection during the public hearings.

The Inquiry relied on advice regarding the general application of defamation law to matters contained in submissions. The advice indicated that matters would generally not be considered defamatory if contained in submissions falling within the terms of reference of the Inquiry.

The nature of this advice was incorporated into the Information Package. Discretion was exercised as to whether to make a submission publicly available. In light of the advice that had been provided to the Inquiry, notwithstanding the Inquiry's view that submissions should be publicly available, it was felt appropriate in certain instances to refrain from providing copies of certain submissions.

Initially submissions received (with redactions) were placed on the Inquiry website. The submissions were subsequently removed based on further advice obtained by OLG about possible defamation issues.

6.4 The hearings

The hearings were held over seven days at the Mathoura Visitor and Business Centre, commencing on the 4 April 2016 and concluding on 12 April 2016.

During the hearings, both Mr Broad and I asked questions of witnesses in relation to matters relevant to the terms of reference.

Evidence during the hearings was given under oath or affirmation. Evidence had to be relevant to the terms of reference of the Inquiry. I retained discretion to refuse evidence that was not relevant.

The public hearings were conducted on an informal basis. The procedures that were adopted sought to ensure that the Inquiry proceeded in a simple and expeditious manner, while at the same time, recognising the rights of the people involved.

During the hearings, the Inquiry heard from the Mayor and six of the other Councillors. The Inquiry also heard from Ms Margot Stork (the GM), Mr Peter Dunphy, the Executive Director of SafeWork and from Mr Tim Hurst, the Acting Chief Executive Officer of the OLG.

Clr Anderson was unable to attend the hearings, as was the former councillor, Mr Burke.

No person or parties sought to have legal representation at the hearing.

6.5 Procedural fairness

The terms of reference call upon the Commissioner to inquire, report and provide recommendations to the Minister on aspects involving the governance of the Council. Up until the merger of the Council with Wakool Shire Council, it was open to the Inquiry to make a recommendation that the Governor declare all civic offices to be vacant. Such a recommendation, if made, and if acted upon, could result in the appointment of an administrator or a fresh council election.

While the Inquiry would only be making comments, findings or recommendations, these might be taken up by the Minister or by the Governor and given effect to. Given this, the Inquiry regarded itself as having a duty to act fairly in accordance with the principles of administrative law. The Inquiry sought to conduct its proceedings in a manner, which afforded natural justice to the Councillors and members of Council's staff.

In my opening speech, I indicated that I would allow an opportunity for written submissions in reply to evidence given during the hearings.

I received 18 submissions in reply from councillors, Council staff and members of the public.

During the public hearings a number of speakers provided additional material. These have been treated as submissions.

Whilst not wishing to detail the entirety of the approaches taken, it is appropriate to highlight some of the major aspects embodied in the manner in which the Inquiry was conducted. Included in the procedures adopted were:

- the majority of submissions which were received by the Inquiry were made available for public viewing,
- details which were thought to be inappropriate, were deleted from some submissions and this approach provided opportunity to others to comment on or correct statements made in the submissions,
- providing copies of documents to councillors, witnesses and to the council and seeking comment or clarification,
- conducting the hearings in public, and
- providing a written right of reply following the conclusion of the hearings.

CHRONOLOGY

- 13 September 2012 Local Government elections, Clr Weyrich elected as mayor
- 15 May 2013 By-election – Clrs Bilkey and Mackenzie elected
- 28 April 2014 Margot Stork appointed as GM
- 25 July 2014 GM requests intervention by OLG
- 3 September 2014 OLG intervention commences
- 24 November 2014 Meeting between councillors and GM
- December 2014 Workcover becomes involved
- 9 December 2014 Mediation occurs
- 8 January 2015 GM's Workcover claim leaked
- 20 February 2015 GM lodges "omnibus" conduct complaint
- 15 March 2015 GM lodges further conduct complaints
- 16 March 2015 Workcover issues Improvement Notices
- 18 March 2015 Clrs Mackenzie, Campbell, Moon and Bourke attending meeting at Deep Creek
- 12 April 2015 GM on leave
- 15 April 2015 Janice McLeay provides investigation report
- 30 April 2015 McLeay report leaked
- 30 June 2015 GM returns from leave
- 8 July 2015 Conduct reviewer's report re conduct complaint involving Deep Creek
- 12 July 2015 Clr Murphy raises concerns for her safety at meeting
- 31 August 2015 GM on leave
- 15 September 2015 Clr Pocklington elected Mayor, Clr Campbell elected as Deputy Mayor
- 5 October 2015 Mayor negotiates GM's return to work

- 6 October 2015 Council considers reviewer's report about Clr Mackenzie's conduct – Clrs Campbell and Moon leave meeting depriving quorum
- 12 October 2015 GM returns to Work
- 19 October 2015 Reviewer's report on Clr Campbell's credit card allegations
- 17 November 2015 Clrs Campbell and Moon leaving meeting preventing quorum
- 17 December 2015 OLG writes to GM and Higgins about Kleem's report suggesting referral to another reviewer
- 11 January 2016 Clr Mackenzie and Moon lodge a motion of no confidence in GM
- 8 January 2016 GM's performance review
- 12 January 2016 Janice McLeay's notes leaked
- 15 January 2016 Inquiry convened
- 19 January 2016 Lack of quorum and meeting does not proceed
- 19 January 2016 GM lodges application to Fair work Commission
- 5 February 2016 Request for submissions advertised
- 10 February 2016 Councillors suspended during the Inquiry
- 22 February 2016 Submissions to be submitted
- 18 March 2016 Notice of hearings advertised
- 4 April 2016 Public hearings commenced
- 12 May 2016 Premier announced 19 new councils

DICTIONARY

Code	Council's adopted code of conduct
Council	Murray Shire Council (prior to 12 May 2016 when it was dissolved)
council	a council in its general operation as a body politic
Councillors	the former councillors of Murray Shire Council
GM	Council's General Manager, Margot Stork
Guidelines	OLG Guidelines for the Appointment & Oversight of General Managers
LG Act	<i>Local Government Act 1993</i>
majority councillors	Councillors Weyrich, Pocklington, Anderson, Bilkey and Murphy
Mayor Pocklington	Councillor Pocklington as mayor from September 2015 to May 2016
Mayor Weyrich	Councillor Weyrich as mayor from September 2012 to September 2015
Minister	the Minister for Local Government
minority councillors	Councillors Mackenzie, Campbell, Moon and Burke
Model Code	the Model Code of Conduct for Local Councils in NSW, March 2013
new Council	Murray River Council (as proclaimed in the proclamation of 12 May 2016 which involved the amalgamation of Murray Shire Council and Wakool Council

OLG	Office of Local Government
Procedures	The Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW, March 2013
SafeWork	SafeWork NSW formerly WorkCover
WHS Act	<i>Work Health and Safety Act 2011</i>