REPORT OF THE PANEL OF INQUIRY INTO THE CITY OF CANNING

AN INQUIRY UNDER DIVISION 2, PART 8
LOCAL GOVERNMENT ACT 1995

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Inquirer

May 2014
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CHAPTER ONE

APPOINTMENT OF INQUIRER AND TERMS OF REFERENCE
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APPOINTMENT OF INQUIRER AND TERMS OF REFERENCE

Publication of Department of Local Government’s Authorised Inquiry Report

1.1 On 9 February 2012, after receiving representations from the City of Canning’s Mayor Joe Delle Donne OAM and other sources, the then Minister for Local Government, the Hon John Castrilli MLA, in accordance with section 8.3(3) of the Local Government Act 1995, directed Ms Jennifer Mathews, Acting Director General of the Department of Local Government, to commence an Authorised Inquiry into the City of Canning.

1.2 On 23 February 2012, Ms Mathews authorised an Authorised Inquiry, pursuant to section 8.3(2) of the Local Government Act 1995, to inquire into and report on matters identified in the Authorised Inquiry’s Terms of Reference. Those Terms of Reference were:

1) Implementation of Council resolutions by the City of Canning Chief Executive Officer, Mr Mark Dacombe;

2) Council’s relationship with, and management of, the City of Canning Chief Executive Officer, Mr Mark Dacombe;

3) The appointment of Executive and other employees at the City of Canning from 23 February 2009 and the appropriateness of the processes used for those appointments;

4) The conduct of Council members and employees of the City of Canning, including but not limited to:
   a) tendering, purchasing and procurement, and contract management;
   b) improper or undue influence; and
   c) behaviour at Council meetings

5) The adequacy of the City of Canning’s procedures, including but not limited to:
   a) transparency of decision making, information provided to Council members, and recording of Council decisions; and
b) the conduct of Council meetings, including observance of relevant legislation and protocols.

6) Whether the City of Canning has provided good government in respect of these matters, and;

7) Any other issue that is determined to be of relevance to the above

1.3 The Authorised Inquiry resulted in the publication, in November 2012, of the Authorised Inquiry Report into the City of Canning (the “Authorised Inquiry Report”). That Report was written to comply with section 8.13 of the Local Government Act 1995.

1.4 The Authorised Inquiry Report covers 478 pages and a wide range of issues. It makes 66 findings in relation to the issue of whether good government was provided by the City of Canning Council. It also makes a number of key recommendations. I note, in particular, the comments at pages 6:26 and 6:27 of the Authorised Inquiry Report, which reads as follows:

69. The Inquiry submits ... that there has been a clear failure by Council to ensure the City of Canning performs its functions properly. It is further submitted by this Inquiry that this Report has identified that this failure has been both serious and continuous over an extended period of time.

70. The situation that exists now is that Council has seriously eroded its professional relationship with its Administration to the extent that the Inquiry considers that if the Council were to remain in office the potential exists for further major problems to develop.”

1.5 Importantly, the Authorised Inquiry Report recommends as follows at page 6:27:

71. It is recommended that the Minister for Local Government appoint an Inquiry Panel under section 8.16 of the Local Government Act 1995 to inquire into, and report upon, particularly having regard to the contents of this Report, the ability of the City of Canning to provide for the good government of the persons in its district. An Inquiry Panel has power under section 8.22 to recommend that a Council be dismissed or that a Council that has been suspended be reinstated.

72. Because there is clear evidence of a serious failure by the Council over an extended period of time to ensure the City of Canning performs its functions properly, it is submitted by this Inquiry that it would be inappropriate for the Council to continue to act as the governing body of the city, pending the outcome of the panel of inquiry.
73. It is recommended that pending the outcome of the Inquiry Panel, the
Minister suspend the council under section 8.19(1) of the Local

1.6 The sheer size of the Authorised Inquiry Report, the detailed analysis provided in it
and the significant number of findings made throughout it point to what was
undoubtedly a considerable investigative undertaking, drafting exercise and factual
analysis on the part of those charged with writing it. These persons are to be
commended for their efforts in that regard and the result of those efforts.

Suspension of Council and Appointment of an Inquiry Panel

1.7 On 22 November 2012, having reviewed the findings and recommendations in the
Authorised Inquiry Report, the then Minister for Local Government, the Hon John
Castrilli MLA, suspended the Council for the City of Canning. The Minister also
called for the appointment of an Inquiry Panel, as recommended in the Authorised
Inquiry Report.

1.8 Given the length and content of the Authorised Inquiry Report and the extensive
arguments and numerous conclusions contained in it, the Minister was entirely
justified in suspending the council and calling for the appointment of an Inquiry
Panel to determine whether good government had been and could be provided in
the City of Canning. To do otherwise would have been inappropriate and a
disservice to both the Council and the citizens of the City of Canning.

1.9 On 10 December 2012, by an Instrument under the hand of the Minister, I was
appointed as an Inquiry Panel pursuant to section 8.16 of the Local Government
Act 1995, to be read with sections 5 and 6 of the Royal Commissions Act 1968
(WA), to conduct an inquiry into aspects of the City of Canning and its operations
and affairs.
1.10 Section 8.16 of the *Local Government Act 1995* reads:

**8.16 Minister may institute an inquiry**

(1) The Minister may by written notice appoint an Inquiry Panel consisting of one person or 3 people to inquire into and report on any aspect of a local government or its operations or affairs.

1.11 As an aside, I should state that the use of the term “Panel” in the *Local Government Act 1995* to refer to the appointment of one person to chair an Inquiry strikes me as rather peculiar. It caused some confusion amongst those wanting to make submissions to this Inquiry and is not particularly useful. It would, in my opinion, be more accurate for the legislation to be amended such that when one person is charged with the tasks I was charged with (rather than three, as is allowed by the legislation), that one person should be referred to as an “Inquirer”.

**This Inquiry’s Terms of Reference**

1.12 Section 8.17 of the *Local Government Act 1995* reads:

**8.17 Scope and duration of inquiry**

The notice appointing an Inquiry Panel is to set out:

(a) the nature of the inquiry to be conducted;

(b) the functions of the Inquiry Panel; and

(c) any limit imposed on the duration of the inquiry.

1.13 Paragraph A of the Minister’s Notice appointing me as the Inquiry Panel (what I will refer to throughout the remainder of this Report as the “Terms of Reference”) reads:

**A. Nature of the Inquiry to be Conducted**

1. The Inquiry Panel is to inquire into and report on those aspects, operations and affairs of the City of Canning (including the Council and the Administration) during the period 1 February 2009 to
27 November 2012 inclusive, which may be necessary, in order to determine:

(i) Whether there has been a failure to provide for the good government of persons in the City of Canning’s district;

(ii) The prospect of such good government being provided in the future (including by reference to whether the Council and Administration has the ability to, and is likely to, do so); and

(iii) Any steps which may need to be taken to ensure that such good government does happen in the future.

2. The Inquiry Panel may inquire into and report on a period, or periods, before 1 February 2009, if it considers that to be necessary, or that it may be necessary, for the purpose of properly discharging its function under paragraph 1 above, and placing the matters inquired into within a relevant context in the circumstances.

3. The Inquiry Panel is (and without limiting the generality of paragraph 1 above) to give due consideration to, and inquire into and report on, the matters raised in the Authorised Inquiry Report of the Inquiry into the City of Canning, including in particular:

(i) Allegations of improper or undue influence in administrative tasks, such as recruitment, employee management, procurement and tendering;

(ii) Council’s relationship with the City of Canning Chief Executive Officer and the Administration of the City of Canning;

(iii) Governance practices, including adherence to the financial interest provisions of the Local Government Act 1995;

(iv) The City of Canning’s membership of the Southern Metropolitan Regional Council; and

(v) Adequacy and competency of Council decision making.

1.14 Pursuant to section 8.17(b) of the Local Government Act 1995, the Terms of Reference also outline the functions of the Inquiry in paragraph (B), as follows:

B. Functions of the Inquiry Panel

The functions of the Inquiry Panel are as set out in A, above, and, for the avoidance of doubt, include the obligations to inquire into, report on, and then make the recommendations in relation to the matters the subject of the Inquiry that it considers appropriate (in accordance with its duty under section 8.22 of the Local Government Act 1995).
1.15 I note in that regard that section 8.22 of the *Local Government Act 1995* reads as follows:

8.22 Report of Inquiry Panel

(1) An Inquiry Panel’s report is to contain any recommendations that the Inquiry Panel considers appropriate.

(2) Without limiting subsection (1) the Inquiry Panel may recommend –

   (a) that a council be dismissed; or

   (b) that a council that has been suspended be reinstated.

(3) The report is to be given to the Minister

1.16 My appointment as the sole Inquirer took effect on 1 April 2013. I had no authority in relation to the administration of the Inquiry (including the hiring of Inquiry Staff, office accommodation and document control systems) until that time. Further, Inquiry staff were not provided any of the evidence relied on by the authors of the *Authorised Inquiry Report* until that time.

1.17 Pursuant to section 8.17(c) of the *Local Government Act 1995*, the Terms of Reference specifically limited the duration of this Inquiry by requiring that I report on or before 31 March 2014. That reporting date was ultimately extended to 31 May 2014 due to the amount of evidence the Inquiry was required to examine and to enable me to properly review what amounted to lengthy and detailed Written Submissions in Reply (discussed below) from witnesses and/or their lawyers appearing before the Inquiry.

1.18 Ultimately, my recommendations to the Minister are just that: recommendations. Any findings made by me have no binding legal effect. They do not and cannot determine legal rights or obligations. They are expressions of opinion only. Once this Inquiry has reported to the Executive Government, it ceases to exist.

**Royal Commissions Act 1968**

1.19 Under section 8.20 of the *Local Government Act 1995*, Inquiry Panels have the powers of a Royal Commission, including the powers of the Chairman of a Royal
Commission. Hence, in addition to the provisions of the *Local Government Act 1995* relevant to an Inquiry of this sort, the provisions of the *Royal Commissions Act 1968* also apply with such modifications as are required. These powers include, but are not limited to:

- **88** The power to obtain documents and other things;
- **9** The power to summons witnesses and documents;
- **10** The Power to examine on oath; and
- **12A-15E** Broad contempt powers.

**Counsel Assisting**

1.20 Barrister Darren Renton was appointed by the Minister as Counsel Assisting the Inquiry.

1.21 Mr Renton was given authority by me to appear and call witnesses, and examine and cross-examine, whenever in his discretion he regarded it as necessary or appropriate in order to elicit evidence germane to this Inquiry. He was also given authority to make such submissions to me on the law and the facts that he believed would assist me in forming a view as to whether there had been and, if so, to what extent, there had been a failure to provide good government in the City of Canning.

1.22 The central role played by Counsel Assisting in eliciting evidence and examining witnesses during the course of public hearings will be examined in more detail in Chapter Four of this Report. For now, however, I thank Mr Renton for his invaluable assistance throughout this Inquiry. His skill as an advocate and the cooperative and respectful way in which he dealt with other counsel and all witnesses allowed me to address the issues at hand, rather than some of the more peripheral and less than helpful side issues that have tended to plague other inquiries of this sort in the past.
Inquiry Staff

1.23 In addition to myself and Mr Renton, the Inquiry staff comprised:

- Mr David Morris – Executive Officer;
- Mr Brett McKeever – Senior Investigator;
- Ms Danielle Rafferty – Senior Document Officer;
- Ms Kate Mort – Associate to the Inquirer and Senior Research Assistant;
- Ms Leeann Cogan – Administrative Assistant;
- Mr James Moffat – Research Assistant;
- Mr Luke Seitz – Research Assistant;
- Mr Harry Guo – Research Assistant.

1.24 Inquiries of this sort cannot function without competent staff. I have been extremely fortunate to work with an exceptional group of women and men who worked tirelessly and often very late into the night and on weekends to ensure that me, Counsel Assisting, all lawyers appearing before the Inquiry and all witnesses were provided with as much assistance as they needed throughout the course of the Inquiry. Their efforts were, rightly, the subject of much praise by lawyers and witnesses during public hearings (T1823, T645 and T451). I echo and endorse those comments here.
CHAPTER TWO

THE MEANING OF “GOOD GOVERNMENT”
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Introduction

2.1 At its core this Inquiry has been tasked with determining whether there was a failure on the part of the Council of the City of Canning to provide good government to the citizens of the City of Canning.

2.2 In the present circumstances where the Minister has suspended the Council of the City of Canning, pursuant to the power to do so under section 8.19 of the Local Government Act 1995, the Minister must, pursuant to section 8.24(4)(a) of the Act “reinstate the council if the inquiry has not recommended its dismissal” or a period of two years has elapsed since the date of suspension (the date of suspension in this case being 22 November 2012).

2.3 The appropriateness of making a recommendation that the Council be dismissed flows from any conclusions I reach as to the extent to which, if any, there has been a failure to provide good government in the City of Canning as a result of acts or a failure to act on the part of the Council as a body or any member of the Council. Further, whether or not a recommendation is to be made as to the dismissal of the Council, any other recommendations from me which might be appropriate will generally be focused on the provision of good government in the City of Canning.

2.4 This Inquiry into the City of Canning is the 7th government appointed Inquiry into the actions of a local government in Western Australia in the past 14 years. In determining what constitutes good government, I have been greatly assisted by the comments of previous Inquirers for the Cockburn Inquiry (2000), the South Perth Inquiry (2002) and the Joondalup Inquiry (2005). All of these inquiries build on each other and provide a useful framework within which to determine what constitutes good government.
2.5 The meaning of “good government” is, of course, fact specific and contextual. This is clear from an overview of the sometimes disparate circumstances under which “bad government” was found to have been provided in each of the local governments the subject of previous local government inquiries in Western Australia. Nonetheless, collectively, these previous inquiries provide an effective benchmark from which I have been able to draw comparisons, make recommendations and ultimately determine whether, on the evidence before me, good government was provided in the City of Canning during the relevant period.

2.6 This Inquiry has also, like those before it, turned to the definitions and analysis provided in the many governmental and non-governmental reports charged with defining the meaning and scope of the term good government. An overview of these reports is provided below.

**Good Governance**

2.7 A review of previous local government inquiries and relevant literature on issues of governance and good government makes it clear that one significant measure of whether there has been a failure to provide good government is an examination of the question of “governance”.

2.8 Governance refers to the process of decision making, together with the process by which decisions are implemented. An analysis of decisions made focuses on the formal and informal actors involved in decision making and the way in which they implement the decisions made, together with the formal and informal structures that have been set in place to arrive at and implement these decisions.

2.9 In the present case, the Council of the City of Canning is one of the parties involved in decision making. The executives of the Administration of the City of Canning, together with the staff of the Administration, are involved in the implementation of those decisions.
In the context of all local governments, the approach a council takes in conducting its business is often referred to as governance, which the Local Government Association of South Australia’s Comparative Performance Measurement Project defines as:

... the ability of a council to provide community leadership and to ensure it reflects the aspirations of the community it serves, both in current terms and for the future. It reflects the strategic management planning and policy development function of a council; its relationship with other spheres of government; its accountability to the community; the decision making role of the elected council and the process by which a council enacts its statutory responsibilities and functions to achieve its strategic directions: “Information Paper II: Governance in Local Government” (Financial Sustainability Program, Local Government of Authority of South Australia: October 2006) at page 2.

The Local Government Authority of South Australia further identifies (as above at pages 4-5) five core principles for good governance, all reflecting principles of representative democracy and responsible government. Those principles are:

1. **Accountability**

Promoting openness, honesty and an acceptance of responsibility for decision making and performance.

This principle requires elected Councils and their administrations to:

(a) Understand the formal and informal accountability relationships that exist within the Council and within the community.

(b) Take an active and planned approach to dialogue with, and accountability to, their community.

(c) Engage effectively with all stakeholders.

2. **Values**

Promoting and demonstrating the values of Councils and the exercising of good governance through ethical behaviour and appropriate conduct.

This principle requires elected Councils and their administrations to:

(a) Establish and articulate their organisational values and put these values into practice.

(b) Ensure that organisational values are effective.

(c) Ensure that they exercise leadership by behaving in ways that uphold high standards of conduct.
(3) Leadership

Establishing a clear vision and direction for the local area with clarity about the roles and responsibilities of the elected Council and its administration.

This principle requires elected Councils and their administrations to:

(a) Be clear about their individual and collective roles and responsibilities and to make sure that those roles and responsibilities are carried out to a high standard and are subject to performance assessment.

(b) Be clear about their relationships and know what to expect of each other.

(c) Ensure that a constructive working relationship exists between the elected Council and the administration.

(d) Be clear in communicating the Council’s purpose and vision and its intended outcomes for the community.

(4) Transparency

Making informed transparent decisions and managing risk.

This principle requires elected Councils and their administrations to:

(a) Be rigorous and transparent about how decisions are made and listen and act on the outcomes of constructive scrutiny.

(b) Have and use good quality information, advice and support to ensure that services are delivered effectively and to appropriately and openly balance what the community wants against its priority needs.

(c) Make sure that an effective risk management system is established, implemented and reviewed regularly.

(d) Recognise the limits of lawful action and observe both the requirements of legislation and the general responsibilities placed on Councils by law, while also accepting responsibility to use these legal powers to the full benefit of the stakeholders in their area.

(5) Community Engagement

Engaging stakeholders and making accountability real.

This principle requires elected Councils and their administrations to:

(a) Exercise leadership through effectively engaging their communities and stakeholders, and to develop constructive relationships.
Take an active and planned approach to dialogue with, and accountability to, the community to ensure effective and appropriate service delivery.

Make the best use of resources by taking an active and planned approach to meet responsibilities.

The United Nations Economic & Social Commission for Asia & the Pacific identifies similar principles: see http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp.

Finally, I note the work of the Independent Commission for Good Governance in Public Services (the “Commission for Good Governance”), chaired by Sir Alan Langlands in the United Kingdom. Throughout 2004, the Commission for Good Governance worked to provide a broad set of principles for determining the scope of good governance. Having consulted widely, it produced the “Good Governance Standard for Public Services” (the “Standard”).

The Standard outlines six principles of good governance that are common to all public service organisations, including local governments. They are intended to help all those with an interest in public governance access and assess good governance practices. These six principles provide a further useful overview of the meaning and scope of the term good governance. They are:

1. Good governance means focusing on the organisation’s purpose and on outcomes for citizens and service users
   1.1 Being clear about the organisation’s purpose and its intended outcomes for citizens and service users
   1.2 Making sure that users receive a high quality service
   1.3 Making sure that taxpayers receive value for money

2. Good governance means performing effectively in clearly defined functions and roles
   2.1 Being clear about the functions of the governing body
   2.2 Being clear about the responsibilities of non-executives and the executive, and making sure that those responsibilities are carried out
2.3 Being clear about relationships between governors and the public

3. Good governance means promoting values for the whole organisation and demonstrating the values of good governance through behaviour

3.1 Putting organisational values into practice

3.2 Individual governors behaving in ways that uphold and exemplify effective governance

4. Good governance means taking informed, transparent decisions and managing risk

4.1 Being rigorous and transparent about how decisions are taken

4.2 Having and using good quality information, advice and support

4.3 Making sure that an effective risk management system is in operation

5. Good governance means developing the capacity and capability of the governing body to be effective

5.1 Making sure that appointed and elected governors have the skills, knowledge and experience they need to perform well

5.2 Developing the capability of people with governance responsibilities and evaluating their performance, as individuals and as a group

5.3 Striking a balance, in the membership of the governing body, between continuity and renewal

6. Good governance means engaging stakeholders and making accountability real

6.1 Understanding formal and informal accountability relationships

6.2 Taking an active and planned approach to dialogue with and accountability to the public

6.3 Taking an active and planned approach to responsibility to staff

6.4 Engaging effectively with institutional stakeholders
2.15 These six principles, in turn, result in and are central to the meaning of good government because of the benefits that flow to the community from good governance procedures. Broadly, these benefits have been summarised as:

(1) **Better decisions**

To properly reflect the broad interests of the community, decisions should be informed by good information and data, by stakeholder views and by honest and open debate.

(2) **Promotes community confidence**

Transparent and accountable decisions increase the community’s confidence in their local government by demonstrating that decisions will be made in the community’s overall interest regardless of differing opinions.

Good governance reminds local governments that they are acting on behalf of their community and fosters an understanding of the importance of having open and ethical processes which complies with the law and withstands scrutiny.

(3) **Encourages Elected Members and council officers to be confident**

Good governance allows councillors to be confident across issues and fosters an environment where they can trust the advice they are given. It also provides that their views will be respected, even if not agreed with and that the council chamber is a safe place for debate and decision making.

This in turn creates an environment where administration officers will have confidence in providing full and frank advice that is acknowledged and respected by councillors.

(4) **Supports ethical decision making**

Making choices and having to account for them in an open and transparent way encourages honest consideration of the choices facing those in the governance process. This is the case even when differing moral frameworks between individuals means that the answer to ‘what is the right thing to do’ is not always the same.

(5) **Helps local government meet its legislative responsibilities**

Open and accountable decision making that is able to be followed by observers provides an environment which increases the likelihood of compliance with relevant legal requirements. Such a process reduces the likelihood and temptation to take shortcuts or bend the rules: “Why is good governance important” at http://www.goodgovernance.org.au

2.16 A review of previous local government inquiries in Western Australia supports the argument that good government includes these underlying principles.
2.17 As is clear from the analysis provided below, these principles are also compatible with the provisions of the *Local Government Act 1995* and, as such, provide a useful measure in the present case.

**The Local Government Act 1995 and Good Government**

2.18 Relevantly, section 3.1 of the *Local Government Act 1995* states that:

3.1 *General function*

1. The general function of a local government is to provide for the good government of persons in its district.

2. The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

3. A liberal approach is to be taken to the construction of the scope of the general function of a local government.

2.19 Somewhat surprisingly, the *Local Government Act 1995* does not explicitly define the term good government. This is unfortunate, particularly given how much of the statute focusses on ensuring the provision of good government.

2.20 In these circumstances, the ordinary rules of statutory construction suggest that the term should be given its ordinary meaning. Further assistance can also be drawn from an analysis of what the provisions of the *Local Government Act 1995* do say, albeit implicitly, about good government.

2.21 In that regard, I note the content of section 1.3, subsection 1, of the *Local Government Act 1995*, which reads:

*This Act provides for a system of local government by:*

(a) providing for the constitution of elected local governments in the state;

(b) describing the functions of local governments;

(c) providing for the conduct of elections and other polls; and
2.22 Section 1.3, subsection (2) then provides that:

This Act is intended to result in:

(a) better decision-making by local governments;
(b) greater community participation in the decisions and affairs of local governments;
(c) greater accountability of local governments to their communities; and
(d) more efficient and effective local government.

2.23 As summarised by Greg McIntrye SC, the Inquirer for the Inquiry into the City of South Perth (2002):

…it can be inferred from that subsection that the legislature intended that the good government of a local government might be measured by the quality of (a) its decision-making, (b) community participation in its decisions and affairs, (c) its accountability to its community, and (d) its efficiency and effectiveness.

2.24 I agree with that conclusion.

2.25 The Local Government Act 1995 further gives effect to the intention of Parliament in relation to the provision of good government (as expressed in section 1.3 subsection (2) above), by defining the role of the Mayor, Councillors and Chief Executive Officers.

2.26 A review of these statutory provisions reveals a clear boundary between management and governance responsibilities. As outlined in the Authorised Inquiry Report:

The principle behind this delineation is ensuring an efficient and clear decision-making process. As outlined by the then Minister for Local
Government, Hon Paul Omodei MLA, in his second reading speech for the Local Government Bill on 31 August 1995:

“There will be clear specification of the roles of key players; that is, council, mayor or president, and councillors. This is designed to promote efficient administration at the local government level and to avoid conflicts caused by uncertainty. The lack of role clarity has led to some mayors/presidents and councillors becoming involved in administrative matters which should be handled by staff. The new Act will provide a clear distinction between the representative and policy making role of the elected councillors and the administrative and advisory role of the chief executive officer and other staff.”

(Second Reading Speech, Minister for Local Government, Local Government Bill, Hansard 31 August 1995, pp7547-7553)

Section 2.7(1)(a) of the Act as it was when it came into operation on 1 July 1996 read “The council…directs and controls the local government’s affairs”. Since the enactment of the Local Government Amendment Act 2009, the phrase ‘direct and controls’ in section 2.7(1)(a) of the Act has been replaced by the word ‘governs’. On 8 September 2009, when the Local Government Amendment Bill 2009 was being considered in detail in Parliament, the Hon John Castrilli MLA, Minister for Local Government, said in regard to the intent of that replacement:

“It really clarifies the position that Elected Members are there to govern at that higher strategic level, and directed control is really invested in the position of the chief executive officer, who handles the everyday, hands-on running of the organisation. That is the distinction we are trying to draw.”


A significant further reason for defining the duties of Council and the Administration of a local government is to curtail inappropriate influence or corruption:

“…prior to the reforms of the 1990s, [local government] had to deal with a local government culture where councillors were involved in directing employees in the implementation of decisions. Legislation had played a role in this by conferring powers on the mayor that would normally be exercised by a CEO as an appointed official. Prior to the reforms, there was no real distinction between policy making and implementation (Clark 2004:xv). This was explicitly addressed by recent legislation to provide a clear distinction between the policy/strategic functions of the elected council and the administration’s responsibility to carry out the policy.”
227 Section 2.7 of the *Local Government Act 1995* defines the role of the Council as follows:

(1) The Council -

(a) governs the local government’s affairs; and

(b) is responsible for the performance of the local government’s functions.

Without limiting subsection (1), the Council is to -

(a) oversee the allocation of the local government’s finances and resources; and

(b) determine the local government’s policies.

228 Section 2.8 of the *Local Government Act 1995* then defines the role of the Mayor in the following terms:

1) The Mayor or President

a) presides at meetings in accordance with this Act; and

b) provides leadership and guidance to the community in the district; and

c) carries out civic and ceremonial duties on behalf of the local government; and

 d) speaks on behalf of the local government; and

 e) performs such functions as are given to the Mayor or President by this Act or any other written law; and

 f) liaises with the CEO on the local government's affairs and the performance of its functions.

2) Section 2.10 applies to a councillor who is also the mayor or president and extends to a mayor or president who is not a councillor.
Section 2.9 of the *Local Government Act 1995* outlines the role of the Deputy Mayor as follows:

*The deputy mayor or deputy president performs the functions of the mayor or president when authorised to do so under section 5.34.*

Finally, section 2.10 of the *Local Government Act 1995* defines the role of a Councillor as follows:

* A councillor:
  a) represents the interests of electors, ratepayers and residents of the district; and
  b) provides leadership and guidance to the community in the district; and
  c) facilitates communication between the community and the council; and
  d) participates in the local government’s decision-making processes at council and committee meetings; and
  e) performs such other functions as are given to a councillor by this Act or any other written law.

As further explained in the *Authorised Inquiry Report* (at pages x and xi), Elected Members constitute the Council. They are responsible for observing and implementing section 2.7 of the *Local Government Act 1995* and ensuring that the needs and concerns of their community are addressed:

*An elected member will often make representations to the Administration of their respective local government on behalf of a constituent; it is consistent with their role as an elected member, especially when considering section 2.10(c) of the Act as outlined above. However, an elected member may not give directions to the Administration of a local government. This can only be done by Council collectively, in the form of a Council decision or resolution.*

I agree with that conclusion.

The administration of any local government is provided for in Part 5 of the *Local Government Act 1995.*
2.34 Section 5.2 of the Local Government Act 1995 provides that it is the duty of the Council of a local government to “ensure that there is an appropriate structure for administering the local government.”

2.35 By virtue of section 5.36, all local governments must employ a Chief Executive Officer (“CEO”), the local government’s most senior employee. Relevantly, section 5.36 relevantly provides:

Section 5.36 Local Government Employees

(1) A local government is to employ –
   (a) A person to be the CEO of the local government; and
   (b) Such other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed.

(2) A person is not to be employed in the position of CEO unless the council –
   (a) Believes that the person is suitably qualified for the position; and
   (b) Is satisfied* with the provisions of the proposed employment contract.

*Absolute majority required

(3) A person is not to be employed by a local government in any other position unless the CEO –
   (a) Believes that the person is suitably qualified for the position; and
   (b) Is satisfied with the proposed arrangements relating to the person’s employment.

(4) ...

2.36 The distinction between subsections 5.36(2) and (3) of the Local Government Act 1995 is important because it is clear that the CEO must be satisfied with any proposed employment – not the council.
In relation to senior employees of a local government, the provisions of section 5.37 of the Local Government Act 1995 relevantly provide:

5.37 Senior Employees

(1) A local government may designate employees or persons belonging to a class of employee to be senior employees.

(2) The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(1a), and the council may accept or reject the CEO’s recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.

(3) ...

I also note the provisions of section 5.41 of the Local Government Act 1995, which outlines the duties of a CEO as follows:

5.41 Functions of CEO

The CEO’s functions are to:

(a) advise the Council in relation to the functions of the local government under this Act and other written laws; and

(b) ensure that advice and information is available to the Council so that informed decisions can be made; and

(c) cause Council decisions to be implemented; and

(d) manage the day-to-day operations of the local government; and

(e) liaise with the Mayor or president on the local government’s affairs and the performance of the local government’s functions; and

(f) speak on behalf of the local government if the Mayor or President agrees; and

(g) be responsible for the employment, management, supervision, direction and dismissal of other employees subject to section 5.37 subsection (2) in relation to senior employees; and

(h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and

(i) perform any other functions specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.
2.39 The effect of sections 5.36 and 5.37 of the Local Government Act 1995 (save for subsection 5.37(2) in relation to senior employees) and subsection 5.41(g) of the Local Government Act 1995 is that a council has no lawful authority to give directions to the CEO on matters concerning the local government’s employees. Having satisfied itself that the CEO is suitably qualified for the position, the responsibility then devolves to the CEO to be satisfied about the suitability of non-senior employees.

2.40 As again summarised by Greg McIntyre SC in his Report into the City of South Perth (2002), the above provisions, in particular the ways in which powers have been allocated between the Mayor, the Councillors and the CEO, prescribe the processes by which the Parliament has sought to indicate its view as to what will lead to “good government” in the form of “good” decision-making, “good” community participation, “good” accountability and a “good” level of efficiency and effectiveness.

2.41 I agree with that analysis.

Conclusions

2.42 Outlined above are the principle and statutory requirements that have guided me as I seek to determine whether or not good government has been provided in the City of Canning. All of the above was highlighted to witnesses and/or their lawyers throughout the course of the Inquiry (see: CI10/03702 at pages 8-16; CI10/03335). No objection was received as to their meaning, scope and impact, either during the course of public hearings or in written submissions.

2.43 It is clear from the above that, taking into account the stated intention of the Local Government Act 1995 Act and the principles of good governance that underlie the meaning of the term good government more broadly (as that term is commonly used), the question of whether there has been a failure to provide for the good government of persons in a district can be determined inter alia by considering whether the actions, conduct (including a failure to act) or decisions of either the
council or the administration of a local government, either individually or collectively, fail to deliver any of the matters articulated in the *Local Government Act 1995* and the principles of good governance that support it.

2.44 In relation to any recommendation to dismiss a council, I agree with the conclusion of Mr Neil Douglas in his role as Inquirer for the Inquiry into the City of Cockburn (2000) that “it does not follow because of the finding that there have been specific instances of a failure to provide good government that a city should be dismissed.”

2.45 Clearly, not every failure will warrant a recommendation that a council be dismissed. Individual failures when considered in isolation may not give rise to a proper foundation for a recommendation of dismissal of the council. Nonetheless, when considered together with others, their collective weight and force may provide a proper basis for such a recommendation. What must be examined are the nature and extent of any wrongdoings.

2.46 To illustrate the point, where there is evidence of systemic failings in the process of decision making, such as routine rejection of the advice of administrative experts without proper foundation, it is more likely that a failure to provide good government will be identified. This in turn could warrant a recommendation of dismissal, in contrast to a single or isolated instance of such conduct, which may not.

2.47 An Inquirer is not prevented from making other recommendations that it considers appropriate, as long as they are within its terms of reference, to ensure that good government does happen in the future. An example of this would be recommending the appointment of a mediator to moderate any relationship conflicts that exist between Elected Members and the administration of a local government, or recommendations for better training of councillors and administrative staff.
CHAPTER THREE

THE CITY OF CANNING AND THE AUTHORISED INQUIRY REPORT
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The City of Canning

3.1 As explained in the Authorised Inquiry Report at pages xii to xiv, the City of Canning is a local government district located within the Perth metropolitan region. It shares boundaries with the City of South Perth, the City of Gosnells, the City of Cockburn, the City of Melville, the Town of Victoria Park, the Shire of Kalamunda and the City of Belmont.

3.2 The City is situated roughly 10km southeast of the Perth GPO and is 64.8 square kilometres in area. According to the Australian Bureau of Statistics, at 31 March 2010 the City’s population was estimated to be 88,433.

3.3 The City is partitioned according to the Ward system and has 4 Wards: Nicholson, Bannister, Beeliar and Mason. Its administrative centre is located at 1317 Albany Highway, Cannington.

3.4 With the exception of Nicholson Ward, which has one seat, each Ward is represented by 3 Council members, thereby distributing the representation of the elected Council. The Mayor is elected by voters, not by councillors.

3.5 At the time of its suspension by the Minister for Local Government in November 2012, the City Council consisted of:

- Mr Giuseppe (Joe) Delle Donne OAM (Mayor) – a Councillor since 1979; Mayor since 2008.
- Mr Bruce Mason (Deputy Mayor, Bannister) – a Councillor since 1993.
- Ms Mary Daly (Bannister) – a Councillor since 2001.
- Mr Tim Dowsett (Bannister) – a Councillor since 1989.
- Mr Stuart Clarke (Beeliar) – a Councillor since 1983.
- Ms Bev Olsen (Beeliar) – a Councillor since 2007.
• Mr Robert Morgan (Beeliar) – a Councillor since 2009.
• Mr Stephen Boylen (Mason) – a Councillor since 2010.
• Mr Lindsay Elliott (Mason) – a Councillor since 1984.
• Mr Graham Barry (Mason) – a Councillor since 2003.
• Ms Megan O’Donnell (Nicholson) – a Councillor since 2011.

3.6 Ms Michelle Wheaton, who was a Councillor from 2008-2011, also appeared before the Inquiry during public hearings.

3.7 As noted, the Mayor and all Councillors were suspended in November 2012. Councillors Clarke and Boylen resigned their positions as councillors shortly after the Council was suspended in late 2012. At that time, the government appointed Mr Linton Reynolds as Commissioner to act as the Council for the City of Canning pending the Minister’s decision on whether or not to dismiss the current Council. Mr Reynolds was previously the Mayor of Armadale for five terms (10 years) from 2001-2011.

3.8 There was some discussion during the course of the Inquiry’s public hearings about the remuneration for the Mayor and Councillors. This is a relevant issue as the remuneration offered is not generous. This necessarily has an effect on the amount of time Councillors can devote to their positions and how much time they can devote to education etc. This issue is discussed in more detail in Chapter Fifteen of this Report.

3.9 From 26 June 2012, the fees and allowances payable to Elected Members of the City of Canning were as follows:

Councillor
$10,400 per annum, made up of:
Meeting Fees $7,000
Telecommunication Allowance $2,400
IT Allowance $1,000
Deputy Mayor

$25,400 per annum, made up of:

- Meeting Fees $7,000
- Deputy Mayor Allowance $15,000 (25% of Mayoral Allowance)
- Telecommunication Allowance $2,400
- IT Allowance $1,000

Mayor

$77,400 per annum, made up of:

- Meeting Fees $14,000
- Mayor Allowance $60,000
- Telecommunication Allowance $2,400
- IT Allowance $1,000

Full business and Private use of Council Vehicle as per Council policy.

(Source: Western Australia Salaries and Allowances Act 1975, Determination of the Salaries and Allowances Tribunal on Local Government Elected Council Members Pursuant to s. 7(b) – 19 June 2013).

3.10 On 5 February 2013, the Western Australian Salaries and Allowances Tribunal was empowered to determine certain payments that are to be made or reimbursed to elected council members with effect from 1 July 2013. As a result of its inquiries into the levels of fees and charges throughout local government in Australia and current circumstances the Tribunal set new permissible levels of remuneration. Taking into consideration the maximum allowances and fees as set out by the Salaries and Allowances Tribunal, the maximum fees and allowances payable going forward will be as follows:

Councillor

$33,400 per annum, made up of

- Meeting Fees $30,000
- Telecommunication Allowance $2,400
- IT Allowance $1,000
**Deputy Mayor**

$53,650 per annum, made up of:

- **Meeting Fees** $30,000
- **Deputy Mayor Allowance** $21,250 (25% of Mayoral Allowance)
- **Telecommunication Allowance** $2,400
- **IT Allowance** $1,000

**Mayor**

$133,400 per annum, made up of:

- **Meeting Fees** $45,000
- **Mayor Allowance** $85,000
- **Telecommunication Allowance** $2,400
- **IT Allowance** $1,000

*Full business and Private use of Council Vehicle as per Council policy.*

*(Source: Western Australia Salaries and Allowances Act 1975, Determination of the Salaries and Allowances Tribunal on Local Government Elected Council Members Pursuant to s. 7(b) – 19 June 2013).*

3.11 The City of Canning employs in excess of 650 administrative and operational staff including Executive positions (Directors) and the Chief Executive Officer.

3.12 The Current Chief Executive Officer is Ms Lyn Russell. Ms Russell was appointed by Commissioner Reynolds at a Special Council Meeting on 14 May, 2013. Her appointment commenced on 4 June 2013.

3.13 Ms Russell’s immediate predecessor as CEO was Mr Mark Dacombe. Mr Dacombe left the City of Canning on 30 January 2012. The circumstances surrounding Mr Dacombe’s separation and his relationship with the Council during the period 2009 to 2012 was the subject of much scrutiny during the course of public hearings for the Inquiry and is discussed in considerable detail throughout the remainder of this Report.
3.14 After Mr Dacombe left the City, Mr Andrew Sharpe was appointed Acting CEO. He held this position from 30 January 2012 to 4 June 2013, when Ms Russell was appointed. Prior to being appointed Acting CEO, Mr Sharpe was employed as Executive Manager Corporate Services with the City of Canning. He is currently employed as Director Corporate Services.

3.15 During Mr Dacombe’s term as CEO there were significant changes to the City’s Administrative structure. Flow charts showing the Administrative structure pre, during and post Mr Dacombe’s term as CEO are provided at Appendix A in this Report.

3.16 It is apparent from these charts that for the periods 2008-2009 and 2011-2012 the corporate executive for the City of Canning increased in number from four to five. Of that five, only two, Executive Engineering and Technical Services and Executive Community Services retained line management responsibility for the same set of managers, albeit with the latter changing its title to Executive Client and Customer Services.

3.17 The remaining two previous executive positions (Executive Finance and Client Services and Executive Strategic and Regulatory Services) changed their titles to Executive Corporate Services, which had direct line management responsibility for the Manager Information Technology, Senior Manager Financial Services, Manager Legal and Democracy Services and Executive Property Assets and Economic Development (which had direct line management responsibility for Manager Health and Compliance Services and Manager Planning and Building Approval).

3.18 A new executive position was also created, Executive City Futures, which had direct line management responsibility for Senior Manager City Futures.

3.19 It appears from the chart for the period 2011-2012 that a new class of manager was created with four Senior Manager positions identified, these being:

- Senior Manager City Futures
- Senior Manager Financial Services
3.20 In addition, two new managerial positions were also created:

- Manager Legal and Democracy Services (position level 6B-7A); and,
- Manager Health and Compliance Services (position level 7A-8A).

3.21 I note that of all of the positions, changed or created, only one position, that of the Manager of Planning Services, which was changed to Manager Planning and Building Approval Services, was re-classified at a lower position level. Both positions reported direct to a member of the Executive.

3.22 The cost of the new management structure under Mr Dacombe was significant. However, as the City only provided the Inquiry with salary costs for the CEO, Executive and Senior Managers, this comparison is limited to the dollar values for these positions, which in essence make up the Executive Management Team.

3.23 During 2008-2009, the salary costs for the Executive Management Team was $754,000 plus superannuation and the costs for the provision of five vehicles.

3.24 During 2011-2012, the salary costs for the Executive Management Team, inclusive of four new management position, was $1,572,903 plus superannuation and the costs for the provision of nine vehicles.

3.25 In addition to this there would also have been additional costs associated with the creation of two additional position level 6B -7A Managers. This resulted in their being:

- Six position level 7A – 8A managers
- Nine position level 6B -7A managers, and
- One position level 4C -5C manager.
3.26 Taking into account annual salary increases of 5% over two years, the increase in costs associated with Mr Dacombe’s Senior Executive Team restructure was $741,078 plus superannuation and an additional four vehicles. This equates to an increase of almost 100% from the costs in the year 2008-2009.

3.27 These salary figures were provided to the Inquiry by the City of Canning in March 2014.

3.28 I want to acknowledge the assistance provided by the current Administrative team and the staff at the City of Canning when asked for information by the Inquiry. It became clear throughout the Inquiry that many of the City of Canning’s IT and document management systems were dated and difficult to navigate. I recognise that during the course of this Inquiry staff at the City of Canning were required to retrieve information and evidence that was not always easy to locate. I very much appreciate their efforts in that regard and note, in particular, the efforts of Ms Kate Jones and her team at the City.

The Authorised Inquiry Report

3.29 Inquiries of this sort are sometimes preceded by an Authorised Inquiry established pursuant to section 8.3(3) of the Local Government Act 1995. As discussed, in relation to this Inquiry, the Authorised Inquiry Report was provided to the Minister for Local Government in November 2012.

3.30 It is inevitable that many of the issues canvassed and detailed in the Authorised Inquiry Report will be discussed and scrutinised by a subsequently appointed Inquiry Panel. Here, the Terms of Reference, discussed above, specifically require me to do so.

3.31 While I am entitled to rely on any evidence gathered during the course of the Authorised Inquiry and its subsequent Report, as were any witnesses who appeared before me (an issue discussed in detail in Chapter Four of this Final
3.32 What I am required to do is determine whether there has been a failure to provide for the good government of persons in the City of Canning’s district. In that regard, the Authorised Inquiry Report offers a concrete and useful set of issues that this Inquiry is free to examine in determining this issue. I need not canvass every issue discussed in the Authorised Inquiry Report if, after reviewing the evidence available to me, I do not think an issue is relevant to the issue of whether there has been a failure to provide good government. Further, I am free to investigate issues not specifically raised in the Authorised Inquiry Report if, again, these issues touch on the issue of good government.

3.33 The Authorised Inquiry Report suggests matters that are relevant to inquire into. This Inquiry also investigated issues not addressed in the Authorised Inquiry Report. Ultimately, the Inquiry canvassed the following issues during public hearings:

1) Council and Administrative decision making in relation to the Nicholson Road/Bannister Road project.
2) Council and Administrative decision making in relation to the Centenary Avenue/Manning Road Project.
3) Council and Administrative decision making in relation to the Willetton Child Care Centre and the Willetton Sports Club.
4) Council’s decision to withdraw from the Southern Metropolitan Regional Council.
5) The circumstances surrounding, and Council’s decisions in relation to, the Refuse Truck Purchase.
7) The circumstances surrounding the appointment of a Legal Services Provider.
8) Elected Members’ relationship with the Chief Executive Officer, particularly in relation to the City’s Refocus Program.
9) The circumstances surrounding Mr Dacombe’s (the CEO’s) 2011 and 2012 Performance Appraisals.

10) The circumstances surrounding the suspension of the CEO by the Mayor, the CEO’s resignation and Council’s decision to accept that resignation.

11) Allegations of Improper or Undue Influence on the part of the Mayor, Mr Delle Donne, in relation to the father in law of his daughter, Mr Terry Blanchard.

12) The circumstances surrounding, and Council decisions made in relation to, the tendering process for Engineering Consultancy Services.

13) The circumstances surrounding, and Council’s decisions made in relation to, the ‘Sevenoaks’ Engineering Contract.

14) The circumstances surrounding, and Council’s decisions made in relation to, the recruitment of the Executive Engineering and Technical Services.

15) The City’s Governance Procedures, including the control of public question time, the quality of the City’s Minutes, the adequacy of the City’s Standing Orders, the use of secret votes by the Council and Council members’ interference with tender evaluation panels.

16) The professional relationship between the Councillors and the Administration and its impact on the provision of good government.

3.34 An examination of the evidence relevant to these issues ultimately allows me to make a broad determination about the conduct of the Council and the Administration generally, whether there has been a failure to provide good government to the citizens in the City of Canning and whether a recommendation should be made to the Minister for Local Government that, in the circumstances, the Council should be dismissed.
CHAPTER FOUR

PROCEDURE AND NATURAL JUSTICE
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PROCEDURE AND NATURAL JUSTICE

Introduction

4.1 Inquiries of this sort cannot function without clearly structured and defined procedures. Those who appear before them often do so without legal representation and those who do appear as lawyers are often unaccustomed to the ways in which Government Inquiries and Royal Commissions operate.

4.2 Inquiries such as these and “normal” court proceedings are vastly different forums. The procedures used in each are often polarised and many of the rules lawyers come to expect when engaged in trial work do not apply in relation to Government Inquiries and Royal Commissions.

4.3 Despite the fact that this was the 7th local inquiry to be held in this state in the past 14 years, my appointment did not come with a procedural guide or manual. Staff retained by the Inquiry (other than Counsel Assisting) were not, through no fault of their own, well versed on the “ins and outs” of inquiries of this sort. This Inquiry, like those before it, effectively found itself having to start from scratch when it came to document management, office and court set up and, importantly, hearing procedures.

4.4 This lack of precedent is often frustrating for those charged with running these inquiries. “Starting from scratch” is time consuming and, as a consequence, cost inefficient. I am hopeful this Report will serve as a procedural guide for those appointed to manage future inquiries. In that regard, I attach to this Report (at Appendix B) a copy of the five Practice Directions that guided lawyers representing witnesses before the Inquiry and, importantly, witnesses without legal counsel. I trust they were useful in explaining the central role of Counsel Assisting, how evidence is heard and relied on in inquiries of this sort, how witnesses are examined and cross-examined and the importance of final written submissions to me when writing this Report.
4.5 A Bench Book modelled on the Bench Book used by the state’s Crime and Corruption Commission and incorporating practice directions commonly used in Royal Commissions throughout Australia would greatly assist future inquiries of this sort in Western Australia.

4.6 In an effort to clarify how inquiries of this sort operate, a half day procedural hearing was held by me on 17 June 2013 at the City of Canning Council Chambers. A copy of the transcript for this procedural hearing is available on the Inquiry’s website: www.canninginquiry.wa.gov.au.

4.7 This procedural hearing consisted of an Opening Statement by me outlining the purpose of the Inquiry, my role as the Inquirer, the role of Counsel Assisting, the procedures to be followed to ensure that the Inquiry ran efficiently and effectively and the law and statutory principles relevant to public inquiries of this sort. Appearances from those seeking leave to appear were also taken and granted. Notice of this hearing was advertised in the relevant newspaper publications, both local and state-wide, as were all subsequent hearings in October and November 2013.

4.8 During the 17 June 2013 procedural hearing, I made it clear that I was acutely aware of the possible consequences of any recommendation by me to the Minister that the Council be dismissed. I acknowledged the stresses inevitably faced by Councillors and witnesses called to give evidence, adding that my intention was to alleviate these stresses as much as possible:

*It is not my role to find anyone guilty or not guilty of anything. This is not a criminal trial and witnesses should not feel that they have a case to prove. Their role is to assist me in ensuring that the full story is told. They deserve to do that in an environment that guarantees fairness to all who appear – particularly those who feel that their reputations are on the line. My role is to ensure that fully accountable public hearings are put in place, aimed at determining whether good government has or has not been provided. Those asked to assist me in this process as witnesses (councillors, past and current CEO’s, Administrative staff, ratepayers and residents) can only assist me in that regard if they are afforded natural justice and procedural fairness.*
4.9 Further comment on the procedures used by the Inquiry is provided below, particularly as they relate to ensuring natural justice to persons appearing before the Inquiry.

Public Hearings

4.10 As part of its investigative functions, I determined that this Inquiry would include public hearings to facilitate public awareness of the issues to be canvassed by me. It is entirely appropriate and desirable that inquiries such as this one be open to the public. The public airing of evidence is an inherent and important feature of all local government inquiries.

4.11 As noted above, the Inquiry opened in public session on 17 June 2013 with a lengthy statement by me. The Inquiry was then adjourned until 21 October 2013 when, upon resumption, Counsel Assisting (Mr Darren Renton) made an opening statement and began to call oral evidence.

4.12 Public hearings ended on 29 November 2013. The only exception to the requirement that all hearings be open to the public arose on one occasion where it was demonstrated that there was an exceptional circumstances which, in the interests of justice, required the suppression of some evidence. I am satisfied that the suppression order drafted by me balanced the particular public interests in question, recognising that there is a significant public interest in this Inquiry being conducted publicly. No objection was received from witnesses or lawyers to the non-disclosure of this particular evidence. I note that none of the evidence which required suppression in this instance forms the basis of any adverse findings I have made.

4.13 All hearings were held in a designated courtroom on level 8 in Perth’s Central Law Courts at 501 Hay Street. The Inquiry was required to fit out the court room with suitable transcription recording facilities, a document viewing system and broadband internet connection. This was challenging as these were required to be
fitted safely and securely without any damage or alteration to the fabric of the court building. However, with the assistance of the IT department at the Industrial Relations Commission, who provided a mobile court room recording desk, the costs for this fit out were reduced significantly.

4.14 As the public gallery in the main hearing room was limited in size it was also necessary to hardwire a video and document viewing link to an adjacent court room to allow for all interested parties to view and follow proceedings in the main hearing room.

4.15 The Department of Local Government had no equipment or systems or procedures in place to assist Inquiry staff with the challenging task of what effectively amounted to constructing a digitally capable court room from scratch. The Department should be given the resources it needs to ensure that all future inquiries are properly serviced.

4.16 I am advised by Mr David Morris, the Inquiry’s Executive Officer, that upon formal closure of this Inquiry, all purchased equipment will be disposed of in accordance with State Government guidelines by the Department of Local Government.

4.17 This Inquiry was essentially “paper free”. As discussed further below, all documentary evidence the Inquiry intended to, or was able to, rely on was made available to lawyers and witnesses in digital form. Further, all evidence was presented and viewed in the hearing room electronically, rather than via hard copy – except where a witness specifically required a hard copy or where new evidence was tendered through a witness. I again acknowledge the dedication of the Inquiry staff in ensuring that this was possible. I also thank those appearing before me as lawyers and witnesses (many of whom were, like me, somewhat dubious about the use of digital copies in place of paper copies) for their cooperation and for working effectively with the Inquiry staff to ensure that everything that needed to be done was done.
Hearing Transcripts

4.18 All hearings were recorded and transcribed by Merrill Corporation Pty Ltd (Merrill’s).

4.19 Transcripts of all public hearings were made available on the Inquiry’s website and were presented in the format currently required by the State Government. All transcripts were posted on a daily basis to allow interested parties to follow the proceedings remotely in as close to real time as possible.

Leave to Appear

4.20 Notice was published in the West Australian on 24 April 2013, the Canning Times on 30 April 2013 and the Canning Examiner on 4 May 2013, giving notice of my appointment and inviting persons to give notice of an intention to seek leave to be heard and examine witnesses at public hearings.

4.21 There is often an assumption that anyone who wants to appear and speak and/or be legally represented before inquiries of this sort can do so. This is not the case.

4.22 Section 22 of the Royal Commissions Act 1968 provides that a person may be legally represented when appearing at a hearing. The application of this section to an inquiry provides that the legal representative of such a person may, to the extent that the Inquiry Panel thinks proper, examine that person, or any other witness on any matter which the Inquiry Panel deems relevant to the Inquiry.

4.23 Lawyers do not have an absolute right of appearance before an Inquiry Panel. Nor do they have an unqualified right to examine and cross examine witnesses as they see fit. An Inquiry Panel can, and often will, limit what legal representatives can say and do. Further, the authorisation to appear may be withdrawn by the Inquiry Panel, or made subject to altered or additional limitations or conditions, at any time.
4.24 In particular, the Inquiry Panel may:

- Limit the particular topics or issues upon which the person may examine and cross-examine;
- Impose time limits upon examination and cross-examination;
- Require that submissions be presented in writing only.

4.25 This is consistent with the long history of Royal Commissions throughout Australia imposing such conditions. If these conditions were not able to be imposed, inquiries of this sort would not be able to investigate and report on those issues they have been asked to investigate in a timely manner.

4.26 In relation to who should be given leave to appear I note the words of Owen J in *Edwards v Kyle* (1995) 15 WAR 302 at pages 317 to 318, who writes:

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

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

4.27 As stated, this means that not everyone who wants to appear at an inquiry of this sort will be granted authority to do so. Throughout these proceedings I was conscious of avoiding unnecessary representation and took the view that representation, and participation in the investigation that it invites, should serve a real and direct interest of the person concerned in or arising from the subject-matter of the hearing. An interest means some real risk that they may be subject to an adverse finding or that their reputation may be adversely affected. It must be something more than that which a curious or concerned member of the public may have.
4.28 In relation to who sought authority to appear and examine and cross-examine witnesses before this Inquiry, authority was given to the following legal representatives:

- Mr Peter McGowan was given authority to appear and examine on behalf of the Mayor, Mr Giuseppe Delle Donne OAM. Mr McGowan was instructed by Chris Stokes and Associates.
- Mr Richard Hooker was given authority to appear and examine on behalf of Mr Mark Dacombe. Mr Hooker was instructed by HLS Legal.
- Mr Phillip Urquhart was given authority to appear and examine on behalf of Councillor Graham Barry.
- Ms Belinda Moharich was given authority to appear and examine on behalf of Councillor Mary Margaret Daly.
- Mr Tim Houweling was given authority to appear and examine on behalf of Councillor Bev Olsen.
- Mr Steven Blythe was given Authority to appear and examine on behalf of Councillor Megan O’Donnell.
- Mr Raoul Cywicki was given authority to appear and examine on behalf of Councillor Michelle Wheaton.
- Ms Judith Fordham was given authority to appear and examine on behalf of Councillor Stuart Clarke.
- Ms Maria Saraceni was given authority to appear and examine on behalf of Councillor Bruce Mason. Ms Saraceni was instructed by McKay Legal.

4.29 All of these lawyers were given authority by me on the following terms:

... to make submissions in relation to the issue of whether there has been a failure to provide for the good government of persons in the City of Canning. Further, authority to examine and cross-examine witnesses subject to the condition that said Authority is limited to such examination and cross-examination as will, in my opinion, challenge or test the foundation for any adverse or unfavourable comments in relation to their clients.

4.30 This limiting condition is directly related to the fact that leave to appear was granted as part of the process to accord procedural fairness to the witnesses represented. The terms of the condition are suggested by a dictum in the majority judgment in the State of New South Wales v Cannellis (1994) 181 CLR 309 related to the nature of what it means to accord procedural fairness.
4.31 Mr Neil Douglas was given a more limited authority to appear and examine on behalf of the City of Canning. Having considered Mr Douglas’ application to appear for the City of Canning, which I understood to be limited to Administration staff, authority was granted to make submissions in relation to the issue of whether there had been a failure to provide for the good government of persons in the City of Canning – specifically, in connection with any formal or technical processes concerning the operations of the City. Further, authority to examine and cross-examine witnesses was granted but subject to the condition that the authority was limited to such examination and cross-examination as was considered necessary, by me, in connection with the formal or technical processes concerning the operations of the City. I also advised in relation to Mr Douglas’ application that the authority to appear was subject to further consideration being given to any legal opinions provided by McLeods Barristers and Solicitors to the City of Canning during the period of time covered by this Inquiry and any issues of conflict that might arise.

Witnesses Summoned to Appear before the Inquiry

4.32 The following persons were summoned to appear before the Inquiry and did so appear:

- Mr Mark Dacombe, Former CEO, City of Canning
- Ms Michelle Wheaton, Former Councillor
- Mr Stuart Clarke, Suspended Councillor
- Ms Mary Daly, Suspended Councillor
- Ms Bev Olsen, Suspended Councillor
- Ms Megan O’Donnell, Suspended Councillor
- Mr Robert Morgan, Suspended Councillor
- Mr Graham Barry, Suspended Councillor
- Mr Stephen Boyle, Suspended Councillor
- Mr Lindsay Elliott, Suspended Councillor
- Mr Timothy Dowsett, Suspended Councillor
• Mr Andrew Sharpe, Director Corporate Services, City of Canning
• Mayor Joe Delle Donne OAM, Suspended Mayor
• Mr Bruce Mason, Suspended Councillor and Deputy Mayor
• Commissioner Linton Reynolds, City of Canning
• Mr Anthony Quahe, Principal, Civic Legal
• Mr David Griffiths, Mayor, City of Gosnells
• Mr David Harris, Director Infrastructure, City of Gosnells.

4.33 Regrettably, there is a tendency in inquiries of this sort to look for, or paint some witnesses as “baddies” – those who, because of personality flaws or ulterior motives, are “blamed” for all that has gone wrong.

4.34 It is important to preface the Findings made in this Report by saying that I was impressed by all who appeared before this Inquiry as witnesses and very much appreciate their candour and assistance. In other words, there are no “baddies” and there is no one person to blame.

4.35 All witnesses struck me as well intentioned and committed to providing good government to the people of Canning or (in the case of some witnesses, the City of Gosnells). To the extent that mistakes were made by any witnesses in relation to issues relevant to this Inquiry, I am satisfied that these mistakes were not the fault of malice or ill will.

4.36 Mr Dacombe, in particular, struck me as man of considerable integrity. The Council’s decision to hire him in late 2008 was based on his many years of local government service and a strong theoretical and practical understanding of the ins and outs of local government. There was no reason to question that decision and the Council should not be criticised for hiring Mr Dacombe.

4.37 It was also clear to me during public hearings that the events leading up to Mr Dacombe’s departure from the City in early 2012 were deeply distressing to him and his family. Despite this, he presented his evidence before the Inquiry in a reasoned, clear and thus helpful manner.
4.38 Similarly, the many years of service given by Mayor Delle Donne (who I note was awarded a Medal of the Order of Australia (OAM) for services to Local Government and the City of Canning on 13 June 2011 in the General Division of the Queen’s Birthday Honour List), merit recognition. Like his fellow Councillors, the Mayor has dedicated a great deal of his working life to promoting the interests of local residents. His commitment, and indeed the commitment of all Councillors who appeared before this Inquiry, cannot be questioned.

4.39 I heard no evidence before this Inquiry to suggest that anyone who appeared before me was anything but passionate about their respective roles and committed to doing the right thing.

Investigative, Not Judicial

4.40 Witnesses are called for examination before public inquiries of this sort for all sorts of reasons. Many are called despite their conduct not being in question. They are called because it is concluded that they can assist the Inquiry by giving information about events, circumstances, systems, procedures or the activities of other persons. Others are called because their actions have been questioned.

4.41 This inevitably raises the question: how do you cater for the needs and interests of both?

4.42 The examination of an individual before an inquiry is but one part of the investigative process, the purpose of which is to get to the truth of a matter. Hearings held by inquiries such as these are not court proceedings. An inquiry of this sort is an investigative process into subject matters of widespread public interest and importance. As a consequence of its investigative function, these inquiries are not bound by the rules of evidence and are free to exercise their functions with as little formality and technicality as they see fit in the circumstances. Were an inquirer required to proceed with the kind of formality or technicality associated with formalised court proceedings he or she would lose their ability to conduct investigations in an efficient, timely and cost efficient manner.
4.43 Overall, hearings of this sort are designed to be inquisitorial. The Inquiry into the City of Canning was an inquiry conducted by me, as an Inquirer, to ascertain facts. Although I was, for the purposes of the *Evidence Act 1906*, a person acting judicially, hearings held were not formal judicial proceedings. Rather, they were an exercise of executive and administrative power. As an Inquirer I am entitled to inform myself on any matter and in any such manner as I see fit. An examination in the context of an investigative inquiry is an open-ended and unpredictable process. It is essentially one that is intended to be instrumental in discovering facts which, once assessed by this Inquiry in conjunction with other material available to it, forms the basis for its subsequent opinions and recommendations pertaining to the Terms of Reference.

4.44 In these circumstances, different procedures apply to those normally used in the formal judicial process. This can, and often does, catch legal representatives and the wider public more familiar with formalised court hearings off guard. Many are, for example, left wondering why they are not entitled to examine and cross examine witnesses and make submissions and tender evidence or object as a matter of right and as they see fit.

4.45 To assist all lawyers and witnesses appearing before me I released five Practice Directions. These Practice Directions related to:

- Hearing Administration
- Legal Representation
- Calling of Witnesses and Production of Exhibits
- The role of Counsel Assisting
- Examination and Cross Examination of Witnesses in Relation to both Represented and Non-Represented Witnesses
- Objections to the Taking of Evidence
- Final Written Submissions
Procedural Fairness and Natural Justice: General Comments

4.46 To ensure fairness and justice to those whose reputations will be scrutinised and a thorough examination of the issues, there are procedural rules to which all persons charged with investigating the issues before them must adhere. Importantly, this Inquiry was bound by the rules of natural justice or procedural fairness.

4.47 Broadly, within the context of any inquiry such as this, procedural fairness and natural justice require that where an individual’s reputation risks being brought into question, that person must be given an opportunity to respond. Accordingly, procedures must be in place to ensure that this can happen. This Inquiry’s approach was that persons who might be adversely affected by evidence available to me as the Inquirer would be afforded an opportunity to respond to that evidence.

4.48 In general terms, procedural fairness requires that this Inquiry be free of bias or pre-judgment. Also, those against whom there might be adverse findings or comments must be given an opportunity to be heard in relation to such findings or comments, and to know what is being taken into account by me in arriving at any conclusion about their conduct.

4.49 I have been guided in the conduct of this Inquiry by the words of Brennan J in Annetts v McCann (1990), 170 CLR 596 at 608, when he said:

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

4.50 Further discussion in relation to the requirements of natural justice as they pertain to the specific use of evidence by this particular Inquiry is provided below.
Burden of Proof

4.51 I have proceeded on the basis which is common to administrative inquiries of this sort – ie, that the standard of proof which should be applied is on the balance of probabilities.

4.52 Like my predecessors in previous local government inquiries, I have also conducted this Inquiry on the basis that the strength of the evidence necessary to establish a fact on the balance of probabilities may vary according to the nature of what is to be proved. In that regard, I am mindful of the words of Dixon J in Briginshaw v Briginshaw, which is reported at (1938) 60 CLR 336 at page 362 when His Honour said:

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences.*

Evidence before the Inquiry

4.53 When this Inquiry commenced on 1 April 2013, it set about gathering evidence by exercising its powers to obtain documents and other evidence under the provisions of the *Royal Commissions Act* 1968 as outlined above. Numerous summonses to produce were issued, including one to the Department of Local Government to obtain all the evidence obtained by the Authorised Persons Inquiry. Summonses were also issued to potential witnesses.

4.54 Responses to those summonses were not uniform and various materials were received on different dates.

4.55 It was part of the function of Counsel Assisting, Mr Darren Renton, to assemble and present evidence which he regarded as relevant to the terms of the Inquiry. In assembling this evidence, Mr Renton had the assistance of Inquiry officers.
4.56 The Inquiry issued 19 summonses to witnesses in order to obtain documentary materials. As discussed below, those materials, once obtained, were all evidence before this Inquiry. They were subsequently provided to witnesses and/or their lawyers.

4.57 The summonses issued and documents received were as follows:

**Summons No. 1**

*This was issued to The Director General of the Department of Local Government, Ms Jennifer Mathews. Ms Mathews responded to the summons by providing 14 unindexed archive boxes of documentation. This documentation was a combination of relevant documents provided to the Authorised Inquiry in response to its formal notices and that Inquiry’s working documents.*

**Summons No. 2**

*This was issued to Mr Andrew Sharpe in his personal capacity. Mr Sharpe responded to the summons by indicating that he had no private documentation relating to the Terms of Reference.*

**Summons No. 3**

*This was issued to Mr Andrew Sharpe as Acting Chief Executive Officer of the City of Canning on behalf of the City. While the City did not provide specific documents to the Inquiry when first asked it did formally respond offering unfettered access to all documents and formally waived privilege over relevant documents by way of Council resolution. The Inquiry obtained relevant documents from the City as they were identified. Regrettably, some were provided to the Inquiry much later than was desirable for an Inquiry with a finite amount of time within which to review the evidence provided to it. The Inquiry is grateful to Ms Lynn Russell and Ms Kate Jones of the City of Canning for working with Inquiry staff to ensure that all relevant documents were eventually provided to the Inquiry.*
Summons No. 4

This was issued to suspended Mayor Joe Delle Donne. Mayor Delle Donne requested one extension of time to produce his documents. On 7 June 2013 he responded to the summons by producing 11 unindexed archive boxes of documents.

Summons No. 5

This was issued to suspended Councillor Bruce Mason. Councillor Mason responded to the summons on 23 May 2013 by providing one lever arch file of documents.

Summons No. 6

This was issued to suspended Councillor Graham Barry. Councillor Barry requested an extension of time to produce his documents and was granted an extension until 13 June 2013. On that date, he provided 14 unindexed archive boxes of documents.

Summons No. 7

This was issued to suspended Councillor Lindsay Elliott. Councillor Elliott responded to the summons by advising that, having presented documents to the previous Authorised Inquiry, he had no further documents to produce.

Summons No. 8

This was issued to suspended Councillor Bev Olsen. Councillor Olsen responded to the summons by providing 18 partially indexed archive boxes of documents.
Summons No. 9

This was issued to Suspended Councillor Robert Morgan. Councillor Morgan responded to the summons by providing one plastic sleeve of printed emails.

Summons No. 10

This was issued to suspended Councillor Timothy Dowsett. Councillor Dowsett responded to the summons by indicating that he had no further documents to produce.

Summons No. 11

This was issued to retired Councillor Stuart Clarke. Mr Clarke requested an extension of time until 7 June 2013 and responded to the summons by providing one A4 folder of documents.

Summons No. 12

This was issued to suspended Councillor Mary Daly. Councillor Daly responded to the summons by indicating that, having presented documents to the previous Authorised Inquiry, she had no further documents to produce.

Summons No. 13

This was issued to suspended Councillor Stephen Boylen. Councillor Boylen responded to the summons by indicating that, having presented documents to the previous Authorised Inquiry, he had no further documents to produce.

Summons No. 14

This was issued to suspended Councillor Megan O'Donnell. Councillor O'Donnell responded to the summons by providing 1 partially indexed CD containing 5 PDF files which each contained up to 500 documents.
Summons No. 15

This was issued to the former Chief Executive Officer of the City of Canning, Mr Dominic Carbone. Mr Carbone advised the Inquiry he had no documents of relevance to provide.

Summons No. 16

This was issued to the former Mayor of the City of Canning, Dr Michael Lekias. Dr Lekias responded to the summons by indicating that he had no relevant documents to produce.

Summons No. 17

The Inquiry was initially unable to serve a summons on the immediate previous Chief Executive Officer of the City of Canning, Mr Mark Dacombe, due to being located away from the Perth Metropolitan and as a consequence of his employment. The Inquiry later contacted Mr Dacombe by telephone and email and was advised by him that he had no further documents to produce.

Summons No. 18

This was issued to Mr Anthony Quahe of Civic Legal (in his capacity as a Principal of that law firm). Mr Quahe responded to the summons by providing a copy of a PowerPoint presentation and copies of 45 emails.

Overall, the summonses resulted in eight being answered on the basis that there were no further documents to provide. The remaining 11 resulted in approximately 70 archive boxes of documents being delivered, comprising approximately 10,000 documents, from which approximately 3,500 were selected by the Inquiry as relevant.
4.59 That figure was later refined to around 300 key documents. In addition, Inquiry staff reviewed tens of thousands of emails, with any relevant emails being identified.

4.60 In addition to the documents outlined above, the Inquiry also received many submissions from members of the public. The vast majority of those related to planning matters, with the gravamen of the complaint being effectively to ask this Inquiry to act as an avenue of appeal for decisions that were not in the applicant’s favour. Such matters were not within the Terms of Reference and could not be considered.

4.61 The Inquiry also received submissions from Mr John Harding, a ratepayer in the district of Canning. While it was not possible to address the specific issues raised by Mr Harding, I nonetheless thank Mr Harding for his submissions and the time that clearly went into preparing them.

4.62 The evidence obtained by the Inquiry was provided to witnesses – albeit, not in a single bundle on a single date. Such a process was inevitable where ongoing inquiries were being conducted and evidence was provided in response thereto during the course of investigations.

4.63 As noted, one of the Terms of Reference of the Inquiry specifically required me to give due consideration to, and inquire into and report on, the matters raised in the Authorised Inquiry Report of that Inquiry into the City of Canning.

4.64 Unlike the experience in some previous local government inquiries, the relevant issues and evidence likely to be examined by this Inquiry were readily identifiable to all witnesses and their lawyers as a result of the publication and distribution of the Authorised Inquiry Report. This greatly assisted the Inquiry and those who appeared before it. The Authorised Inquiry Report was and has been available for consideration by the Inquiry and witnesses likely to be the subject of adverse findings by me as the Inquirer since its date of publication.
4.65 A copy of the *Authorised Inquiry Report* was provided to witnesses by Inquiry staff many months prior to the commencement of public hearings.

4.66 As part of the first tranche of evidence provided to witnesses by the Inquiry, all witnesses were given the materials received from the Department of Local Government said to comprise the evidence obtained by the Authorised Persons Inquiry. An index was compiled and provided to assist in navigating through the materials that had been digitised and provided on a hard drive, both for ease of access and prompt provision.

4.67 In response to requests from counsel for several of the witnesses, a revised index of materials was prepared by Counsel Assisting, representing the then best attempt to identify documents relevant to each witness in relation to each of the major issues to be covered by the Inquiry. The issues reflected those covered by the Authorised Persons Inquiry in the order in which they appeared in the *Authorised Inquiry Report*.

4.68 Both this index and the index previously provided were done so on the express written basis that they represented Counsel Assisting’s considered view of the relevance of the evidence to each witness at that time but that they were not exhaustive or conclusive of the evidence that may be canvassed during the course of the public hearings. The indexes were intended to provide some measure of forensic assistance to those witnesses likely to have adverse findings made against them and their legal counsel.

4.69 All evidence relied on by the Inquiry was given an identification code (e.g., C110/03335) so that all documents could be more easily identified. Those codes are used throughout this Report. To the extent that transcript evidence from the public hearings is cited in this Report, it will be referenced with a “T” and the appropriate transcript page number (e.g., T16-T18).

4.70 As discussed above, on 17 June 2013, I made lengthy opening remarks referring to the issues to be considered by the Inquiry. Those remarks identified the same
topics that were covered by the Authorised Inquiry Report, with the addition of one further issue that was later abandoned (T16-T18 and T48).

4.71 Relevantly, I made it clear that examination of persons was but one part of the investigative process (T19-T20 of CI10/03702) and that Practice Directions would be issued (T21 of CI10/03702) to regulate the manner in which aspects of the investigative process would be conducted (including representation), noting the need for natural justice and procedural fairness. Those Practice Directions were made available on the Inquiry's website and provided directly to witnesses and their counsel.

4.72 I further outlined (at T31 of CI10/03702) the processes available to witnesses who wanted the evidence of other persons or other documents to be before the Inquiry.

4.73 As consideration of the evidence continued in the months that followed, it became apparent that some materials that ought to have formed part of the evidence obtained by the Authorised Persons Inquiry were incomplete, missing or inaccurate. Consequently, additional requests for further materials were made resulting in further evidence being received over the course of several months.

4.74 Due to the very late provision of some of this evidence by the City of Canning, the public hearings scheduled as part of the Inquiry's investigations were delayed to allow witnesses and their counsel a reasonable opportunity to consider them.

4.75 Consistent with the request of witnesses through their counsel for relevant material, a decision was made by Counsel Assisting to identify which new pieces of evidence related to which specific witnesses.

4.76 Consequently, as new evidence was received, witnesses or their counsel received copies of documents considered by Counsel Assisting to be relevant to them.
4.77 Following a request from counsel for one of the witnesses, Counsel Assisting identified for each witness likely to be the subject of adverse findings the areas of examination to be covered during the public hearings, as not all areas were relevant to each witness. These areas reflected the broad issue headings identified in the *Authorised Inquiry Report*.

4.78 On 21 October 2013 at the commencement of eight weeks of further public hearings, I made further remarks acknowledging that I would not rely on any evidence without first having given affected persons a right of reply and access to such material should it form the basis of an adverse finding (T6).

4.79 Following my remarks, Counsel Assisting gave an opening address that outlined in broad terms the matters under investigation (T26-T48).

4.80 During his opening address, Counsel Assisting specifically dealt with how the evidence obtained by the Inquiry would be referenced and utilised. In particular, he made the following remarks:

- The hearings would supplement the evidence that had already been obtained (T11);
- All materials obtained by the Inquiry were now evidence before it (T17);
- Each document obtained by the Inquiry had been digitised and given a unique Inquiry reference number (T17);
- Evidence obtained during the Authorised Persons Inquiry was evidence before the Inquiry Panel, including the interviews of witnesses and other investigations conducted as part of that Inquiry (T28);
- The evidence obtained from the Authorised Persons Inquiry would be relied on to support submissions he would make and was available to me to base findings on (T29);
- It was also available to witnesses to put alternate factual scenarios before the Inquiry (T29); and
- Not every piece of evidence obtained by the Inquiry would be put to witnesses but all of it was available to be used as outlined above (T29).
4.81 No objection was raised at any stage in relation to this proposed course of action.

4.82 As witnesses were called to give evidence they were advised of the Terms of Reference of the Inquiry prior to giving evidence or asked if they were already familiar with them.

4.83 As indicated previously, the Practice Directions provided that witnesses had the opportunity to engage legal representation. No witness who requested representation was refused that opportunity.

4.84 Transcripts of the hearings were provided daily on the Inquiry’s website and witnesses’ counsel were at liberty to be present throughout the course of the hearings with many doing so.

4.85 Lawyers representing witnesses were permitted to examine that witness in appropriate circumstances on appropriate areas as per the Practice Directions. Discussions between counsel and Counsel Assisting saw agreement reached in relation to proposed areas without the need for any rulings by me as the Inquirer.

4.86 To enable witnesses and counsel reasonable time to consider the scope of any proposed cross-examination, witnesses were re-called for cross-examination after a period of approximately two weeks following the conclusion of evidence led by Counsel Assisting. Again, through co-operative discussions between counsel for the witnesses and Counsel Assisting, areas of cross-examination were agreed upon without the need for any rulings by me as the Inquirer.

4.87 Witnesses were permitted, in compliance with the Practice Directions, to apply for further evidence to be called or adduced, including the ability to request that additional witnesses be examined.

4.88 No request to make any other witness available was pursued on behalf of any witness. A request on the part of the Mayor for additional witnesses to be called was subsequently withdrawn.
4.89 Some witnesses called for additional documents obtained by the Inquiry to be produced during oral evidence (i.e. documents not specifically produced by Counsel Assisting during his examination of a witness) while others sought to adduce new material. No request to introduce new evidence or to produce other evidence already in the possession of the Inquiry was refused.

4.90 Witnesses were permitted to be re-examined by their own counsel at the conclusion of cross-examination.

Allegations Raised that Natural Justice Not Provided by Counsel Assisting

4.91 On 17 December 2013 Counsel Assisting delivered his Written Closing Submissions. These submissions identified various findings of fact open and the conclusions that could be drawn from them arising from the evidence obtained by the Inquiry and during public hearings. Those submissions were detailed and, inter alia, sought a number of findings adverse to the Mayor, some of the Councillors, Mr Dacombe and aspects of the Administration.

4.92 Evidence in support of these submissions was identified by reference to the Inquiry number allocated to it. The submissions followed the format of the public hearings and the order of evidence adduced, which in turn mirrored the order of evidence and issues in the Authorised Inquiry Report.

4.93 Copies of these submissions were made available to any witness against whom adverse finding might be made. In accordance with the Practice Directions, these witnesses were invited to provide me with Written Submissions in Reply to any proposed adverse findings against them, including identifying any additional findings of fact said to be open on the evidence.

4.94 In his Written Closing Submissions, Counsel Assisting referred to evidence which was before the Inquiry in documentary form and which was evidence before the Inquiry. Some of that material was not put to witnesses in hearings before reference was made to it by Counsel Assisting in his Written Closing Submissions.
4.95 Following receipt of Written Closing Submissions from Counsel Assisting, some counsel on behalf of their clients expressed concern to Counsel Assisting that some of the matters in his Written Closing Submissions had not been put to their clients for comment during the course of the public hearings. It was argued that this was unfair to these witnesses as they had essentially been caught off guard by the use of this evidence by Counsel Assisting in his Written Closing Submissions. I am advised that counsel for one of the Councillors and Counsel Assisting exchanged emails along these lines. Suffice to say that counsel for one of the Councillors in respect of whom Counsel Assisting had sought adverse findings argued that his client was being denied procedural fairness as the Councillor had not been questioned in respect of the subject matter of some of the proposed adverse findings outlined in Counsel Assisting’s Written Closing Submissions.

4.96 I took these concerns very seriously. In response, I met with counsel for Mayor Delle Donne and agreed to provide a further opportunity for all witnesses against whom adverse findings had been made by Counsel Assisting and who, as a result, might have adverse findings made against them in my Final Report to the Minister, to adduce any further evidence to me (in the nature of a statement of evidence by way of affidavit) that they felt would assist me in direct response to Counsel Assisting’s Written Closing Submissions. I also agreed to extend the time available to file Written Submissions in Reply until the end of January 2014.

4.97 On 7 January 2014 I wrote to all witnesses and their lawyers indicating that some counsel who had appeared for witnesses during the Inquiry had approached the Inquiry and had suggested that further evidence would assist me in forming my decisions when writing my Final Report to the Minister. I expressed the view that, it was my opinion that all witnesses had to date been afforded natural justice and procedural fairness. I expanded, however, as follows:

Nonetheless I do note that some witnesses believe that due to the manner in which the evidence was adduced during the public hearing process, they may not have fully relayed their version of events. The perception is, I have no doubt, very real to them and a source of concern.

In the light of the above I write to advise that I am prepared to allow any witness who feels it is necessary to do so to provide further evidence to me by
way of affidavit, addressing any matter arising from Counsel Assisting’s submissions or any evidence available to the Inquiry. The affidavits should be provided to me by noon on 31 January 2014.

4.98 Despite this offer, no witness sought to provide any additional evidence to me via affidavit. Nor were any requests made to adduce evidence in any other form.

4.99 Written Submissions in Reply were, however, received from the Mayor and a number of Councillors. Some, but not all, of these Written Submissions in Reply, raised allegations about the content of Counsel Assisting’s Written Closing Submissions and the adverse findings contained therein.

4.100 There were two primary complaints raised in these Written Submissions in Reply that to some degree overlap:

   a) The first complaint alleges that matters not put to witnesses during the course of oral evidence that might form the basis for an adverse finding cannot be relied upon by the Inquiry as they lack an evidential basis.

   b) The second complaint alleges that countervailing evidence, particularly if it was to lead to a finding adverse to a witness, had to be put to that witness during their oral evidence in order to fulfil the obligations of natural justice and procedural fairness.

4.101 In these circumstances, it is thus necessary for me to give careful, legally grounded, consideration to whether the failure to raise certain matters during the course of the public hearings renders submissions about them (and the evidence upon which they are based) null and void and, consequently, not available to me when I investigate the issues I have been asked to investigate.

What do Natural Justice and Procedural Fairness Require in Relation to these Allegations?

4.102 There can no longer be any doubt that the principles of procedural fairness apply to an inquiry such as that under consideration here: Edwardes v Kyle (1995) WAR 302 per Owen J.
4.103 In Annetts v McCann (1970) CLR 596 Mason CJ, Deane and McHugh said (at [2]):


4.104 The content of the rules of procedural fairness are informed by its subject matter, the evidence and the “interest” of persons affected: Russell v Duke of Norfolk [1949] 1 ALL ER 109 at 118. Importantly, the requirements of natural justice (and procedural fairness) depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth – Russell v The Duke of Norfolk at 118.


4.106 As outlined in Mahon v Air New Zealand [1984] 1 AC 808, there are two basic principles of natural justice in relation to commissions of inquiry:

a) *Firstly, a commission of inquiry must make findings that are based upon material that logically tends to show the existence of facts consistent with those findings; and*

b) *Secondly, a commissioner conducting an inquiry should listen to any relevant evidence which conflicts with any proposed finding and any rational argument against such a finding which a person represented at the inquiry, and who may be adversely affected by such a finding, may*
wish to place before the commission of inquiry or would have so wished if made aware of the risk of the finding being made.

4.107 The first rule will be satisfied when the commission of inquiry bases its findings of fact upon some probative material that tends to show logically the existence of those facts.

4.108 In relation to the second rule, it has been said and is now accepted (Final Report of the Royal Commission into the Building and Construction Industry [2003], [33] at page 53) that the main requirement of procedural fairness in relation to an inquiry is that it “cannot lawfully make any finding adverse to the interests of (a person) without first giving (that person) the opportunity to make submissions against the making of such a finding” (Peter M Hall QC (now Justice Hall, NSW Supreme Court) Investigating Corruption and Misconduct in Public Office, 2004, Law Book Co. at page 712).

4.109 In Edwardes (at 318), after reviewing the relevant authorities, Owen J provided a summary of the components of procedural fairness that must be afforded in an inquiry under the Local Government Act 1960, not unlike the present Inquiry. His Honour stated:

The need to act with fairness will almost invariably involve the investigator, at some stage before publication of the report, advising the affected party of what has been put against him and giving that party a real opportunity to be heard. The party must be given sufficient particulars of contentious matters to allow it to respond by way of correcting or contradicting the adverse material.

4.110 In relation to the provision of additional evidence by witnesses against whom an adverse finding has been made or is possible, Hall J (as he now is) in his comprehensive work on the subject of Commissions of Inquiry, writes at page 719, [13.105] that:

...whether a person who may be affected by an adverse finding has a right to call additional evidence to answer contemplated adverse findings has not been clearly established. In this respect Australian law may be narrower than the law in the UK having regard to the procedural fairness requirements as stated by the House of Lords (sic) in Mahon ... at 820-821.
4.111 Even if this were to be found to be a component of procedural fairness in Australia, given the terms of my letter of 7 January 2014, this element has been accommodated. Indeed, every opportunity to rebut allegations made by Counsel Assisting has been provided.

4.112 Overall, I can find no authority for the proposition that, as a matter of general principle, a person against whom an adverse finding may be made or sought has a right, as a matter of procedural fairness, to be questioned by Counsel Assisting on that subject matter or to have such an allegation or proposed finding put to him or her in the course of giving oral evidence, in addition to being advised of the possibility that he or she might be the subject of adverse findings and being given an opportunity, before findings are made, to provide material in opposition to such adverse findings. The overriding obligation upon a commission of inquiry is clear: to provide a person who is at risk of an adverse finding an opportunity to meet it by evidence or submission.

Was procedural fairness provided such that I may rely on evidence not raised during the course of public hearings but cited in Counsel Assisting’s Written Closing Submissions?

4.113 A review of the Inquiry transcripts makes it clear that a great deal of material was provided by the Inquiry to all who appeared before it. To the extent that any material was not made available to witnesses, I cannot, and will not, rely on it. Nor did Counsel Assisting in his Written Closing Submissions.

4.114 This material included as much of the material that was before the previous Authorised Persons Inquiry as could be obtained by this Inquiry. The material was acquired by the Inquiry over time, assessed, indexed and re-indexed and then served on the parties to whom it was relevant. As discussed below, there could be no doubt that all of this material was before me and was available to be taken into account by me.
4.115 In this regard it is important to note the following:

A. I indicated in remarks made on 21 October 2013 in public hearings that:

i. It was made plain that the taking of oral evidence was only part of the investigation process (T6);

ii. No evidence would be relied upon unless a right of reply had first been afforded to those whose reputations risk an adverse finding (T6);

iii. Much of the material to be considered would be in written form (T6);

iv. Practice Directions 1 and 3 provided procedures for the receipt of evidence from witnesses not called by Counsel Assisting and for additional evidence from witnesses called (T6).

v. Cross-examination of witnesses would be deferred so as to permit all parties to be aware of all of the evidence before committing to cross-examination (T7).

B. Counsel Assisting in his opening address indicated:

i. The hearings would supplement evidence otherwise obtained by the Inquiry (T11);

ii. All materials obtained by the Inquiry were in evidence (T17), (this included all of the material before the Authorised Persons Inquiry which preceded the Inquiry and the Authorised Inquiry Report);

iii. Evidence obtained by the Authorised Persons Inquiry was before the Inquiry, including interviews of witnesses and other material obtained as a result of the investigations conducted by that Inquiry (T28).

4.116 It would have been apparent before any oral evidence was called that the Inquiry was able to consider and rely upon all of the material that had been before the Authorised Persons Inquiry and the findings of that Inquiry as part of its deliberations. It would also have been apparent that any witness was at liberty to put forward a statement of any additional evidence that the witness sought to have considered in accordance with Practice Direction 1.

4.117 It was also made apparent that where any witness was at risk of an adverse finding that witness would be given an opportunity to be heard. Indeed, it was specifically
stated that the submissions of Counsel Assisting would be considered by the Inquiry before service upon the parties with a view to ensuring that they “comprise the outer limits of any adverse conclusions or comments that might be included in the final report” (T8).

4.118 I also note that the adverse findings in the Authorised Inquiry Report were plainly stated and available.

4.119 In the circumstances, I reject the allegations made by counsel representing some witnesses in relation to a denial of procedural fairness caused by the use of evidence by Counsel Assisting in his Written Closing Submissions. Having regard to the matters set out above and the very clear terms of my letter to all witnesses of 7 January 2014 allowing further evidence, I am of the view that I can, should I so determine, rely upon the Written Closing Submissions of Counsel Assisting even where those submissions point to material upon which witnesses were not examined by him or others before the Inquiry, provided they are supported by evidence, any conclusions reached are logical and the evidence relied upon is probative.

4.120 In my view this is the case not only in respect of complaints made by lawyers for some of the witnesses in respect of alleged failures not to examine those parties in respect of matters upon which Counsel Assisting later sought adverse findings, but also in relation to complaints that Counsel Assisting did not examine on the general issue of 'an absence of good governance'.

4.121 The findings in the Authorised Inquiry Report concerning an absence of good governance on the part of the Council was a conclusion reached after an examination of a number of specific issues and instances – each one of which was examined, not just individually, but also in the context of the quality of governance by the Council.

4.122 The Authorised Persons Inquiry's relevant investigative material was available to the Inquiry and was provided to all witnesses. In his opening statement Counsel
Assisting referred to the specific matters and instances of conduct which would be the subject of examination by the Inquiry. This Inquiry is entitled to form a view about the quality of governance based upon the materials which formed the basis for conclusions reached concerning the conduct of the Mayor and Councillors and when determining whether there was an absence of good governance.

4.123 The Inquiry indicated that it proposed to provide the written submissions of Counsel Assisting to the parties and that the parties would have an opportunity to respond with the provision of further evidence and submissions in advance of any findings being made. That indication applied to any submission concerning good governance as it did to submissions seeking adverse findings against individuals. The provision of Counsel Assisting’s submissions and the invitation to provide additional evidence and submissions was sufficient to comply with the obligation to afford procedural fairness.

**Specific Written Submissions in Reply in Relation to Procedural Fairness Concerns**

4.124 A number of specific natural justice/evidentiary concerns were raised by lawyers for some Councillors. These arguments are best addressed here, rather than in the chapters that follow, as my response to these concerns will have an impact on the way I examine the evidence throughout the remainder of this Report.

4.125 As detailed above, in his opening remarks Counsel Assisting made plain that the material obtained during the course of the Authorised Persons Inquiry had been obtained and provided to parties and that it was before the Inquiry and would be considered by the Inquiry. It was also made plain that witnesses would not necessarily be examined further in relation to that material. Witnesses were advised that they were at liberty to put on evidence challenging material that was before the Departmental Inquiry (T28-T29).

4.126 Counsel Assisting then went on over the next 18 pages (T29-T47) to summarise each of the matters that would be examined by the Inquiry noting in respect of relevant issues the conduct of particular persons that called for examination.
4.127 An examination of the transcripts, exhibit list and indexes used by the Inquiry and made available to all witnesses indicates that the overwhelming majority of documents relied upon or referred to by Counsel Assisting in his Written Closing Submissions were either shown to witnesses or displayed during the public hearings. All were referenced in the *Authorised Inquiry Report* and made available to witnesses and/or lawyers representing them.

4.128 **Mayor Delle Donne**

In submissions on behalf of Mayor Delle Donne by Christopher Stokes and Associates (for whom Mr Peter McGowan acted as counsel), a number of criticisms are made of Counsel Assisting’s conduct. In the main these submissions have a theme that claims there was a duty upon Counsel Assisting to examine the Mayor and others on matters upon which Counsel Assisting has sought adverse findings. Further, it is argued that, in the absence of such examination, the Mayor and others have been denied procedural fairness or natural justice.

4.129 No authority for such a bold proposition is put and, as I have indicated above, I have not been able to locate any such authority.

4.130 In submissions on behalf of Mayor Delle Donne by Christopher Stokes and Associates it is claimed that the Departmental Findings are treated as if “they stand unless there is evidence to the contrary”. This is an unreasonable conclusion to draw from the submissions which were based upon documents and other evidence which was clearly before the Inquiry and open to all lawyers to rely on – in and out of public hearings.

4.131 In submissions on behalf of the Mayor, it appears that a complaint is made that not every witness was examined by Counsel Assisting upon every document relied upon by him in his written submissions. As I have indicated above no such obligation reposes on Counsel Assisting an inquiry. The duties of providing procedural fairness are imposed upon the Inquirer. Those duties were met by permitting the legal representation of interested parties where appropriate, by
permitting cross examination of a witness by those with leave on relevant matters, especially where that witness' evidence was adverse to a party for whom cross-examining counsel appears, and, more fundamentally, by ensuring that each person who was at risk of adverse findings had notice thereof and an opportunity to bring forward further material in response.

4.132 In submissions on behalf of the Mayor an argument is also developed to support a submission that questions were not put to the Mayor and a number of Councillors concerning the existence of a “group” within the Council. In fact, the Mayor was examined on this point at (T635-T636). The Mayor rejected the proposition and drew attention to records of Council meetings. The Mayor is quoted as saying: “It’s laughable, because the only group that is there, it’s the Council”.

4.133 Further, contrary to the submission put on the Mayor’s behalf other persons were examined regarding the existence of a “group”: Councillor Daly was asked about this topic at T193 and T241; Mr Dacombe at T121; Councillor Morgan at T684, T685, T693, T699; Councillor Boylen at T735, T736; Councillor Clarke at T810-T812, T820, T823, T832; Councillor Barry at T1027-T1028; Councillor Mason at T1109-T1110. There was also cross examination of Mr Dacombe at T1217-T1219. Mr Dacombe was also cross-examined at length by counsel for one of the witnesses about the existence of a number of “groups” within Council. Other witnesses were also cross-examined on the issue of the existence of “groups” of Councillors voting as a bloc (e.g. Councillor Dowsett at T1581-T1582).

4.134 When I consider the submissions of Counsel Assisting on this point, I will have regard to the response by the Mayor and the material to which he referred and the evidence of other witnesses.

4.135 In submissions on behalf of the Mayor a further complaint is made that there is no evidence to support a finding that the Mayor was being deliberately vague when he made his first declaration concerned his relationship with Mr Terry Blanchard and that in the absence of any examination of the Mayor on this issue by Counsel Assisting the submission ought to be rejected.
4.136 I address the relationship between the Mayor and Mr Terry Blanchard in detail in Chapter Twelve of this Report. In relation to the issue of what could or could not be said by Counsel Assisting in his Written Closing Submissions, however, and natural justice principles more generally, I note the following.

4.137 Contrary to what seems to be suggested, Counsel Assisting did in fact examine the Mayor on the issue of how it came about that between November 2010 and May 2012, in circumstances where his relationship with Mr Blanchard had not changed (his daughter was married to Mr Blanchard’s son), he varied his declaration of interest form from a position where in November and December 2010 he had said that he knew the family to a point where he admitted that Mr Blanchard was his daughter’s father in law (see: T614-T616).

4.138 This examination occurred at T614-T618. Counsel Assisting contends that the Mayor’s answer was on one view evasive; on another, deliberately non responsive (see T616). In my view the submission made by Counsel Assisting was one open to be made on the available evidence. This does not mean that I agree with the submission – simply that it was one that Counsel Assisting is entitled to make.

4.139 It was not a breach of procedural fairness in my view for Counsel Assisting not to put the issue of deliberate vagueness in his examination. In any event, even if Counsel Assisting was under an obligation to put such a matter to the Mayor, the fact is that the Mayor was given notice of Counsel Assisting’s submissions but did not to respond to them. In my view, and on the authorities, my final letter permitting further evidence in all of the circumstances amounted to sufficient compliance with the Inquiry’s obligations to ensure procedural fairness. The submission that Counsel Assisting was prevented from making the submission because he did not seek a response from the Mayor is jurisprudentially unsound.

4.140 I am of the same view concerning further submissions on behalf of the Mayor, wherein it is stated that:

... it was never put to the Mayor that his non-declaration was deliberate and it is therefore submitted no basis for an adverse finding arises.
In my view it follows from the authorities that whether or not Counsel Assisting put the substance of the finding sought, namely that the Mayor’s failure to make a declaration at the Council meeting on 13 December 2011 was deliberate, begs the question as to whether such a finding is open to me as the Inquirer in circumstances where following service of Counsel Assisting’s submissions and receipt of submissions from the Mayor, the Mayor was afforded an opportunity to be heard upon the suggested finding.

I am of the same view in respect of the remaining objections to Counsel Assisting’s Written Closing Submissions based upon the argument that in the absence of examining the Mayor on the proposed adverse finding it is not open for Counsel Assisting to seek such a finding. I note in that regard submissions on behalf of the Mayor which state:

Counsel Assisting examined Mayor Delle Donne at some length in respect of the first selection process: T615 – 626. It was never put to Mayor Delle Donne during that examination that his role in participating in the selection process was inappropriate either at all or after he had received advice from Mr Dacombe by e-mail on 9 December 2011.

For the reasons outlined above, I also reject any argument that the fact that Counsel Assisting did not put this to the witnesses makes such an adverse finding unfair or indeed impossible.

Councillor Barry

It has been submitted on behalf of Councillor Barry that “whenever Counsel Assisting failed to put to Councillor Barry an adverse finding that he now asserts is open, then as a matter of procedural fairness, the conclusion cannot be made (sic) against him”.

No authority is offered to support this broad submission.

I will not analyse Counsel Assisting’s written submissions concerning Councillor Barry and compare them to the oral evidence in detail as I do not believe it is
necessary to do so to provide a response to this submission. Consistent with the views I have expressed previously, in the circumstances of this matter and in view of my final letter of 7 January 2014 permitting the provision of more evidence, no breach of procedural fairness, such as would prevent me as the Inquirer from making any adverse finding invited by the submissions of Counsel Assisting, has been occasioned by the actions of Counsel Assisting in not examining any witness on the substance of any such adverse finding.

4.147 **Councillor Olsen**

Written submissions were also filed on behalf of Councillor Olsen. Those submissions also raise the issue of denial of procedural fairness. The thrust of these submissions is that:

- a) a person has a proper opportunity to present their case to a Court; and,

- b) adverse findings concerning Councillor Olsen's state of mind “should have been the subject of direct propositions put to Councillor Olsen so that she would have a chance to correct or contradict them.

4.148 Again, no authority is provided in support of the latter submission, whilst the former is no more than a reformulation of the requirement to provide a person who is at risk of an adverse finding with an opportunity to rebut it – something that was clearly done throughout this Inquiry as evidenced by the procedures put in place and outlined above.

4.149 In my view, my letter as Inquirer of 7 January 2014 permitting the provision of further evidence provided the opportunity for Councillor Olsen to be heard in respect of the adverse finding sought by Counsel Assisting.

4.150 Written submissions filed on behalf of Councillor Olsen refer to *Edwardes* at 318 for the proposition that “the time for ensuring that the plaintiff had enjoyed the full range of procedural rights was during the inquiry, not at some later stage.” A review of this case reveals that Owen J was referring to “at some stage before publication of the report” in his judgment in *Edwardes*.
4.151 In the present matter, Councillor Olsen, and all persons who were at risk of adverse Findings, were given notice of Counsel Assisting’s written submissions and each was invited to provide further evidence should he or she wish, within the life of the Inquiry, and before a report, was prepared and published. The decision of Owen J in Edwardes is to the same effect. It does not assist Ms Olsen or any of the other Councillors who might choose to rely on it.

4.152 It is apparent that Counsel Assisting chose not to examine the parties in detail on matters where adverse findings had been made by the Authorised Inquiry and on the general issue of the quality of governance. There were no doubt good reasons for this. The Inquiry's Terms of Reference and the specific matters which were the subject of adverse findings in the Authorised Inquiry Report were open and were well known. The letter of 7 January 2014 and the invitation it contained served to ensure that all witnesses were under no misapprehension concerning their right to provide further evidence and submissions concerning any matter which had been the subject of Counsel Assisting’s written submissions, or generally.

Evidence relied on by me when writing this Report

4.153 In writing this Report to the Minister, I have relied on the Written Closing Submissions prepared by Counsel Assisting and the evidence cited therein. I am also guided by the Written Submissions in Reply on behalf of the witnesses who appeared before the Inquiry.

4.154 I carefully considered the Written Submissions in Reply to determine whether any submission might give rise to an adverse finding against a witness that had not previously been raised by Counsel Assisting. In those circumstances, I had intended to seek a response from the relevantly affected witness to ensure that they were accorded natural justice and procedural fairness.

4.155 Ultimately, this second round of “natural justice” responses proved unnecessary as I have not, in writing this Report, made adverse findings that stray from those highlighted by Counsel Assisting and responded to in Written Submissions in Reply.
by those against whom said adverse comments and the evidence used to support them apply. In writing this Report I have taken into account all submissions received and have carefully considered them in their context as responses to the submissions made by Counsel Assisting. No evidence is relied on or any adverse finding made by me that has not been addressed in these submissions.

Conclusions

4.156 In conclusion, I am very much of the view that this Inquiry has satisfied its obligations of procedural fairness and natural justice. All evidence relied upon by Counsel Assisting and ultimately me as the Inquirer, including evidence and argument cited in the Authorised Inquiry Report then referenced in the Written Submissions of Counsel Assisting, was made available to all witnesses and their counsel. Importantly, all were given a right of reply. Counsel Assisting and the Inquiry staff are to be commended for the considerable efforts they undertook to ensure that all evidence was accessible and user friendly.

4.157 To the extent that concerns have been raised about the way in which Counsel Assisting relied on this evidence in his written submissions, these concerns would have been best addressed by the provision of further evidence by those concerned that their voices had not been heard – an option made available to all witnesses and/or their lawyers but which none chose to avail themselves of. There can be no suggestion that a right of reply was not provided and there is simply no case law to support the assertion that evidence or argument not specifically put to witnesses during the course of public hearings but referred to by Counsel Assisting in his Written Submissions is not now available to me as Inquirer in writing this Report. At its core, this Inquiry is an information gathering exercise. No blame can be directed at Counsel Assisting because others chose not to assist the Inquiry with further information and evidence when such an opportunity was readily available to them and when all information relevant to the Inquiry and all witnesses was accessible and easily referred to.
4.158 As emphasised by me throughout this Inquiry, this Inquiry was not a trial and it was not adversarial in nature. It was an investigation designed to give me the information I need to make certain determinations about the provision of good government in the City of Canning. Put simply, to adopt the evidentiary procedures required in a formal trial would make inquiries of this sort unworkable. What matters is fairness, resulting in an opportunity to be heard before any adverse findings can be made. Nothing in this Report, including any adverse comment and the evidence upon which said comment is built, relied on evidence not available to all witnesses and not foreshadowed by Counsel Assisting and to which an opportunity to respond was provided to those whose interests or actions have been the subject of adverse comment by Counsel Assisting.

4.159 I am satisfied that the procedures adopted throughout this Inquiry, particularly by Counsel Assisting, have satisfied well established principles of procedural fairness.
CHAPTER FIVE

THE COUNCIL’S RELATIONSHIP WITH CEO MARK DACOMBE
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THE COUNCIL’S RELATIONSHIP WITH CEO MARK DACOMBE

Introduction

5.1 Mark Dacombe commenced working as CEO for the City of Canning in February 2009. He ceased in that role in January 2012.

5.2 Much of the evidence before this Inquiry revolved around the relationship between Mr Dacombe and the Council during the period 2009-2012. The evidence reveals an increasingly dysfunctional relationship, best described by Councillor Olsen as “toxic” (T358) and by the City’s Director Corporate Services, Andrew Sharpe as one that caused “fear” (T854, T856, T884-T885). These appear to be an accurate assessment of the situation from both the position of some Councillors and senior members of the Administration.

Performance Appraisal for 2009/2010 Period

5.3 Evidence before the Inquiry demonstrated that Mr Dacombe inherited a difficult working environment when he was hired as CEO. Mr Dacombe’s own evidence suggested that upon his commencement in February 2009, the Mayor and several councillors informed him that there was a cultural environment reflecting a lack of trust between the Elected Members and the staff (T52).

5.4 It is clear from the evidence that the Council initially embraced Mr Dacombe’s appointment with hope and expectation that he could bring about a cultural change to improve the way in which the Administration worked with the Council: see, for example, T232-T233, T226, T570-T571 and T863.

5.5 This is best evidenced in the results of Mr Dacombe’s first Performance Appraisal in October 2010. To assist in that regard, a Performance Review Document was developed in line with the conditions set out in Mr Dacombe’s employment contract. The document for the assessment period 2009-2010 contained a list of
competencies Mark Dacombe would be measured against, as well as nine performance criteria.

5.6 As explained in the Authorised Inquiry Report, the performance criteria were measured against a numerical scale with a score of five signifying “outstanding”, descending thereafter to one, indicating a need for “significant improvement”. Competencies were then measured on an alphabetical rating scale of ‘A’ through ‘D’. This allowed the assessor to select the appropriate sub-set of descriptors that matched the performance against each of the competencies.

5.7 In the process of finalising the Performance Review for the 2009/2010 period, Mayor Delle Donne and Mr Dacombe mutually agreed that the performance criteria would be revised for the next assessment period to reflect the changes Mark Dacombe would be making under his new Refocus Program (discussed below).

5.8 Mayor Delle Donne and Mr Dacombe formally met to conduct this first assessment. They mutually agreed that Mr Dacombe, in his capacity as CEO, had achieved all of the performance criteria outlined in the 2009/2010 Performance Review document: CI10/8870.

5.9 This first Performance Review document was signed by Mayor Delle Donne and Mark Dacombe on 8 October 2010.

CEO Salary Increase

5.10 At the Ordinary Council Meeting on 8 February 2011 (CI10/03157), the Council was presented with Report CE-006-11, Contract of Employment – Chief Executive Officer: CI10/03182.

5.11 The Report addressed Mr Dacombe’s performance appraisal for the 2009/2010 period, noted that it had been conducted and agreed upon by the Mayor and CEO and signed by both men.
5.12 The Report also advised that the Council could approve a salary increase for Mr Dacombe. The suggested 3.5% salary increase was in accordance with the amount recommended by the Salary and Allowances Tribunal.

5.13 Councillor Elliott moved a motion, seconded by Councillor Barry that stated:

(a) That the Salaries and Allowances Tribunal’s recommended general adjustment of 3.5% be applied to the Chief Executive Officer’s total remuneration effective 1 August 2010... (CI10/03157 at page 41)

5.14 This motion was not supported. Instead, Councillor Mason moved an amendment to Councillor Elliott’s motion, changing the salary increase from 3.5% to 5%.

5.15 Council voted unanimously for Councillor Mason’s amendment, agreeing that the 5% pay increase would take effect from 1 August 2010 (CI10/03157 at page 41 & 42).

5.16 It is fair to say that as at 8 February 2011 Mark Dacombe was held in high regard by the Council (see, for example, T118, T486, T586, T693, T819, T1028-T1029 and T1111).

The Refocus Program

5.17 Central to much of Mark Dacombe’s tenure as CEO for the City of Canning was his introduction of the Refocus Program in July 2010.

5.18 The Program was first introduced to the Council during a presentation in July 2010 with the title “Above All Service: Refocus 2010” (CI10/02083).

5.19 Refocus is described in the Authorised Inquiry Report as a multi-year program designed to breathe new life in the organisation, set a clear direction forward for the organisation, set up a new executive structure, change roles within the executive structure and clarify the role of Managers within the organisation. This is an accurate summary of the program’s quite broad objectives.
5.20 Further, it is noted that the presentation given to Councillors outlined that Mr Dacombe intended to improve customer service, leadership and have a more integrated approach to dealing with corporate issues.

5.21 Following this presentation, Mr Dacombe, along with members of his Executive team, worked through December 2010 to January 2011 developing the new program to incorporate the Council’s priorities. Members of the Executive leadership team took part in a two day workshop detailing the organisational change that would take place. The workshop was facilitated by Mike Richardson, from New Zealand, who was hired by Mr Dacombe as a consultant to oversee and assist him with the Refocus program. Mr Richardson’s role with the City of Canning is discussed further below.

5.22 In early 2011 Mr Dacombe met with Mayor Delle Donne and discussed a new governance structure to deal with “Council business”. During this discussion a structure involving Forum Meetings and Project Advisory Groups (PAGs) was agreed upon. It was intended that Forum Meetings and PAGs would allow Council to be kept fully informed of business activities conducted under the Refocus Program and contribute to the management of the program.

5.23 Forum Meetings and PAGs, incorporated in Report CE-008-11 (CI10/03181), were adopted by the Council at the Ordinary Council Meeting of 22 February 2011 (CI10/03164).

Councillors’ Differing Understanding of Refocus

5.24 Mr Dacombe described Refocus (at T97-T98) as one that he developed and put in place to:

…(shift) an organisation both at the officials level and the Elected Members level from one that was very much focused on detailed service delivery to one which was much more strategically focused around managing … a City.

5.25 Mr Dacombe went on to state (at T98) that he “…(didn’t) think at the end of the day any of them (Elected Members) got that”.

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5.26 During hearings, Mr Dacombe also described a situation (at T100) in which his efforts to introduce change were met with resistance by Elected Members as they were, in his opinion, pushed beyond their comfort zones, resulting in comments from Mayor Delle Donne and Councillors Mason and Barry that he was “...taking the power away from Council”, when his intention was, in his opinion, the opposite.

5.27 Whatever Mr Dacombe’s intention in this regard, the evidence shows that it was soon clear that there was a worrying degree of confusion very early on amongst Councillors in relation to what Refocus actually was, what it entailed and, importantly, how its success was to be monitored.

5.28 Evidence provided by Councillors during the public hearings demonstrates the extent to which their understanding of the Program differed:

1. Councillor Daly thought Refocus was a complete waste of time; ‘mumbo jumbo’; one that she wished she had engaged more with; a ‘talkfest’ and something that she did not understand what it was meant to achieve (T220-T226);

2. Councillor O’Donnell was trying to gain an understanding of what Refocus was about during Forums held on 9 and 23 November 2011 (T291);

3. Councillor Olsen said Refocus was to look into the Administration and bring it from that (toxic) culture to the new culture and invigorate it. It was never meant to change the Council (T358);

4. Councillor Dowsett thought Refocus was going to re-look at a lot of the issues in the City with a view to restructuring (T484);

5. Mayor Delle Donne understood that Refocus was to fix up some of the problems the City was experiencing but it had no milestones, making it difficult to identify tangible achievements (T574-T575);

6. Councillor Morgan said Refocus was to sort of get the Council thinking more strategically than those nuts and bolts issues (sheds, patios, fences) (T690);

7. Councillor Boylen noted that Refocus had both aspirational elements and operationalised elements to deliver outcomes (T723);
8. Councillor Elliott understood Refocus to be a staffing adjustment with structural changes of positions (T775);

9. Councillor Clarke said Refocus looked at tying all the things together in the Council and making certain that the ratepayers and the public were part of it so that they knew what was going on, the City shaping (T814). It was both a philosophy and one with tangible projects (T815);

10. Mr Sharpe stated that Refocus was a change and improvement program that was designed to put the strategic levers in the hands of the Elected Members and create capacity within the City to address emerging issues around local government; it was an engagement process, getting away from detail and moving into a higher level of strategic delivery within local government (T863);

11. Councillor Barry suggested Refocus involved aspects of aspirational change for the City (T1024); and

12. Councillor Mason indicated that Refocus was a brand name given to an internally focused business-improvement program designed to support the Council and implement their decisions (T1100-T1101).

5.29 Counsel Assisting, in his Written Closing Submissions, submitted that the failure of the Councillors and the CEO to share the same understanding of what the Refocus Program was and how it would operate inevitably contributed to its demise (discussed below).

5.30 I agree. The lack of consistent understanding undoubtedly led to frustrations of different kinds in Councillors – all of whom wanted to see progress but many of whom did not understand how, or what, programs were being implemented under the Refocus Program (see, for example, example T572-573, T725, T818 and T1024).

5.31 This lack of any consistent understanding also meant that different Councillors had different (often disparate) views about whether the Program was performing (see T293, T575, T580, T724-726, T775, T816, T1024 and T1101). In turn, this made it difficult for the Council to determine objectively whether the Refocus Program was delivering any benefits to the City and its residents.

5.32 Councillor Stephen Boylen in his evidence during public hearings noted what he perceived as difficulty monitoring the success of the Refocus Program. He
described a strategic and aspirational plan that lacked indicators of success or progress:

…I don’t know how we ever measured it. There was nothing presented as indicators of efficiency or effectiveness. We weren’t getting a link – a certain target set and the extent to which we’d met those targets, linked across to the works that were being undertaken (T723).

5.33 As outlined by Counsel Assisting, a further point of contention between Mr Dacombe and the Council was in relation to the roles of the new Executives. Mr Dacombe noted during the course of hearings (at T119) that the Council found it difficult to come to terms with the new Executive roles: see also T142, T220, T572-T573, T691, T1030 and T1104-T1105. I note, in particular, the Council’s concerns in relation to Mr Kevin Jefferies, Acting Executive Engineering. It is clear from the evidence that Mr Dacombe was satisfied with Mr Jefferies’ managerial skills but that the Council had concerns about Mr Jefferies’ apparent lack of engineering skills and/or knowledge (see, for example, email correspondence from Councillor Bruce Mason to Mark Dacombe date 6 July 2011: CI10/01972).

5.34 There were clear signs in November 2011 that the Council was unimpressed with Refocus. As a result, Mr Dacombe proposed two forums on 9 and 23 November 2011 in an effort to address the Council’s concerns about Refocus.

5.35 Before these meetings occurred, however, the Council voted to cancel the Project Advisory Groups (PAGs), which had been part of the governance reporting structure implemented to run alongside Refocus. This occurred at the Ordinary Council Meeting of 8 November 2011 (CI10/02832 at page 20). PAGs were intended relay the progress of projects under Refocus to the Council. Despite this, Council Olsen submitted a notice of motion, prior to the Ordinary Council Meeting of 8 November 2011, to abolish PAGs. In evidence before the Inquiry (at T419 and T423-T425), Councillor Olsen explained that her reason for doing so arose from a concern that the PAGs were becoming strategic and not every councillor was attending. In the circumstances, she wanted to ensure that the information being presented at PAGs was provided to all councillors – not just those who chose to attend PAGs.
5.36 I note from the evidence that Councillor Olsen’s motion was submitted without seeking advice or consulting the CEO or Administration staff.

5.37 Two forum workshops were eventually held on 9 and 23 November 2011 (CI10/01023 and CI10/01024 respectively). The Forums were intended to update Councillors on the Refocus program and identify the steps necessary to take the Program forward. However, the evidence shows that they achieved little.

5.38 In a letter dated 9 February 2012 to the Authorised Persons Inquiry (CI10/00840), Mr Dacombe mentioned the two Forums. In relation to the progress of the Forums Mr Dacombe stated:

> At the first I made some opening remarks and then a great deal of time was spent on members’ complaints. The second meeting was a rerun of the first: CI10/00840 at page 7.

5.39 During public hearings, Mr Dacombe indicated that he was of the opinion that the Council was resistant to any engagement on the issues (T106 and T108) and that the Forums had an inquisitorial flavour about them (T108). Councillor O’Donnell expressed the view that the Council appeared to have disengaged from Refocus as it wasn’t working (T292). Councillor Olsen noted (T425) that by this time she had decided she could not support Refocus anymore. Mayor Delle Donne, in turn, was concerned that no member of the Executive team was present at the Forums, when the whole point was to get everyone “singing from the same page” (T581).

5.40 It is evident, particularly from subsequent events, that Mr Dacombe failed in his attempt to get Council “back on side” and that the Council was no longer willing to support the Refocus program. It is also clear that these events represented a significant decline in the relationship between Mr Dacombe and some of the Councillors.

5.41 Signs of deterioration in the relationship between the Council and Mr Dacombe are further evident from his email to Mayor Delle Donne dated 10 July 2011 (CI10/01204) attaching a letter setting out his understanding of some of the
concerns held by Councillors and seeking an opportunity to discuss them and move forward: see also T123 and T1029. In this email, Mr Dacombe writes:

_The attached letter aims at crystallising the issues so that we can address them and move forward. I am totally committed to doing an excellent job for you and the Council and look forward to dealing with these matters to ensure we remain firmly on the same page._

5.42 There was no response from Mayor Delle Donne to this letter: T124 and T589.

5.43 The Mayor’s silence in this regard is telling. Mr Dacombe’s evidence was that his relationship with Mayor Delle Donne was initially positive, but that by October 2011, the Mayor had adopted more of an adversarial approach in his dealings towards him (T95).

5.44 The evidence reveals that dissatisfaction on the part of the Council, particularly with Refocus and its associated projects, had grown by November 2011. This is best evidenced by Councillor Olsen’s motion to abolish PAGs in November 2011 and the Forum workshops of 9 and 23 November 2011 where Mark Dacombe attempted, but ultimately failed, to get the Council “back on side”.

**The Cancellation of Refocus**

**Councillor Mason’s Notice of Motion**

5.45 On 5 December 2011 Councillor Mason sent an email to Mayor Delle Donne and Councillors Barry and Olsen attaching a notice of motion he was planning to put forward at the next Ordinary Council Meeting (CI10/02094), scheduled for 13 December 2011. That notice of motion related to the cancellation of Refocus.

5.46 On 7 December 2011, Councillor Mason sent an email to Mark Dacombe, Andrew Sharpe and Mayor Delle Donne notifying them of two motions that he intended to move at the 13 December Ordinary Council Meeting. The first motion related to the cancellation of Refocus. The second motion was for the CEO to advertise for
the position of Executive of Town Planning Services and appoint Councillor Mason and the Mayor to the selection panel (CI10/02095).

5.47 Mark Dacombe was overseas on leave at the time he received this email from Councillor Mason. Councillor Mason did not request advice on the possible ramifications of the motion from Mr Dacombe. At no time, did Councillor Mason consult Mr Dacombe in relation to this issue. The email simply informed Mr Dacombe of his intention to move the motion. Nor did Councillor Mason consult other members of the Executive team or other Councillors who were not parties to the email.

**Mark Dacombe’s Email Expressing Concern over Motion**

5.48 On 9 December 2011 Mark Dacombe, whilst still on leave overseas, responded to Councillor Mason’s email (CI10/02904). Mr Dacombe’s response, also sent to Mayor Delle Donne, expressed a number of concerns regarding the cancellation of Refocus and possible consequences arising from any cancellation of Refocus. Mr Dacombe also advised that the motion to put the Mayor and Councillor Mason on the recruitment panel was contrary to the *Local Government Act 1995*.

5.49 In relation to Refocus, Mr Dacombe indicated that, if successful, the motion would halt projects that were intended to reform city building, customer service and organisational development. Mr Dacombe also expressed concern that the potential halt to projects caused by the motion could result in Council not meeting certain statutory obligations related to the ‘integrated planning’ framework. He wrote:

* A resolution that halts this work would mean that the Council could not meet its statutory obligations (CI10/02904).

5.50 Upon receiving Mark Dacombe’s email, Councillor Mason forwarded a copy to Councillors Barry and Olsen inviting them to comment on Mr Dacombe’s concerns (CI10/02096).
5.51 During public hearings Councillor Mason explained that he forwarded this email to Councillors Barry and Olsen because he had previously informed them of his proposed motion (T1110).

5.52 None of the Councillors who were privy to Mr Dacombe’s email corresponded with Mr Dacombe. Nor did they disclose any of the details of the emails they had been sent to any other elected member. As explained by Counsel Assisting, the evidence shows:

1. Councillor Olsen indicated she had never opened the email (T427).

2. Mayor Delle Donne stated he could not recall whether he shared the email (T584). During his evidence to the Authorised Person Inquiry (CI10/00190 at page 63) the Mayor offered no explanation for why the content of that email was not shared with other Elected Members prior to the 13 December 2011 Ordinary Council Meeting and properly conceded that it was a lack of judgment on his part not to have shared it. When this prior evidence was put to him during the course of public hearings, Mayor Delle Donne justifies his decision to not share the email on the basis that it was not appropriate for him to do so, it being the CEO’s responsibility (T584).

3. Councillor Barry said he did not send it to anyone else and did not think he should have (T1031).

4. Councillor Mason also said that he did not send it to anyone else (T1111).

5.53 Mr Dacombe’s evidence was that he did not send the email to any other elected member or have discussions with them about the matter as he felt it would be inappropriate to have such discussions prior to having had an opportunity to discuss them with Mayor Delle Done, particularly given the prior success he had had appealing to Mayor Delle Done in trying to have notices of motion ‘hauled back’ (T109-T110).

5.54 Overall, there appears to have been very little sharing of information on the part of some Councillors and members of the Administration team and any “sharing” that did occur was at best selective.
Ordinary Council Meeting 13 December 2011

5.55 At the Ordinary Council Meeting of 13 December 2011 (CI10/00995), despite Mark Dacombe’s email to him expressing concerns over the notice of motion (CI10/02904), Councillor Mason moved his motion to cancel Refocus.

5.56 Mayor Delle Donne and Councillors Barry and Olsen did not disclose to fellow Councillors that they had been privy to Councillor Mason’s motion. The remaining Councillors and Councillor Olsen were also not aware of the adverse consequences outlined by Mr Dacombe in his email.

5.57 Councillor Mason moved his motion, seconded by Councillor Daly. The motion read:

All matters relating to the City's program of “Refocus” cease immediately.

The Chief Executive Officer report to the Mayor and Council on the structure and management of the Organisation's Divisions including, business units, staffing levels, management systems, job structures followed by a briefing to Members on the outcome of all findings.

The Chief Executive Officer prepare a comprehensive report by February 2012 on all outstanding business of the progress and status of each one of them and also the ones that has not been implemented since 2009. The report to include:

(a) All items moved as resolutions of Council
(b) Include a timeline for implementation for each item
(c) Any staffing implications, current and future
(d) Contain a budgetary breakdown for the remainder of 2011/12 and 2012/13: CI10/00995 at page 20.

5.58 Following further discussion on the motion Councillor Barry moved a motion to amend part (b) to state,

...that Council RESOLVES that it shall honour all existing current written/signed Contracts relating to the “Refocus” Program up to 13 December 2011: CI10/00995 at page 21.
5.59 Councillor Clarke then asked a question of Mr Dacombe in relation to what effect the proposed cancellation would have on existing contracts. Before allowing Mr Dacombe to speak to the question, the Mayor commented:

_I hope you’re not going to sway anybody one way or the other, just the facts…_ (CI10/02058).

5.60 The motion to cancel Refocus was passed by a majority vote.

5.61 Mayor Delle Donne and Councillors Mason, Barry, Olsen, Daly, Clarke and O’Donnell voted for the motion. Councillors Elliott, Boylen and Morgan voted against the motion.

5.62 It is worth noting that the decision to cancel what can only be described as a central pillar in Mark Dacombe’s tenure as CEO was made at a particularly busy time in the Council’s calendar. The evidence establishes that the Council meetings in December 2011 and January 2012 were particularly lengthy, being the only meetings held in that month, rather than the fortnightly meetings held in other months. Further, these meetings contained considerably more matters than the usual fortnightly meetings (see, for example, T347, T375, T513, T671, T716, T752 and T1032).

5.63 This inevitably raises the question of whether Councillors gave sufficient time and reflection to the cancellation of a significant part of the City’s planning strategy.

### Appointment to Selection Panel

5.64 At the same Ordinary Council Meeting of 13 December 2011 Councillor Mason moved his second motion in relation to the selection panel.

5.65 The motion read:

_The Chief Executive Officer be authorised to immediately advertise for the position for an Executive Town Planning Services and that the Mayor and the deputy Mayor be appointed to the selection Panel_ (CI10/00995 at page 22).
5.66 The evidence shows that the motion was moved without any discussion or consultation with Mr Dacombe or Administrative Staff. It was simply flagged in the email sent to Mr Dacombe when he was overseas. It is also clear that Councillor Mason ignored the advice Mr Dacombe had outlined in his email of 9 December 2011 in relation to illegality (CI10/02904).

5.67 On the evidence, only Councillor Mason, Councillor Barry and Mayor Delle Donne were aware that the motion was contrary to the *Local Government Act 1995*. They did not disclose this information to other Councillors. Nor did CEO Mr Dacombe or anyone else from the Administration.

**Mark Dacombe’s Relationship with Mike Richardson**

5.68 During cross examination at the public hearings the issue of Mark Dacombe’s relationship with Mike Richardson was addressed. The criticism that Mr Dacombe attracted in relation to this relationship was his failure to publicly tender for the work that Mr Richardson was hired to perform and alleged preferential treatment arising from this previous relationship.

5.69 No formal contract in relation to Mr Richardson’s employment was provided to the Inquiry. In a letter dated 6 December 2012 (CI10/03488), the City of Canning informed the Inquiry that it was unable to locate a formal contract between the City of Canning and Mr Richardson or with either of his associated companies, Salt & Light or Time Well Spent. In the circumstances, the only evidence of a ‘contract’ is found in a series of email messages provided to the Authorised Persons Inquiry by Mike Richardson: CI10/01246.

5.70 It was put to Mr Dacombe during cross examination that he and Mike Richardson were friends and that, based on this friendship, Mr Dacombe had hired Mr Richardson. Mr Dacombe denied this suggestion, explaining that he and Mr Richardson had previously been work colleagues and had a mutual respect for one another. He denied that they were or ever had been friends. Mr Dacombe asserted any relationship was purely professional (T1363).
5.71 During cross examination Mark Dacombe received criticism for not putting Mr Richardson’s job out to tender. It was further suggested that there had been a deliberate attempt by Mr Dacombe to avoid the tender process by splitting the payments to Mr Richardson between his two companies, Salt & Light and Time Well Spent.

5.72 These concerns arise from Regulations 11(1) and 12 of the Local Government (Functions and General) Regulations 1996, which reads:

11. When tenders have to be publicly invited

(1) Tenders are to be publicly invited according to the requirements of this Division before a local government enters into a contract for another person to supply goods or services if the consideration under the contract is, or is expected to be, more, or worth more, than $100 000 unless subregulation (2) states otherwise.

(2) ...

12. Anti-avoidance provision for r. 11(1)

If a local government enters into 2 or more contracts in circumstances such that the desire to avoid the requirements of regulation 11(1) is a significant reason for not dealing with the matter in a single contract, tenders are to be publicly invited according to the requirements of this Division before entering into any of the contracts regardless of the consideration.

5.73 Mr Dacombe rejected the claim that he had acted inappropriately, stating that Mike Richardson was hired for two separate assignments and, despite the aggregate payment to Mr Richardson exceeding $100,000, this was not an attempt by him to avoid an otherwise required tender process (T1151).

Performance Review for 2010/2011 Period

5.74 In early January 2012 Mayor Delle Donne undertook to conduct a second Performance Review of Mr Dacombe for the 2010/2011 period.

5.75 Unlike the first Performance Review, however, the Mayor did not involve Mr Dacombe when conducting the review that was to form part of the appraisal (see T589).
5.76 On 2 January 2012 Mayor Delle Donne emailed Councillor Mason a draft of Mr Dacombe’s Performance Review and requested Councillor Mason’s input: CI10/00651.

5.77 On 3 January 2012, Councillor Mason responded to Mayor Delle Donne, advising that he had used a red font to mark the changes he had made to Mr Dacombe’s Performance Appraisal Document: CI10/03228.

5.78 The evidence shows that in relation to the nine performance criteria used in the Performance Review document, Mayor Delle Donne was less complimentary than Councillor Mason. The criteria were rated 1 to 5, with 1 being the lowest rating and 5 being the highest. Mayor Delle Donne assessed Mark Dacombe to be “competent” in only one of the nine criteria. For the remaining eight criteria the Mayor gave Mark Dacombe a rating of 1 or 2, meaning that his performance as CEO was either:

(1) Unacceptable (does not meet the expected standards – significant improvement required; (2) Needs improvement (occasionally does not meet the expected standards – some improvement required: CI10/01849.

5.79 The evidence shows that the exchange between Mayor Delle Donne and Councillor Mason regarding Mr Dacombe’s Performance Review was done without the knowledge of Mark Dacombe or any other Councillors.

5.80 The evidence shows that the process adopted by the Mayor for the second Performance Review differed from the process used for Mr Dacombe’s first Performance Review. It also appears that the Mayor used the wrong performance criteria for the second appraisal. During the first Performance Review, Mayor Delle Donne and Mark Dacombe had agreed to use a new set of criteria, which would best reflect the changes Mr Dacombe was implementing, for the 2010/2011 period. Mayor Delle Donne did not use this set of criteria. Instead, he used the criteria that had applied at the time he had conducted the 2009/2010 performance review when conducting his assessment.
During his evidence before the Inquiry, Mayor Delle Donne gave evidence as follows in relation to the Performance Criteria and the process used by him:

1) he rejected any suggestion that he had denied Mr Dacombe procedural fairness (T592);

2) he asserted that the use of the wrong performance criteria was due to HR giving him the wrong form (T593); and

3) he asserted that he received no assistance from HR in conducting the review (T593).

CEO Mark Dacombe Separates from the City

Meeting of 12 January 2012

On 4 January 2012 Mayor Delle Donne emailed Mark Dacombe and requested that they, as well as Councillor Mason, meet on 12 January 2012 to discuss matters of “mutual concern”: CI10/01850. No other details were discussed. Nor was any agenda provided to Mr Dacombe. The meeting commenced at 8:37am on 12 January 2012. In attendance were Mark Dacombe, Mayor Delle Donne, Councillor Mason and Andrew Sharpe, whom Mr Dacombe had asked to attend. Andrew Sharpe took hand written notes during the meeting (CI10/01851).

A number of issues were discussed during the meeting. At the end of the meeting the Mayor handed Mr Dacombe a copy of his 2010/2011 Performance Review (CI10/01849). Mark Dacombe was asked to review the document, comment on it and then advise the Mayor (CI10/01851 at page 17).

Mark Dacombe Surrenders Position as CEO: January 2012

Mr Dacombe met with the Mayor on 18 January 2012 and offered to surrender his position as CEO. He informed Mayor Delle Donne that he did not accept the results of the second Performance Review and that he would not sign the document he had been handed on 12 January 2012. After indicating that he had told the Mayor...
that he could not agree with the content of the review, Mr Dacombe gave evidence that he said to the Mayor:

... that in my view that that document and the way in which it had been prepared was evidence, for me, of a complete breakdown in the relationship and that my position was difficult, if not impossible, and that after careful consideration, I was prepared to put to – to him a proposal to bring my employment with the Council to an end (T128).

5.85 On 19 January 2012, Mr Dacombe met with Mayor Delle Donne and Councillor Mason and presented them with a formal written proposal that outlined the terms and conditions of his offer to vacate his position as CEO of the City of Canning: CI10/01890. The proposal outlined that Mr Dacombe was giving three months’ notice and requested that any announcement from the City state that he was leaving to take on new opportunities.

5.86 During the public hearings there was some debate as to when this document was received (C110/00416). Mr Dacombe gave evidence that he presented his formal proposal in a meeting on 18 January 2012 and then again on 19 January 2012 (T128, T1169, T1171 and T1814). Mayor Delle Donne gave evidence that Mr Dacombe returned the day after the 12 January 2012 meeting and presented his formal proposal (T594). Councillor Mason provided evidence suggesting that Mr Dacombe had presented his formal proposal approximately ten minutes after the 12 January 2012 meeting had concluded (T1128).

5.87 I agree with Counsel Assisting that the independent evidence of the date of document CI10/00416 supports the evidence of Mr Dacombe in this regard.

Special Council Meeting 23 January 2012

5.88 At the Special Council Meeting on 23 January 2012 (CI10/01043), the Council was presented with Mr Dacombe’s formal separation proposal in Confidential Report CE-005-12: CI10/03183.
5.89 The evidence shows that only Mayor Delle Donne and Councillor Mason were aware of what had transpired in the lead up to this meeting. Mayor Delle Donne did not make reference to the manner in which he had conducted Mr Dacombe’s Performance Review. Nor were Councillors advised that Mr Dacombe had rejected the Review process as unfair (T127). Without this information it is probable that it would not have occurred to most Councillors that the Performance Review was a central reason for Mr Dacombe’s departure from the City.

5.90 In the circumstances, the Council voted on Mr Dacombe’s departure without any knowledge of the negative Performance Review that he received from the Mayor less than two weeks prior and the circumstances surrounding it.

**Mayor Delle Donne has Audio Device Switched Off**

5.91 A review of the transcript of the Special Council Meeting of 23 January 2012 reveals that the CEO and all staff were asked to leave the meeting while the Council reviewed and discussed the item, relating to Mr Dacombe’s separation.

5.92 Further, Mayor Delle Donne had the audio recording device switched off before Council began any deliberation of Mr Dacombe’s separation proposal.

5.93 During his interview as part of the Authorised Persons Inquiry, Mayor Delle Donne gave the following account in relation to the turning off of the recording during the Special Council Meeting of 23 January 2012 (CI10/00191 at page 9):

1) *Initially he did not know why the tape was turned off because he was not in charge of it;*

2) *He gave instructions for it to be turned off because the CEO didn’t want to have the matters recorded;*

3) *When confronted with the fact that no such conversation with the CEO was recorded on the audio from the meeting, he attempted to justify his actions by asserting that nobody objected to his instruction;*

4) *He decided to turn the tape off to keep the matter confidential because in the past some councillors had broken confidentiality;*
5) As further justification for his actions, he asserted that Mr Dacombe did not object to the tape being turned off; and

6) That he did not seek the Council’s authority to turn it off as he was simply following old procedures.

5.94 During evidence before this Inquiry (T603-T605), Mayor Delle Donne indicated that the reason he had the tape switched off was, in essence, because no authority was required, there had been breaches of confidential items in the past and he did not want the staff to be circulating matters arising from that discussion. The Mayor went on to say that because it had been done before and no-one objected he thought his actions were appropriate.

5.95 During public hearings the Mayor explained that the reason for his slightly different responses to the Authorised Persons Inquiry was due to his having difficulty collecting his mind during that interview (T603).

Motion to Finalise CEO’s Departure

5.96 The nature of the Council’s resolution on 23 January 2012 in relation to Mr Dacombe’s separation was as follows:

(1) Report CE-005-12 be received.

(2) Council resolve to delegate authority to the Mayor to finalise as soon as possible, the contractual arrangements between the City and the Chief Executive Officer and in accordance with section 6.8 of the Local Government Act 1995 to finance the cost of settlement: CI10/01043 at page 3.

5.97 The decision was carried unanimously.

Allion Legal Advice 25 & 27 January 2012

5.98 On 25 January 2012 Mayor Delle Donne met with a representative from Allion Legal to discuss and review the Deed of Release document prepared by Mark Dacombe’s solicitor: CI10/01883. Allion Legal provided advice via email in relation to this matter on the same day: CI10/01885.
The advice stated that it was not desirable for Mark Dacombe to remain in his role during the 3 months’ notice period and suggested that the notice period be paid out to Mr Dacombe. It was suggested that his employment end immediately. The advice also suggested that Mr Dacombe be placed on ‘gardening leave’. This would involve Mr Dacombe remaining as an employee but would not require him to perform his role unless specifically directed.

Allion Legal also suggested that Mayor Delle Donne appoint the Deputy CEO as Acting CEO and arrange for HR to disable Mark Dacombe’s access to the City of Canning’s internet, email and IT services (CI10/01885).

On 27 January 2012 Allion Legal provided further advice via email to Mayor Delle Donne (CI10/02870). The email outlined a guide to be utilised for a proposed meeting with Mr Dacombe that would result in him being placed on ‘gardening leave’. Attached to the email was a draft letter to Mr Dacombe outlining the terms of the arrangement.

Mr Dacombe Suspended on Full Pay – 30 January 2012

On 30 January 2012, in the presence of Councillor Mason, Andrew Sharpe and the Acting Manager of Human Resources, and without prior authority or the knowledge of the Council, Mayor Delle Donne served Mark Dacombe with a letter that effectively suspended him, effective immediately on full salary: CI10/00417.

Mr Dacombe was instructed not to attend work and to return all work-related property in his possession, excluding the City vehicle which he was entitled to continue using.

Analysis

Councillor Mason’s Motions

I note that on 5 December 2011, Councillor Mason sent an email to Mayor Delle Donne, Councillor Barry and Councillor Olsen advising of his intention to move a motion to cease all activities in relation to Refocus.
5.105 I agree with Counsel Assisting in his Written Closing Submissions that the decision by Councillor Mason to send this email to a select group of Councillors (who a number of witnesses saw as belonging to a ‘group’ or ‘pack’ (see T121, T458-T459, T487, T684, T735-T736, T810-T811 and T1027-T1028) on one level demonstrates no more than one elected member seeking the views of trusted or respected colleagues in relation to a proposed motion. On another level, however, the exclusion of the remainder of the Council from discussions deprived the rest of the Council of an important opportunity to carefully consider the matter prior to learning of its inclusion when they received the agenda.

5.106 While I do not accept that there was evidence of a “select group” or “pack” consisting of the Mayor, Councillors Mason, Barry and Olsen, I do find that the deliberate or short sighted exclusion of other Councillors from vital information was inappropriate, particularly given the significance of the proposal to cancel Refocus.

5.107 Further, without consulting other Elected Members who were not parties to the email, Mr Dacombe (who was on leave overseas at the time) or other members of the Executive team, Councillor Mason sent a further email on 7 December 2011 to Mr Dacombe, cc’d to Mayor Delle Donne and Mr Sharpe (who was Acting CEO at the time), wishing to have two notices of motion (the second in relation to his appointment (with the Mayor) to the selection panel) presented at the next the Council meeting (CI10/02095).

5.108 While it is arguable that Mr Dacombe should have expected that the Council was losing or had lost faith in Refocus, particularly following the two forums in November 2011, this does not provide an adequate excuse for the actions of the Mayor and Councillor Mason. Mr Dacombe thought that when he went on leave at the end of November 2011 he had salvaged, to a point, the fate of Refocus. Clearly, the views of Mr Dacombe and a number of other Councillors about the fate of Refocus following those forums differed markedly. The fact that there were signs that Refocus was coming to an end did not justify the lack of a coordinated and thoughtful approach to ceasing projects connected with it. This is particularly so
given sometimes disparate understandings of individual Councillors about what Refocus was and how its success was measured.

5.109 I further note that when Mark Dacombe advised Councillor Mason and the Mayor via email on 9 December 2011 (CI10/02904) that his two proposed motions would have consequences that would contravene the *Local Government Act 1995*, Councillor Mason only forwarded that email to Councillor Barry and Councillor Olsen.

5.110 Councillor Olsen claims that she did not receive this email from Mr Dacombe (T426) and I accept her evidence in that regard.

5.111 It is clear on the evidence that no other Councillors received this information.

5.112 All Councillors were entitled to receive as much information as was available before being asked to vote on issues of considerable significance. It is unfair to expect them to make decisions of this sort without a thorough understanding of the issue and any possible consequences flowing from a decision to support the motions before them.

5.113 Further, the Mayor, as presiding member of the 13 December 2011 Ordinary Council Meeting, should have ensured that his fellow Councillors had the opportunity to receive the same advice he had received from the CEO about the problems raised by Councillor Mason’s motions.

5.114 The Mayor ought to have disclosed the advice he had received from Mr Dacombe noting Mr Dacombe’s concerns, in relation to both the proposal to cancel Refocus and the appointment of the Mayor and Deputy Mayor to the selection panel. I find that the Mayor's invitation to Mr Dacombe to speak to the Council during this meeting carried with it an overtone of suppression. Written submissions made to me on behalf of the Mayor to the effect that Mr Dacombe was given every opportunity to speak do not adequately deal with the events leading up to the meeting (or indeed the evidence of Mr Dacombe in relation to his inability to speak
with the Mayor before the meeting (T110)) in anything other than a perfunctory manner.

5.115 As a matter of good government, the chair of a Council meeting should take steps to ensure that each elected member has access to the same information prior to making their decision. To do otherwise risks creating the appearance of, or indeed the reality of, a lack of transparency in decision making.

5.116 In the circumstances, I find that Councillor Mason, Mayor Delle Donne and Councillor Barry acted inappropriately at the 13 December 2011 Ordinary Council Meeting when they failed to ensure fellow Elected Members received the same advice they had received from the CEO about the problems created by Councillor Mason’s motion to appoint the Mayor and Deputy Mayor to an employee selection panel.

5.117 I agree with Counsel Assisting that the exclusion of other Councillors from the comments and advice provided by Mr Dacombe on these two important matters is inconsistent with a process that promotes transparency in the Council’s decision-making. There should always be a collective exchange of information so that all Elected Members are proceeding from the same starting point.

5.118 By failing to ensure that their fellow Elected Members were aware of the advice of Mr Dacombe on this point, each of Councillors Mason, Barry and Mayor Delle Donne allowed the vote to be made in ignorance of a vital and relevant fact. To exclude some Councillors, as was done here, risks creating the perception that there is an “inside” or “favoured” group and an “outside”/less favoured group within the Council. This jeopardises collaboration and cooperation and undermines morale and collegiality.

5.119 I also find that it was not appropriate for Councillor Mason to move and vote in favour of a motion that he and Mayor Delle Donne be placed on the selection panel. I also find that Councillor Barry and Mayor Delle Donne acted inappropriately when they voted for the motion at the Ordinary Council Meeting
13 December 2011 to place the Mayor and Deputy Mayor on the selection panel, after becoming aware that Mr Dacombe had advised the motion was contrary to the Local Government Act 1995.

5.120 Mr Dacombe had advised in his email of 9 December 2011 (C110/02904) that the motion to appoint Mayor Delle Donne and Councillor Mason to the selection panel was contrary to the Local Government Act 1995. Having had the benefit of Mr Dacombe’s advice on this matter, Councillor Barry, the Mayor and Councillor Mason were on notice that the motion was considered to be *ultra vires*. The decision to ignore that advice was an error of judgment by all three Elected Members and demonstrated poor decision-making. I note that ultimately, Councillor Mason declined to sit on the panel once he accepted it was contrary to the Local Government Act 1995 for him to do so in the circumstances. Nonetheless, his failure to allow open and frank discussion on this point with other Councillors was an error.

5.121 Councillors must take seriously the advice provided to them by local government CEOs. If Councillor Mason, Councillor Barry or the Mayor did not agree with the advice given by Mr Dacombe, they could have investigated the matter further. At a minimum, they should have advised all of their Council colleagues that Mr Dacombe had warned against the course of action proposed. To simply ignore the advice given, however, without any discussion or analysis of the issue demonstrates poor judgement and is not consistent with decision making that provides for good government.

5.122 Nor should these Councillors have voted as they did when the motion was put. As submitted to me by Counsel Assisting, Mr Dacombe’s advice to Councillor Mason and the Mayor was correct in relation to the appointment of the Mayor and Councillor Mason to the selection panel. There is no lawful power authorising a Council to direct a CEO as to the composition of a selection panel, particularly in so far as that direction requires certain Elected Members to be members of that panel. It is not a role of the Mayor, Deputy Mayor or other Elected Members to sit on selection panels for employees of the local government.
5.123 Relevantly, section 5.41(g) of the *Local Government Act 1995* provides that it is the CEO’s function to be responsible for the employment, management supervision, direction and dismissal of other employees. In carrying out that function, it follows that it is the CEO who is responsible for determining the composition and configuration of any selection panel.

5.124 As a necessary consequence of the above, where the CEO chooses to invite an elected member onto a selection panel that elected member can only act as an observer, it not being part of their role to otherwise have any involvement in the employment of staff for the local government.

5.125 In the circumstances, it was inappropriate for the Council to resolve in favour of the motion. Such a decision demonstrates poor judgment, little or no regard for the separation of powers between the Administration and the Executive and was an unnecessary interference in the administrative functions of the City.

5.126 In relation to those Council members who had not been privy to the email exchange, I find that their behaviour in this regard is to some degree explained by Mr Dacombe’s failure to advise them of the legal issues central to the motions they were being asked to decide on.

5.127 Mr Dacombe’s evidence was that he did not send the email to any other elected member or have discussions with them about the matter as he felt it would be inappropriate to have such discussions prior to having had an opportunity to discuss them with Mayor Delle Done, particularly given the prior success he had had appealing to Mayor Delle Done in trying to have notices of motion ‘hauled back’ (T109-T110).

5.128 It may well be the case, as the submissions on behalf of Mr Dacombe suggest, that tensions were so high at this stage between Mr Dacombe and some Councillors that he was loathe to say anything lest he cause further friction. While understandable, Mr Dacombe’s duties clearly required him to take steps to ensure that all Elected Members had the benefit of his advice by either sending a copy of
the email to them, or preparing a short report for presentation. Mr Dacombe should have made it clear during the course of the Ordinary Council Meeting of 13 December 2011 that the notice of motion to appoint Mayor Delle Donne and Councillor Mason to the selection panel was ultra vires. A review of the audio of that meeting (CI10/02058) and the transcript of the minutes (CI10/03452 at pages 35-36) reveals that Mr Dacombe made no comment when the motion to appoint Mayor Delle Donne and Councillor Mason was put to the vote.

5.129 Mr Dacombe’s failure to act in this regard was an error. Having provided preliminary advice, no doubt based on the advice he had received from the Department of Local Government that the motion was contrary to the *Local Government Act 1995*, it was Mr Dacombe’s responsibility to advise the Council as a whole.

5.130 In my view, once it became apparent to Mr Dacombe that neither the Mayor nor Councillors Barry or Mason were going to raise the advice he had previously provided, he was obliged to do so. Similarly, when it became apparent to the Mayor and Councillors Barry and Mason that Mr Dacombe was not going to provide the advice, they ought to have done so. Mutual “buck passing” is not conducive to the delivery of good government.

5.131 In relation to Refocus, the evidence again shows an almost complete failure on the part of the Council and the Administration to work together. I agree with Counsel Assisting that as a matter of prudence and good government, the Council should not have considered the motion to cancel Refocus without having given due regard to the consequences, intended and unintended that would follow from such a decision. The Council failed to do so here and demonstrated a lack of foresight and good judgment in relation to this issue.

**Issues in Relation to Mr Mike Richardson**

5.132 In relation to the employment by Mr Dacombe of Mr Mike Richardson, I agree with Counsel Assisting that the process of engagement lacked elements of
accountability. To be frank, the situation, when examined objectively, does not present a particularly good look.

5.133 I find no improper conduct per se on the part of Mr Dacombe. Notwithstanding the submissions on behalf of several Councillors to the contrary, I am satisfied that Mr Dacombe had a reasonable expectation that the total cost of the initial engagement would be less than $100,000 and, as such, did not require him to publicly invite tenders. He brought his intention to engage Mr Richardson to the Council’s attention and obtained a resolution authorising him to do so: page 49 of the Minutes of the Ordinary Council Meeting of 9 March 2010 (CI10/03327). He also had an expectation that the period of the engagement would not require the full allocation of time (T1762).

5.134 I do, however, believe that this situation could have been much better handled and made much more transparent to those who later queried Mr Dacombe’s actions, however well intentioned (and I stress here that I have no reason to believe that Mr Dacombe’s actions were not well intentioned or that Mr Dacombe’s actions were not above board in this regard).

5.135 I note, in particular, that Mr Richardson’s “contract” was only evidenced by a series of email messages from Mike Richardson to Chris Porteous during the Authorised Persons Inquiry (CI10/01246). No actual contract per se seems to have been prepared or signed. I also note that the sum of money involved was approximately $100,000 – a not insignificant amount of money. Mr Dacombe had also worked with Mr Richardson, who resides in New Zealand, previously. No one from Western Australia was been interviewed for this position.

5.136 These facts when read together do not paint a picture of complete transparency. However unfounded ultimately, they risk a perception of bias or inappropriate behaviour and are bound to raise suspicions. In the circumstances, it is probable that the Council would have been less concerned about Mr Richardson’s role if there had, again, been a greater degree of discussion and information sharing between the Council and Mr Dacombe.
5.137 The evidence before the Inquiry demonstrates that there was a lack of any real formality or structure in relation to when performance reviews would be carried out during the time of Mr Dacombe’s appointment as CEO. On both occasions the reviews were conducted late. Both the Mayor and Mr Dacombe should have paid more attention to the timing of the performance reviews. Both Mr Dacombe and the Mayor need to shoulder the responsibility for the delays in conducting the reviews as each was a material participant and to that extent, I reject the submissions made which assert that blame should be laid at Mr Dacombe's feet. I also find that both the Mayor and Mr Dacombe would have been assisted if the City had in place a more structured system within its Human Resources section that could monitor performance reviews generally and advise relevant parties as and when they fell due.

5.138 The evidence shows that there was a marked difference between the manner in which Mayor Delle Donne conducted Mr Dacombe’s first and second Performance Reviews. The first was conducted amicably and jointly after a process of discussion between the Mayor and Mr Dacombe (see T115, T585-T586). The second was conducted without joint consultation (see T125, T589-T591). The results too could not have been more different.

5.139 A review of Mr Dacombe’s second Performance Review (CI10/01849) reveals that it was completed in advance of being provided to Mr Dacombe (CI10/01514: email from Bruce Mason to Mayor Delle Donne dated 3 January 2012, regarding changes made to Mark Dacombe’s Performance Review – T127, T1112-T1113). This included the section on the Review marked ‘Agreed Feedback Providers’. This was notwithstanding the fact that the entire contents of the document had been prepared by Mayor Delle Donne without any input from Mr Dacombe. Nothing about the contents had been “agreed” upon.

5.140 When Mr Dacombe received an email from the Mayor advising him that he was to meet him to discuss issues of “mutual concern” (CI10/01850), it would not have
occurred to Mr Dacombe that the Mayor had already conducted his second Performance Review. The first Performance Review had been conducted cooperatively and both men had agreed to work together on improving the process for the second Performance Review, including the amendment of performance criteria to more closely align with the work Mr Dacombe was doing in implementing the Refocus Program. On the evidence, it would not have occurred to Mr Dacombe that “improvement” in this context would have included removing him from the process all together.

5.141 Further, as submitted by Counsel Assisting, leading up to the meeting between Mayor Delle Donne, Councillor Mason and Mr Dacombe on 12 January 2012, there had been several discussions about a number of issues of “mutual concern” (see, for example, T125, T595 and T1113-T1114).

5.142 There was no agenda of issues attached to Mayor Delle Donne’s email to Mr Dacombe on 4 January 2012 (CI10/01850). In the circumstances, it is not unreasonable to infer that the matters of mutual concern to be discussed were similar to those that had been raised in previous meetings between the two men in November and December 2011 (T126, T595, T1113-T1114).

5.143 None of these matters included an already completed Performance Review.

5.144 Mr Dacombe was thus very much caught off guard when the Mayor presented him with a completed Performance Review: T126 and T595.

5.145 There does not appear to be any degree of urgency justifying Mayor Delle Donne departing from the process he had used for Mr Dacombe’s first performance review. No cogent reason was provided to justify why it was necessary to change the procedure. In Written Submissions in Reply, the submission was made on behalf of the Mayor that it was

... almost mischievous to suggest that the preparation of the performance appraisal, the handing of it to Mr Dacombe and the invitation for him to consider and come back was anything other than appropriate.
5.146 Such a submission lacks any analysis of the context in which those actions took place, the manner in which they represented a significant departure from the processes adopted at the previous Performance Review and the fact that the Mayor used the wrong performance criteria.

5.147 To have ensured that full and detailed answers were provided during the course of the 12 January 2012 meeting, the Mayor ought to have provided Mr Dacombe with an agenda as an attachment to his email. This would have allowed Mr Dacombe an opportunity to prepare for the meeting and, importantly, raise any questions of concern regarding the Performance Review document prior to it being put in front of him as a finished product.

5.148 At a minimum, the Mayor’s process for review was discourteous and likely to cause further tensions. It did not foster cooperation and on the face of it seems most unfair. It also set a poor precedent of the sort that is not conducive to a good working relationship between the CEO and the Council he is expected to work with in a cooperative and open manner.

5.149 I also find that the Mayor used the wrong performance criteria when assessing Mr Dacombe (T596, CI10/01849: Mark Dacombe Performance Review for 2010/2011 period; CI10/00870: Mark Dacombe Performance Review for 2009/2010 period). It was clear from the second Performance Review document that the Mayor had used the performance criteria that had applied at the time he had conducted the first Performance Review, and not the revised Criteria that he and Mr Dacombe had agree would apply.

5.150 I do not accept the Mayor’s assertion that any mistakes made in this regard were the fault of the Administration or staff. The practice that had developed at the City was that the Mayor would conduct the Performance Review of the CEO. As the person responsible for conducting the review, the Mayor should have ensured that he was using the correct performance criteria.
5.151 While to some degree there is an expectation that the Mayor would have been provided with the correct materials to conduct the review, this does not absolve the Mayor from ensuring that he carried out the review properly.

5.152 In the circumstances, the failure by the Mayor to correctly and fairly assess Mr Dacombe displayed poor judgment and poor leadership.

5.153 I note that Finding 37 of the Authorised Persons Report provides:

Mayor Delle Donne’s –

- haste to conduct the review;
- failure to obtain specialist advice;
- use of the wrong performance criteria; and
- failure to involve the CEO in the process –

leads to the conclusion the Mayor’s primary motivation in conducting the unscheduled 2010-2011 performance review of the CEO was to allow the Mayor to quickly arrive at a premeditated adverse outcome.

5.154 I am not convinced from the evidence that the Mayor’s “primary motivation” in conducting the unscheduled 2010-2011 Performance Review of the CEO was to allow the Mayor to quickly arrive at a premeditated adverse outcome. Nor am I convinced that there was an obligation to obtain specialist advice to assist him in conducting the review. It might be said that such advice could have provided assistance to the Mayor, but the evidence shows that the Mayor had the capacity and ability to conduct a review of the CEO as was evidenced by the mutually accepted review of Mr Dacombe for 2009/2010.

5.155 What is clear, however, is that there were certainly tensions between Mr Dacombe and the Mayor and indeed the Council as a whole. As noted by Counsel Assisting, there had been a steady decline in the relationship between the Council and Mr Dacombe over a prolonged period of time. I note in that regard the letter from Mr Dacombe to the Mayor in July (CI10/01204) calling for a meeting to resolve
tensions, the need for the two Forums in November (aimed at getting things “back on track”) and the manner in which Mr Dacombe was effectively ambushed about the decision to cancel Refocus. Ultimately, the cancellation of Refocus was a significant vote of no-confidence in Mr Dacombe and represented the culmination of the Council’s frustration with both Refocus and Mr Dacombe.

5.156 I also note that in Mr Dacombe’s second Performance Review, the Mayor was critical of Mr Dacombe for “… shift(ing) … the leadership to allow others to take control” (CI10/01849 at page 4) and wrote that “…responsibility for running the organisation has been ‘delegated’ to other members of the Executive team” (CI10/01849 at pages 6 and 7). These comments seem at odds with what Mr Dacombe had proposed under the Refocus Program (CI10/02083 at page 10). Council had agreed to these changes.

5.157 I also note that on 23 December 2011 (at roughly the same time as the Second Performance Review), the Mayor wrote to the Minister for Local Government outlining concerns about Mr Dacombe’s conduct. The concerns raised with the Minister (CI10/01630) related to the fact that Mr Dacombe had advised in a memo to the Mayor and Councillors dated 23 December 2011 (CI10/01666) that he had had former dealings/associations with a number of the Executives recently appointed to the City. The Mayor felt that these pre-existing relationships were such that Mr Dacombe had committed a “serious breach of the City’s Code of Conduct (Feb 2008) under cl 2, Disclosure & Conflict of Interest”. The evidence shows available to me shows that that ultimately these concerns were not warranted. The nature of the relationships themselves does not give rise to either Mr Jeffries or Dr Mouritz coming within the definition of a ‘closely associated’ person for the purposes of section 5.62 of the Local Government Act 1995.

5.158 What all of the above demonstrates is a potentially volatile working relationship that is not conducive to good government. The above does not, in my opinion, prove to the requisite standard that the Mayor set out to use the second Performance Review to fast track Mr Dacombe’s departure. It does, however, make the Mayor’s departure from established practice appear less than helpful.
Given these tensions and concerns, efforts should have been made to make the process more inclusive and more cooperative – not exclusionary and potentially alienating. The process used was not conducive to a good working relationship going forward. It could, in the circumstances, only exacerbate an already bad situation. If there were issues of concern, substantiated or not (and based on the above, there clearly were concerns), these should have been canvassed with Mr Dacombe and discussed. They were not. I note, for example, that despite having written to the Minister on 29 December 2011 about “a number of serious concerns relating to the CEO’s conduct”, the Mayor did not discuss these matters with Mr Dacombe. Instead, Mr Dacombe received a negative performance review that he had not been prepared for and that had not, as had previously been the case, included him in the process. This is unacceptable in the context of an already less than cooperative working relationship.

5.159 In relation to the Mayor’s decision to direct that the audio recording of 23 January 2012 meeting be turned off, I note that during his interview as part of the Authorised Persons Inquiry, Mayor Delle Donne gave a differing account in relation to the turning off of the recording during the Special Council Meeting of 23 January 2012 (CI10/00191 at pages 9-11). During evidence before this Inquiry, Mayor Delle Donne indicated the reason for his changing responses to the Authorised Persons Inquiry was due to having difficulty collecting his mind during the interview (T603).

5.160 I have no reason to doubt the Mayor’s explanation in this regard. Investigations of the sort necessary to an Authorised Persons Inquiry are often lengthy and stressful to those being questioned.

5.161 Despite this, however, I note that the Inquiry did not receive any adequate explanation as to why the tape was actually turned off. To do so was inappropriate as it meant that the City’s records would be incomplete and an objective record of the meeting would not exist.

5.162 In relation to the Mayor’s failure to advise all Councillors of the circumstances and results of Mr Dacombe’s second Performance Review, it is important to note that
when Councillors were asked to vote at the Special Council Meeting held 23 January 2012 most had not been made aware that Mr Dacombe had advised the Mayor on 19 January 2012 that:

- He did not agree with the results of the performance review the Mayor had conducted;
- He would not be signing the review document; and
- He felt the inappropriate manner in which the performance review was conducted had been the ‘final piece in the jigsaw’ that caused him to decide to offer to resign as CEO

5.163 The Report (CE-005-12; CI10/03183) placed before Councillors stated only that:

**BACKGROUND**

The CEO, Mr Mark Dacombe, is employed on a 5 year contract that expires in February 2014. There is provision in the contract for early termination and Mr Dacombe has approached the Mayor with a “Without Prejudice” proposal to leave his position.

5.164 I agree with Counsel Assisting that in the interests of accountability and transparency, the Mayor ought to have disclosed these facts prior to the Special Council Meeting of 23 January 2012. By failing to so inform the Council, the Mayor failed to bring relevant and important information to the Council’s attention, potentially misleading the Council as to the true factual background attending to Mr Dacombe’s proposal (T227, T296), T728), T821, T1114-T1115 and T69). In failing to reveal the whole picture, the Mayor demonstrated poor leadership. Without this information, the Council was denied the full picture. Most were not aware that the second Performance Review was a prime reason for Mr Dacombe leaving. In the circumstances they were denied the opportunity to ask rather obvious questions of Mr Dacombe – for example, whether there was any way to rectify the situation.

5.165 In relation to Mr Dacombe’s eventual departure from the City, it is important to note what the Council had actually given the Mayor authority to do. After being told that Mr Dacombe wanted to leave the City (but again, without being told
anything about the lead up to him making that decision) the motion passed at the Special Council Meeting of 23 January 2012 read:

(2) Council resolve to delegate authority to the Mayor to finalise as soon as possible, the contractual arrangements between the City and the Chief Executive Officer and in accordance with section 6.8 of the Local Government Act 1995 to finance the cost of settlement: CI10/01043 at page 3.

5.166 The Mayor advised Mr Dacombe via a letter on 30 January 2012 that he was, in effect, suspended with full pay (CI10/00417). The decision to issue Mr Dacombe with that letter appears to be based on advice provided to the Mayor by Allion Legal on 25 January 2012 (CI10/01885). I note, in this regard, that there is no recorded resolution of the Council purporting to authorise the Mayor to obtain legal advice pertaining to Mr Dacombe’s departure.

5.167 If the Council did so, it had no authority to do so under the City’s legal services policy CM108 (CI10/03218) in relation to this matter. I note also the operation of Reg 9(1) of the Local Government (Rules of Conduct) Regulations 2007 which is, as I will detail in more detail in Chapter Nine of this Report, a rule of conduct, and not by itself a source of authority for intervening in tasks clearly assigned to the Administration. In relation to this issue there was no reason why Mr Sharpe could not have attended to the obtaining of such advice in a confidential manner.

5.168 Nor do I read Council’s Resolution as suggesting that the Mayor seek legal advice.

5.169 I also agree with Counsel Assisting that, notwithstanding this advice, there is no reasonable basis to interpret the Council’s resolution of 23 January 2012 as authorising the Mayor to direct Mr Dacombe in accordance with the contents of his letter of 30 January 2012. Specifically, he had no right to send Mr Dacombe on 'gardening leave' effectively suspending his from further duties as such a course cannot reasonably flow from the terms of the resolution authorising the Mayor to “... finalise as soon as possible, the contractual arrangements between the City and the Chief Executive Officer and in accordance with section 6.8 of the Local Government Act 1995 to finance the cost of settlement.” I reject submissions
advanced on behalf of the Mayor that such a course of action was authorised under the terms of the resolution of 23 January 2012.

5.170 Notwithstanding the issues about the authority of Mayor Delle Donne to obtain the legal advice from Allion Legal, he should have brought that advice to the Council for consideration and sought a further resolution authorising him to act in accordance with that advice. The Mayor did not discuss his intended course of action with any other elected member (T229, T297, T431, T694, T729, T821 and T1115).

5.171 By failing to seek the Council’s authority to issue Mr Dacombe with the suspension letter, I find that Mayor Delle Donne’s unilateral conduct exceeded the authority placed in him by the Council’s resolution and demonstrated poor judgment.

Mayor Delle Donne’s Failure to Inform Council and Mr Dacombe of CEO Suspected Misconduct

5.172 Finally, I note that on 5 February 2012 Allion Legal provided a report to the City of Canning (CI10/01892) that addressed issues relating to the CEO’s employment and identified concerns of serious misconduct in contravention of the Local Government Act that the Mayor had allegedly discovered whilst conducting the Performance Review for Mark Dacombe.

5.173 I note that the Mayor, having clearly had concerns of serious misconduct on the part of Mr Dacombe, did not raise these concerns with Mr Dacombe when he handed him his Performance Review on 12 January 2012. Furthermore, the Mayor did not raise these concerns during the Special Council Meeting on 23 January 2012 when Council finalised the CEO’s contract. If the Mayor had legitimate concerns that the CEO had acted in manner that constituted serious misconduct he certainly did not disclose that information adequately. He failed to bring these concerns to the attention of Mr Dacombe or the Council. Mr Dacombe should have had these concerns raised with him as a matter of procedural fairness and decency.
5.174 The Council, in turn, should also have been advised of these concerns. The Mayor’s failure to inform the Council of this matter is consistent with the evidence given by him at T597 (CI10/03343).

5.175 Given that the Council were considering the departure of Mr Dacombe and the finalisation of the contractual arrangements in relation thereto, it was particularly apposite for the Council to consider whether Mr Dacombe had engaged in serious misconduct as this would have provided the City with an opportunity to summarily dismiss him (without the need to provide a financial settlement) in accordance with clause 8.1 of Mr Dacombe’s Deed of Employment (CI10/03313).

5.176 The failure on the part of Mayor Delle Donne to raise this matter with either the Council or to a lesser extent, Mr Dacombe, represents poor judgment on the part of the Mayor.

Conclusions

5.177 Councillor Mason sent an email to the Mayor, Councillor Barry and Councillor Olsen advising of his intention to bring a motion calling for the cancellation of Refocus. Councillor Mason did not send this email to any other Councillor; nor did the Mayor, Councillor Barry or Councillor Olsen.

5.178 In the circumstances, I find that the deliberate or short sighted exclusion of other Councillors in relation to this email was inappropriate and demonstrated poor judgement, particularly given the significance of Councillor Mason’s proposal to cancel the Refocus program.

5.179 In relation to CEO Mark Dacombe’s email dated 9 December 2011 to Councillor Mason, the Mayor and Mr Andrew Sharpe advising that Councillor Mason’s two proposed motions (in relation Refocus and appointment to the selection panel) would have consequences that would contravene the Local Government Act 1995, and Councillor Mason’s subsequent email to the Mayor and Councillor Barry and Councillor Olsen only, I find that that Councillor Mason, Mayor Delle Donne and
Councillor Barry acted inappropriately at the 13 December 2011 Ordinary Council Meeting when they failed to ensure fellow Elected Members received the same advice they had received from the CEO about the problems created by Councillor Mason’s motion to appoint the Mayor and Deputy Mayor to an employee selection panel.

5.180 I also find that it was not appropriate for Councillor Mason to move and vote in favour of the motion that he and Mayor Delle Donne be placed on the selection panel given the concerns raised by Mr Dacombe to him.

5.181 I find further that Councillor Barry and Mayor Delle Donne acted inappropriately when they voted for the motion at the Ordinary Council Meeting 13 December 2012 to place the Mayor and Deputy Mayor on the selection panel, after becoming aware that Mr Dacombe had advised the motion was contrary to the *Local Government Act 1995*. The decision to ignore that advice was an error of judgment by all three Elected Members and did not demonstrate good decision-making.

5.182 I also find that it was inappropriate for the Council to resolve in favour of this motion. Such a decision demonstrates poor judgment, little or no regard for the separation of powers between the Administration and the Executive and an unnecessary interference in the administrative functions of the City.

5.183 As a matter of prudence and good government, the Council should not have considered the motion to cancel Refocus without having given due regard to the consequences, intended and unintended, that would follow from such a decision. The Council failed to do so here and demonstrated a lack of foresight and good judgment in relation to this issue.

5.184 In relation to those Council members who had not been privy to the email exchange, I find that their behaviour in this regard is to some degree explained by Mr Dacombe’s failure to advise them of the legal issues central to the motions they were being asked to decide on. I find that Mr Dacombe’s failure to act in this regard was an error.
5.185 In relation to Refocus generally, the evidence shows a serious failure on the part of the Council and the Administration to work together in a cooperative fashion.

5.186 Given the almost symbiotic relationship between Refocus and Mr Dacombe’s performance, it is concerning that the Council did not have a clear picture of how to assess the implementation of Refocus and measure its success or failure. The evidence demonstrated that many Councillors did not understand what Refocus was or how it could be measured. This no doubt led to the Council being unable to properly determine an appropriate mechanism to monitor Mr Dacombe’s performance. I find that the lack of clear performance indicators undoubtedly led many Councillors to feel that Mr Dacombe had failed to deliver what was expected and subsequently to a lack of mutual trust or respect and ultimately to a failure to provide good government.

5.187 In relation to the employment by Mr Dacombe of Mr Mike Richardson, I find that the process of engagement lacked elements of accountability. I find no improper conduct per se on the part of Mr Dacombe. Nonetheless, it is clear that this situation could have been much better handled and made much more transparent to those who later queried Mr Dacombe’s actions, however well intentioned. It is probable that the Council would have been less concerned about Mr Richardson’s role if there had, again, been a greater degree of discussion and information sharing between the Council and Mr Dacombe.

5.188 I find that in relation to Mr Dacombe’s Performance Reviews, there was a lack of any real formality or structure in relation to when performance reviews would be carried out during the time of Mr Dacombe’s appointment as CEO. Both Mr Dacombe and the Mayor must shoulder the responsibility for the delays in conducting the reviews as each was a material participant and to that extent, I reject submissions made which assert that blame should be laid solely at Mr Dacombe’s feet.

5.189 I also find that both the Mayor and Mr Dacombe would have been assisted if the City had had in place a more structured system within its Human Resources section.
that could monitor performance reviews generally and advise relevant parties as and when they fell due.

5.190 In relation to Mr Dacombe’s second Performance Review, I find that the Mayor’s process for review was discourteous towards Mr Dacombe and likely to cause further tensions. It did not foster cooperation and on the face of it seems most unfair. It also set a poor precedent of the sort that is not conducive to a good working relationship between the CEO and the Council he is expected to work with in a cooperative and open manner.

5.191 I also find that the Mayor used the wrong performance criteria when assessing Mr Dacombe. It was clear from the second Performance Review document that the Mayor had used the performance criteria that had applied at the time he had conducted the first Performance Review, and not the revised criteria that he and Mr Dacombe had agreed they would establish and apply.

5.192 I find that the failure by the Mayor to correctly and fairly assess Mr Dacombe displayed poor judgment and poor leadership.

5.193 In relation to the Mayor’s decision to direct that the audio recording of 23 January 2012 meeting be switched off, I find the Mayor’s decision to do so was inappropriate as it meant that the City’s records would be incomplete and an objective record of the meeting would not exist.

5.194 In relation to the Mayor’s failure to advise all Councillors of the circumstances and results of Mr Dacombe’s second Performance Review, in the interests of accountability and transparency, the Mayor ought to have disclosed these facts prior to or during the Special Council Meeting of 23 January 2012. By failing to so inform the Council, the Mayor failed to bring relevant and important information to the Council’s attention, potentially misleading the Council as to the true factual background attending to Mr Dacombe’s proposal.
5.195 In relation to Mr Dacombe’s eventual departure from the City I find that the Council had no authority to allow the Mayor to seek legal advice in relation to this matter. Nor, however, do I read Council’s Resolution as suggesting that the Mayor seek legal advice. In any event, there is no reasonable basis to interpret the Council’s resolution of 23 January 2012 as authorising the Mayor to direct Mr Dacombe in accordance with the contents of his letter of 30 January 2012. Specifically, he had no right to send Mr Dacombe on ‘gardening leave’ effectively suspending him from further duties as such a course cannot reasonably flow from the terms of the resolution authorising the Mayor to “… finalise as soon as possible, the contractual arrangements between the City and the Chief Executive Officer and in accordance with section 6.8 of the Local Government Act 1995 to finance the cost of settlement.”

5.196 I further find that the Mayor should have brought any legal advice obtained by him to the Council for consideration and that he should have sought a further resolution authorising him to act in accordance with that advice. The Mayor did not discuss his intended course of action with any other elected member. In the circumstances, Mayor Delle Donne’s unilateral conduct exceeded the authority placed in him by the Council’s resolution and demonstrated poor judgment.

5.197 Finally, I find that the Mayor, having clearly had concerns of misconduct on the part of Mark Dacombe, did not raise these concerns with Mr Dacombe when he handed him his Performance Review on 12 January 2012. Furthermore, the Mayor did not raise these concerns during the Special Council Meeting on 23 January 2012 when Council finalised the CEO’s contract. The failure on the part of Mayor Delle Donne to raise this matter with either the Council or to a lesser extent, Mr Dacombe, represents poor judgement and poor leadership.

5.198 All of the above paints a picture of a strained and dysfunctional relationship between the Council and Mr Dacombe. The result was poor decision making, poor leadership and the failure to provide good government to the residents of the City of Canning.
CHAPTER SIX

THE NICHOLSON AND BANNISTER ROAD PROJECT
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THE NICHOLSON AND BANNISTER ROAD PROJECT

The Project

6.1 The Nicholson and Bannister Road project involved an upgrade to a significant intersection in the Canning Vale area.

6.2 Nicolson Road is classified as a ‘regional road’ in the Metropolitan Region scheme and a ‘main road’ by Main Roads WA. Based on these classifications, the road is regarded as one of the busiest in the South-East corridor of Metropolitan Perth, with more than 40,000 vehicles accessing the corridor on a daily basis: Main Roads Metropolitan Traffic Digest 2003/2004 – 2008/2009.

6.3 The Nicholson and Bannister Road intersection is classified as a “Black Spot”, meaning that the location has a crash history or is a high risk area for accidents. The Western Australian government Black Spot Program aims to address high risk areas, providing funding to local governments to assist them in improving high-risk locations: www.mainroads.wa.gov.au.

6.4 As discussed below, the City of Canning received funding from three sources aimed at addressing the Nicholson and Bannister Road intersection.

Scope of the Works

6.5 As accurately explained in the Authorised Inquiry Report, the scope of the works to be undertaken by the City of Canning for this project included:

- traffic signal modifications to existing traffic lights at the intersection of Nicholson Road, Bannister Road and Wilfred Road;
- the extension of the existing turning pocket and;
- an additional right turn lane into Bannister Road that would continue as a traffic lane north bound on Nicholson Road.
State and Commonwealth Government Funding

6.7 The Nicholson and Bannister Road project was granted $500,000 Black Spot funding by the WA State Government. The project also received $571,326 in funding from the Commonwealth Government’s Nation Building ‘Roads to Recovery’ program.

Funding from the City of Gosnells

6.8 The boundary between the City of Canning and the City of Gosnells runs through the middle of this project area. As a result, the City of Gosnells agreed to contribute funding in the sum $770,000 for the portion of the works that were located in Gosnells.

6.9 In total, funding for this project from all three sources was $1,841,326. Overall, the project was costed at $2,276,054.

City of Canning Council Involvement in Funding Process

6.10 The evidence shows that Councillors were not made aware that applications for funding were being made. Councillors thus had no involvement in preparing funding applications and were generally “left in the dark” about the projects in question, what was needed and why, until very late in the piece. As discussed below, Councillors did not know much at all about these applications or that funding had been obtained until they first saw the funding amounts mentioned in draft budget papers.

6.11 Councillors were not made aware of the three financial contributions discussed above until a Special Council Meeting was held on 11 August 2011 (CI10/02840). The contributions were listed in the City of Canning’s 2011/2012 Budget Report CR-137-11 (CI10/03187) and in the Project Report of 11 August 2011 (CI10/03295).
Involvement by the City Of Gosnells

Garden Street, Yale Road and Nicholson Road Upgrade

6.12 At the same time as the Nicholson and Bannister Road City of Canning Project was to occur, the City of Gosnells was also preparing to upgrade the intersection of Garden Street, Yale Road and Nicholson Road – all located in Gosnells. This intersection included a roundabout. The project was, however, at least two years away from commencement as the City of Gosnells was still in the process of preparing its application for government funding and had yet to finalise its design plans.

Main Roads Presentation: 6 September 2011

6.13 On 6 September 2011, a presentation conducted by Main Roads WA was held at the City of Gosnells. The presentation explored the benefits of lane metering technology and how this technology would assist traffic flow and alleviate traffic congestion through the Nicholson and Bannister Road intersection and the Garden Street, Yale Road and Nicolson Road roundabout. It was emphasised that these intersections needed to be upgraded to meet increased demands in relation to motorist capacity.

6.14 During the presentation it was emphasised that the City of Canning should proceed with the Nicholson and Bannister Road intersection upgrade without delay as funding had already been secured and traffic signal design had been approved. Furthermore, it was stressed that the City of Gosnells was not in a position to proceed with its project as funding and design had not yet been finalised. Despite this, it was emphasised that the City of Canning should not delay its planned upgrades until the City of Gosnells was in a position to proceed.

6.15 Mayor Delle Donne, Councillor Elliot, former Councillors Michelle Wheaton, Stuart Clarke and Robert Morgan, Kevin Jefferies (Executive of Property Assets and
Economic Development) and Troy Bozich (Manager of Engineering) from the City of Canning attended this presentation.

Council Delays Project for First Time: 13 September 2011

6.16 At the Ordinary Council Meeting of 13 September 2011 (CI10/01682) the Canning Council was presented with Report ET-082-11 (CI10/03139). This Report detailed the tender for traffic signal modification works to be conducted at the Nicholson and Bannister Road intersection. The Report outlined that selecting and purchasing a new traffic signal array needed to be arranged before any other redevelopment or construction of the intersection could be undertaken.

6.17 Report ET-082-11 recommended that Councillors accept the quote from Quality Traffic Management Pty Ltd. However, Councillors passed a motion that this decision be delayed until a meeting could be held with the City of Canning, the City of Gosnells and Main Roads WA to discuss the issue of whether the works should be conducted in conjunction with the City of Gosnells works to the Yale Road and Garden Street roundabout.

6.18 The Councillors’ decision to not accept the Officer’s recommendation not only delayed the tender for traffic signal modification works from progressing, but the project in its entirety.

Letter from City of Gosnells dated 10 October 2011

6.19 The CEO of the City of Gosnells, Ian Cowie, wrote to the City of Canning on 10 October 2011 expressing concern over Council’s 13 September 2011 decision to delay the project: (CI10/01699).

6.20 Mr Cowie’s letter emphasised that the City of Gosnells was of the view that the two projects were separate and should be undertaken accordingly. He further stated that the City of Gosnells had made an application for Black Spot funding.
from the state government for 2012/2013. He also reiterated that the City of Gosnells was not yet in a position to proceed with its own project works.

6.21 Mr Cowie’s final remark in his letter makes clear the City of Gosnells’ desire for the Canning to proceed with their project:

*Given that it will be some time before the City of Gosnells will be in a position to implement the proposed changes to Garden Street/Nicholson Road/ Yale Road we would encourage the City of Canning to proceed with the upgrading work at Bannister Road/Nicholson Road/Wilfred Road at the earliest opportunity:* CI10/01699.

**City of Gosnells Meeting with City of Canning: 22 November 2011**

6.22 A meeting was held at the City of Gosnells on 22 November 2011. Mayor Delle Donne, Kevin Jefferies and Troy Bozich attended from the City of Canning. Mayor David Griffiths and the Director of Infrastructure, David Harris, from the City of Gosnells also attended (T656).

6.23 David Harris expressed concerns over the City of Canning’s decision to delay the project in order to conduct the two projects at the same time. The evidence shows that the Mayor had wanted to delay the projects until they could be conducted together, notwithstanding that this was contrary to advice he had received from various sources (T510, T512, T522, T650, T652 and T656-T657) and notwithstanding that the City of Gosnells repeatedly indicated it was some years off commencing work on its works with any resultant delay only adding to traffic delays and safety concerns: CI10/01699; T649-T650, T656, T671, T791.

6.24 It was again stressed that the City of Gosnells had not yet secured funding. Furthermore, engineering staff from both Councils advised that running the two projects together would result in unnecessary traffic disruption to the area and could potentially make the area inaccessible (T656).
Councillors were presented with Report ET-120-11 (CI10/03140) at the Ordinary Council Meeting of 13 December 2011 (CI10/00995). The Council was invited to accept a recommendation to award the tender for traffic signal medication to Quality Traffic Management.

However, Councillor Barry moved a motion that the recommendation not be adopted on the grounds that it was “not the most advantageous option for the City”. Councillor Barry then moved a motion to suspend all works outlined in Report ET-120-11 “until a comprehensive planning and design schedule with full funding is presented by...City of Canning” (CI10/00995 at page 115).

This motion to delay was passed unanimously by the Council.

On 23 February 2012 a media article regarding the City of Canning Council’s decision to delay the project appeared in the Gosnells Examiner (CI10/01730). The article was critical of the City of Canning Council and attributed the delay in the project to “some” Councillors ignoring the advice of City engineers and Officer recommendations. City of Gosnells CEO, Ian Cowie, commented on the project and the conduct of the City of Canning Councillors.

The article indicated that Mr Cowie was of the opinion that the City of Canning was in a position to proceed with the project, stating that Canning had “everything it needs to proceed with the road works”: (CI10/01730). It was explained that Mr Cowie did not want Canning’s Road project and the project being investigated by Gosnells to run together, adding that he “did not agree with the City of Canning proposing works at the intersection should be delayed to coincide with works at the roundabout”: (CI10/01730). He further stated that “the City of Gosnells has indicated a preference for the two sets of road works to be undertaken separately to enable upgrades to commence as quickly as possible”: (CI10/01730).
At the Ordinary Council Meeting of 13 March 2012 (CI10/03126) the Nicholson Road and Bannister Road project was brought to Council for a third time. Council was presented with Report ET-041-12. This was dealt with at the meeting as an agenda item.

The purpose of Report ET-041-12 was to:

Provide Council with a completed comprehensive planning and design schedule with full funding for the upgrading of the Nicholson Road, Bannister Road and Wilfred Road intersection, and seek Council’s endorsement to award the contract for the modification to the traffic signals at the Nicholson Road, Bannister Road and Wilfred Road intersection: CI10/03141 at page 1.

A motion was moved by Councillor Bruce Mason to amend the officer recommendation to read:

a) Report ET-041-12 Nicholson Road – Bannister Road – Wilfred Road Intersection in Canning Vale, be received.

b) The City of Canning be authorised to enter into a legal agreement with the City of Gosnells and Main Roads WA outlining the obligations and responsibilities to carry out the proposed works at Nicholson Road – Bannister Road – Wilfred Road Intersection in Canning Vale.

c) Council accept the quote from Quality Traffic Management Pty Ltd for Quote No. 01434 – Traffic Signals Modification at Nicholson Road/Bannister Road/Wilfred Road, Canning Vale, as the most advantageous.

d) Both respondents be advised of (c) above and thanked for their submission.

e) The Chief Executive Officer be authorised to call tenders for the Road Construction works at Nicholson Road – Bannister Road – Wilfred Road Intersection in Canning Vale.

f) A further report be presented on the outcome of (b), (c), (d) and (e) above: CI10/03126 at pages 76-77.

The amended motion was passed unanimously by the Council.
Construction Workforce

City of Canning Internal Workforce

6.34 At the same 13 March 2012 Ordinary Council Meeting Report ET-040-12 (CI10/03142) was presented to the Council.

6.35 The purpose of this Report was to seek Council endorsement for a number of construction projects. The Report also addressed the possibility that such projects may need to be brought forward to the 2011/2012 financial year in order to keep the City’s construction workforce busy as there was “...a possible shortage of works to occupy the City’s construction crews” (CI10/03142 at page 138).

6.36 The Report predicted that the current works being conducted by the City’s construction workforce would be completed at the end of the following month (April 2012) (CI10/03142 at page 1).

6.37 The Nicholson and Bannister Road project is listed in the Report as forming part of the Construction Services Works Program for 2011/2012. The Report also highlights that this project was estimated to take 11 weeks to complete and notes that Council had yet to make a decision confirming that the project could actually commence (CI10/03142 at page 2).

6.38 This item was considered immediately before Report ET-041-12, discussed above, in relation to the Nicholson and Bannister Road project (CI10/03141).

The Decision to Outsource

6.39 Provision (e) of Councillor Barry’s amendment made to the Officer Recommendation on 13 March 2012 granted the CEO authorisation to call for tenders for the road construction works (CI10/03126 at pages 76-77).
6.40 Hence, immediately after addressing an item that advised Council that the City’s construction workforce would run out of work at the end of the following month (April 2012) in Report ET-040-12 (CI10/03142), Council amended a motion to outsource the Nicholson and Bannister Road project works.

6.41 The evidence shows that the Council did not seek clarification from Administration staff regarding the level of work available for the internal construction workforce. Nor did Administration staff offer any clarification. Nor did Council seek advice from the Administration staff on the potential implications that may arise from the decision to outsource. Nor did Administration staff offer any such advice.

6.42 Overall, there appears to be very little useful communication or exchange of information between the Administration and the Council.

6.43 In his interview with the Authorised Persons Inquiry, Kevin Jefferies, former Executive of Property Assets and Economic Development at the City of Canning, referred to this resolution as being in conflict with already existing contracts between the City and various suppliers (CI10/00230 at page 38).

6.44 When asked about this matter and the state of the City’s construction workforce during the course of public hearings the evidence of the Councillors and Mayor Delle Donne differed:

1. Councillor Daly responded “You’re joking” when advised that the report dealing with the item considered by the Council immediately before the item dealing with the Nicholson Rd project indicated that the City’s construction workforce would soon run out of work (T184);

2. Councillor O’Donnell understood that the internal workforce had plenty of work and there was carry over from previous years (T265);

3. Councillor Olsen did not understand Report ET-040-12 (CI10/03142) to indicate the internal workforce to be running out of work (T361);

4. Mayor Delle Donne queried at what point in time was the Council informed that the City of Canning outside (sic) workforce was supposed to do the work, noting the need for tenders for work in excess of $100,000 (T528); and

5. Councillor Barry was mystified by the claim given the works being carried over (T985-T986).
Analysis

6.45 In relation to the provision of Black Spot grants generally, I agree with Counsel Assisting that the following findings of facts are open in relation to the manner in which such projects proceeded and the manner in which the Council became aware of them:

a. Applications for funding would be prepared by the City’s engineering staff and submitted to Main Roads WA for funding approval (T62);

b. The Council were not generally informed about the application prior to it being submitted, only after (T62, T368, T372, T459, T521, T669-T670, T747 and T794).

6.46 I also agree with Counsel Assisting that there is little doubt that this process had the potential to result in costs being wasted (in terms of external consultants preparing road safety audits or submissions for government grants for example) if the Council decided not to approve the funded project. I also find that many of the problems and delays discussed above could have been averted if the system in place for Black Spot Funding had been more collaborative and had there been greater cooperation between the Council and the Administration.

6.47 It is important to note that during the public hearings conducted by the Inquiry it was established that applications for funding were prepared by Administration staff and Council were not made aware of such applications until after they had been approved (T62, T368, T372, T459, T521, T669-T670, T747 and T794).

6.48 The Council was not privy to all the work that had already been conducted on the project. As explained in the Authorised Inquiry Report, the City had commenced design and surveying work in 2008. Signal and intersection design had been done. In May 2011 Western Power had completed work to relocate essential services in the area for the period of the works at a cost of $170,000 to the City. Main Roads WA approved the traffic signal design submitted by the City of Canning in July 2011.
6.49 It is clear on the evidence before me that the Council had essentially been left in the dark throughout the early stages of this process, such that when Councillors were eventually asked to make decisions about the Nicholson Bannister Road project, most had insufficient information upon which to base any decisions that needed to be made. Indeed, the point was made a number of times in submissions from witnesses before the Inquiry that a lack of consultation between the Administration and Council prior to the submission of applications for funding led to a delay in Council's understanding of the nature of the project. Delays by the Administration in providing information to the Council or not providing more information were also identified in submissions made on behalf witnesses before the Inquiry as a relevant factor in considering how the Council dealt with this matter.

6.50 In that regard, I agree with Counsel Assisting that it would have been far preferable, as acknowledged by Mark Dacombe (T63), if there had been consultation between the Council and the Administration prior to the submission of Black Spot applications. This would have ensured that the Council knew and understood for which projects funding was being sought. This, in turn, would have enabled the Council to act promptly to approve those projects once funding had been secured. It would also have ensured that, where projects spanned two or more local government districts, appropriate agreements could have been drafted in anticipation of (and, importantly, long before) funding approval, setting out the respective roles and responsibilities.

6.51 Councillor Barry’s motion of 13 December to delay the project and to suspend all works outlined in Report ET-120-11 “until a comprehensive planning and design schedule with full funding is presented by...City of Canning” required the Administration staff to essentially duplicate work. This would not have been necessary had Councillor Barry been provided the above background information well in advance of his motion to delay the project.

6.52 In hearings, I was impressed by the evidence given by Councillor Barry. He struck me as committed to his role as a Councillor and, importantly, to the people of...
Canning. I have no reason to believe that his actions in relation to this issue were malicious or undertaken for any reason other than to try to understand what this project was about and how it was to work logistically and financially.

6.53 In the circumstances, it is reasonable to infer that one explanation for the Council’s delay in progressing this matter can be attributed to the failure of the City’s Administration to provide the Council with a more comprehensive background to the project. I am of the view that the Council was trying to understand what the project was about and how it integrated, if at all, with the proposed project by the City of Gosnells at the Nicholson Road/Yale Road/Garden St roundabout. Had there been better collaboration and some basic communication between the Council and the Administration and had the Council been provided a comprehensive background on the project, it may well have prevented the motion of 13 December 2011. Other delays of the project could also have been avoided or at least addressed more expeditiously.

6.54 It was important for the Administration to ensure that the Council had all relevant material before it when the matter first came before the Council on 13 September 2011. It failed to do so. Had it acted more cooperatively there would have been no need for Councillor Barry’s motion of 13 December 2011 to suspend works on the project until such time that there was a comprehensive planning and design schedule with full funding presented (CI10/00995 at pages 114-115).

6.55 The above should not been seen as placing “blame” entirely on Canning Administrative Officers. The evidence reveals that, while more information and cooperation from the Administration would clearly have assisted in avoiding the delays outlined above, some councillors also failed to ask the types of (sometimes quite basic) questions one would reasonably expect of them. During public hearings, some Councillors professed to know nothing about relevant information that had been presented to them and, in some cases, exercised poor judgment and decision making ability.
6.56 In that regard, I agree with Counsel Assisting’s conclusion that Councillor Daly’s assertion (at T180) that ‘they’ (being a reference to the Council) were never made aware that the City of Gosnells had contributed $770,000 to the project is unsubstantiated. Funding from the City of Gosnells had been mentioned in at least the following documents before the Council:

(1) CI10/03323 – 28 April 2010 Major Road Project Presentation;
CI10/03295 – 11 August 2011 Project Report

6.57 To not take note of this funding option and follow up with questions in relation to what was being done about an important issue within the district of Canning (i.e., an extremely hazardous road intersection) is a dereliction of duty.

6.58 Further, as outlined by Counsel Assisting, one significant issue Councillors had to grapple with (and which showed either a failure to ask what should have been asked or notice what was clearly in front of them) was whether or not the Nicholson Road project should be delayed until such time as a project being formulated by the City of Gosnells was ready to proceed. This issue was clearly put before the Council in a letter from the City of Gosnells dated 10 October 2011 outlining the City of Gosnells concerns in that regard (CI10/01699).

6.59 I agree with Counsel Assisting that Councillor Daly’s assertion (at T181) that she was not aware of this letter is concerning, given that the letter was an attachment to Report ET-120-11, which was presented to the Council at the Ordinary Council Meeting of 13 December 2011, at which Councillor Daly was present.

6.60 It is clear that the Council’s decision not to accept the tender for the traffic signal modifications on a number of successive occasions gave rise to an increasing sense of frustration from the City of Gosnells (CI10/01699; T56, T511, T650-T652, T710 and T747).
6.61 Tensions of this sort between neighbouring Councils do not benefit anyone – particularly local residents, who are denied improved road services because their elected officials fail to resolve something that could have been resolved with better lines of communication and a better understanding of what they were being asked to do. Many of these problems would have been avoided had the City of Canning Council paid better attention to the information before them. This represents a significant error.

6.62 The evidence shows that Mayor Delle Donne wanted to delay the projects until they could be conducted together, notwithstanding that this was contrary to advice he had received from various sources (T510, T512, T522, T650, T652, T656-T657) and notwithstanding that the City of Gosnells repeatedly indicated it was some years off commencing work on its works with any resultant delay only adding to traffic delays and safety concerns (CI10/01699; T649-T650, T656, T671, T791). This demonstrates either a very poor understanding of the issues or a failure to listen to and accept sound advice.

6.63 Another issue raised by Counsel Assisting in his Closing Written Submission is the absence of any formal agreement between the relevant parties setting out the responsibilities of each, particularly in relation to budget run overs. Evidence led during the public hearings establishes that a number of Councillors held concerns that there would be a budget run over on this project due to works straddling two local government boundaries (T369, T525, T983 and T1070).

6.64 It is clear from the evidence that these concerns were not based on any specific evidence indicating a likely blow out in the budget for this project. Rather, they were based on historical experience working with neighbouring local governments and the difficulties experienced when similar budget run overs had occurred (T370, T373, T800, T983-T984 and T1071). While on one reading, bad history might explain a cautious approach, in the context of such difficulties having occurred in the past, I agree that is surprising that it took the Council until 13 March 2012 (pages 76-77 of the Ordinary Council Minutes (CI10/03126) to move that a formal agreement be drawn up, particularly when the matter first came before the

6.65 Further, I agree that the Council’s decision at its Ordinary Council Meeting of 13 March 2012 to amend the Officer’s recommendation by including authority for the CEO to call for tenders for the road construction works at the intersection (CI10/03126 at pages 76-77) failed to properly consider the state of available work for the City’s internal workforce. The Council had been advised at the same meeting through Report ET-040-12 (CI10/03142) that the City’s construction workforce would shortly not have enough work to keep them occupied. Importantly, this item was considered immediately before the item dealing with the Nicholson Road intersection.

6.66 Report ET-040-12 clearly indicated (at page 2) that the City had already allocated the works associated with this intersection to the internal workforce. The Report went on to note that the project was yet to receive a decision from the Council confirming it could commence.

6.67 As summarised by Counsel Assisting, and discussed above, the evidence of witnesses in public hearings differed in relation to this matter.

6.68 I agree with Counsel Assisting that, in the circumstances, the Council should have sought clarification from the City’s Officers about the level of work available for the City’s construction workforce before moving a motion that would see construction work outsourced.

6.69 Such clarification would also have enabled the City’s Officers to inform the Council of any potential implications arising from the proposal. To do otherwise is at best myopic. It inevitably resulted in delays to a project very much needed by residents and all who pass through the district.

6.70 A point made in submissions made on behalf of some witnesses appearing before the Inquiry was that, as the Agendas were prepared and settled by the
Administration, attention should have been drawn by the Administration to the overlap of issues between a potential shortfall of work for the City's internal work construction crews and the item dealing with the Bannister Rd project.

6.71 There is considerable force in this submission. Had this been done, the matter would not have been overlooked. Again, this shows a failure to communicate clearly in relation to information that was readily available.

6.72 Further, the Council should also have confirmed that the value of that work required a tender. In addition, as noted by Mr Kevin Jefferies in his interview to the Authorised Persons Inquiry (CI10/00230), the resolution was in conflict with contracts already in place between the City and various suppliers (see also T675). I agree with Counsel Assisting that the Councillors' failure to engage with the Administration and explore the potential consequences of any decision made demonstrated a lack of foresight and judgment.

6.73 From the evidence given by witnesses in relation to this matter it is evident that Councillors either did not read, misunderstood or did not consider Report ET-040-12 (CI10/03142). The Council failed to give Report ET-040-12 adequate consideration when they unanimously decided to outsource the construction work required to complete to Nicholson and Bannister Road works identified in Report ET-041-12 (CI10/03141). The Council failed to consider the two agenda items holistically and, by treating the matters in an atomistic fashion, failed to demonstrate strategic foresight.

6.74 In relation to Report ET-040-12, Counsel Assisting concludes that it is open to find that the Council's failure to properly consider these two agenda items together demonstrates a failure to provide for the good government of persons in the City of Canning's district. I agree with that assessment.

Conclusions

6.75 In relation to the Nicholson Road project as a whole, I find that the Council had essentially been left in the dark throughout the early stages of the Black Sport
Funding process, such that when Councillors were eventually asked to make decisions about the Nicholson Bannister Road Project, most had insufficient information upon which to base any decisions that needed to be made. It would have been far preferable if there had been ongoing consultation between the Council and the Administration prior to the submission of all Black Spot applications.

6.76 In the circumstances, I find that one explanation for the Council’s delay in progressing the Nicholson and Bannister Road Project can be attributed to the failure of the City’s Administration to provide the Council with a more comprehensive background to the project.

6.77 I also find that while more information and cooperation from the Administration would clearly have assisted in avoiding the delays outlined in this chapter, some Councillors also failed to ask the types of (sometimes quite basic) questions one would reasonably expect of them. During public hearings some Councillors professed to know nothing about relevant information that had been presented to them and, in some cases, exercised poor judgement and decision making ability. This is unsatisfactory.

6.78 In relation to the Mayor’s wish to delay the Canning and Gosnells projects until they could be conducted together, notwithstanding that this was contrary to advice he had received from various sources, and notwithstanding that the City of Gosnells repeatedly indicated it was some years off commencing work on its works with any resultant delay only adding to traffic delays and safety concerns, I find that the Mayor’s actions demonstrate either a very poor understanding of the issues or a failure to listen to and accept sound advice.

6.79 I also find that the Council’s decision at its Ordinary Council Meeting of 13 March 2012 to amend the Officer’s recommendation by including authority for the CEO to call for tenders for the road construction works at the Nicholson Road/Bannister Road/Wilfred Road intersection failed to properly consider the state of available work for the City’s internal workforce. I find that in relation to this issue, the
Council should have sought clarification from the City’s Officers about the level of work available for the City’s construction workforce before moving a motion that would see construction work outsourced.

6.80 Overall, I find that the decisions by the Council concerning the Nicholson Road project demonstrates scant regard for the considerable work carried out by the Administration as well as a fundamental failure to ensure that the benefits that such works would provide to the ratepayers of the district of Canning were delivered. The Council’s decisions were short sighted.

6.81 In relation to the Council agendas prepared and settled by the Administration, I find that attention should have been drawn by the Administration to the overlap of issues between a potential shortfall of work for the City’s internal work construction crews and the item dealing with the Nicholson and Bannister Road project. Had this been done, the matter would not have been overlooked.

6.82 Further, I find that the Council should have clarified the need to put the relevant work out to tender and confirmed that the value of that work required a tender. The failure to engage with the Administration and explore potential consequences of their decision demonstrated a lack of foresight. I find that in relation to this matter it is evident that Councillors either did not read, misunderstood or did not consider Report ET-040-12 and, in the process, failed to demonstrate good judgement.

6.83 The Authorised Inquiry Report finds at Finding 12 as follows:

Council’s decision making in this matter demonstrated poor judgement and little understanding of the technicalities of the matter under consideration. Council displayed further poor judgement by rejecting the professional and technical advice that had been provided by qualified City Officers. It is clear Council would have benefited if it had consulted with City Officers before implementing significant changes that were inconsistent with Office advice. The actions of Council’s uninformed decision making had adverse impacts on the City from a resourcing perspective and unnecessarily disadvantaged residents and motorists who rely on this important arterial road for travel.
6.84 In relation to this Finding, I find that the Council did indeed exercise poor judgment in a number of matters relating to the Nicholson Road/Bannister Road project and a very poor understanding of some of the issues raised by the project.

6.85 I do not find, however, that all errors in this regard were entirely the fault of the Council – as seems to be implied within the Authorised Inquiry Report.

6.86 On the contrary, I find that had the Administration involved the Council much earlier in the Black Spot funding process and later taken steps to ensure that those Councillors seeking relevant information received it, many of the delays at the centre of this issue may have been avoided.

6.87 Overall, I find that in relation to this issue, there was a failure to provide for the good government of the residents of the City of Canning. These failures arose from the delays caused by the Council’s numerous deferrals of any resolution to this issue and by the Councillors’ failure to understand the issues before them. This was not, however, solely the fault of the Councillors. Cooperation goes both ways. It would have been clear to all involved (Councillors and Administrators) that an adequate understanding of the complexities of this project was missing. Despite this, neither Councillors nor the Administration seemed capable of working together to resolve an issue of considerable significance to local residents. Collectively and individually, both failed the residents they are expected to serve.
CHAPTER SEVEN

CENTENARY AVENUE AND MANNING ROAD PROJECT
CHAPTER SEVEN

CENTENARY AVENUE AND MANNING ROAD PROJECT

Background

7.1 This Project, like the Nicholson Road/Bannister Road Project discussed in Chapter Six, also related to Black Spot Funding. The comments made by me in Chapter Five in relation to the need for earlier and more cooperative Council involvement in funding applications for Black Spot projects are equally valid here.

7.2 From the evidence, it is clear that in 2010, the City Administration was made aware of an opportunity to apply to the Nation Building Black Spot scheme for a grant for road improvement works to improve the road along Centenary Avenue in Shelley. The intersection of Manning Road and Centenary Avenue would also be included in the project works, despite a portion of the work on Manning Road being within the boundaries of the City of South Perth.

7.3 The City of Canning Administration staff submitted an application for funding on 15 July 2010 (CI10/02841), along with initial design and survey plans for the proposed project.

7.4 The application was successful and the City was awarded $600,000 from the Nation Building Black Spot funding program.

7.5 The Black Spot Funding was identified in the 2011/2012 budget and in Report CR-137-11 (CI10/03187): see also extract from Project Report Booklet dated 2 November 2011; CI10/02441. The 2011/2012 budget was provided to the Council at a Special Council Meeting on 11 August 2011 (CI10/02840).

7.6 It was noted in Report ET-115-11 (CI10/03143) that the project was 100 percent funded by the Black Spot grant:

The City has received approval to reduce the scope of the project to ensure that the cost does not exceed the 100 percent funded $600,000 grant (CI10/03143 at page 2).
Scope of the Works

7.7 Report ET-115-11 (CI10/03143) outlined the scope of the works for the Centenary Avenue Project. It is clear that the project consisted of two stages.

7.8 Stage One and Stage Two works were described in the Report as follows:

Stage one is the works along Centenary Avenue between Manning Road and Chainage 500 metres. These works include the following:

- Extend the right turn lane from Manning Road into Centenary Avenue,
- Construct an additional left turn lane from Centenary Avenue to Manning Road under traffic signal control,
- Construct an additional northbound lane along Centenary Avenue, and
- Upgrade the shared path along the western side of Manning Road.

Stage two is the works along Centenary Avenue between Chainage 500 metres and Leach Highway. These works include the following:

- Construct an additional northbound lane along Centenary Avenue,
- Accommodate a right turn pocket from Centenary Avenue north into the Sea Scouts and TS Canning facility,
- Accommodate a right turn pocket from Centenary Avenue south into Central Park,
- Extend the bus priority lane along the north approach to the traffic signals at the Centenary Avenue – Leach Highway On/Off Ramps, and
- Widen the northbound Leach Highway Off-Ramp to Centenary Avenue to accommodate two lanes.

The stage two works estimated to cost $670,000 will be submitted as part of future State and Nation Building Black Spot submissions, should the stage one works proceed.

The stage one works are 500 metres long, of which 360 metres is a boundary road, with the City of South Perth and 140 metres is in the City of Canning. The stage two works are 500 metres long and are totally within the City of Canning. It is considered to be logical for the City of Canning to manage the design construction of the Centenary Avenue project: CI10/03143 at page 2.
Special Council Meeting of 11 August 2011

7.9 The Council was expected to adopt the 2011/2012 budget at a Special Council Meeting on 11 August 2011 (CI10/02840).

7.10 Councillor Mason moved a motion requesting further information be provided on a number of items referred to in the budget, including the Centenary Avenue project.

7.11 As well as requesting further information regarding the project, part of Councillor Mason’s motion asked that the item that sought to extend the right turn lane at the Centenary Avenue and Manning Road intersection be deleted:

   Delete Account 53915 Centenary Avenue/ Manning Road – extend Right Turn: CI10/02840 at page 6.

7.12 Councillor Mason’s motion was carried by an absolute majority.

Ordinary Council Meeting 13 December 2011

7.13 At the Ordinary Council Meeting of on 13 December 2011 (CI10/00995) the Council was provided with the detailed report on the background, design and cost of the project (ET -115-11 CI10/03143) that Councillor Mason had requested on 11 August 2011.

7.14 At this meeting, the Council was also made aware that the Project consisted of two stages and that Main Road had approved limiting the scope of works to ensure expenditure was within the funding provided. The Black Spot grant of $600,000 was again highlighted.

7.15 The Officer Recommendation before Council requested that:

   Council proceed with the first stage of the Centenary Avenue road improvement project that is listed on the 2011/2012 Annual Budget at a cost of $600,000 which is 100 percent funded under the Nation Building Black Spot Program: CI10/03143 at page 3.
Councillor Mason’s Motion

7.16 Council did not proceed with the Officer Recommendation, voting instead to pass a motion put forth by Councillor Mason.

7.17 That motion moved that the Officer Recommendation not be adopted and read as follows:

1. The work is to be conducted in the City of South Perth.
2. South Perth have contributed no funding, labour, materials or equipment to the project. And in lieu of, the following be adopted: Council re-affirm its recommendation of 11 August 2011 and the funds be returned to the State Government: CI10/00995 at pages 94 & 95.

7.18 The motion was passed with a majority vote. Mayor Delle Donne and Councillors Mason, Daly, Clarke, Olsen, Barry, Elliott and O'Donnell voted in support of Councillor Mason’s motion. Councillors Morgan and Boylen voted against it.

7.19 The Minutes of 13 December 2011 (at page 94) note the Mayor’s correction of the motion to properly read the Nation Building Black Spot Program, rather than “State Government”.

City of South Perth letter to City of Canning dated 13 January 2012

7.20 After learning of the Council’s decision of 13 December 2011 not to proceed with the project and return the funds to the Government, the City of South Perth wrote to the City voicing concerns over the decision:

South Perth is very disappointed by the recent decision...considers it not to be in the best interests of the broader community. South Perth also believes that Centenary Avenue needs to be upgraded as a matter of priority... (CI10/01740 at page 1).

7.21 In the same letter, the City of South Perth also sought approval to assume responsibility for the project, including works located in the City of Canning. The letter highlighted that discussions with Main Roads had indicated that the
$600,000 grant could be transferred to the City of South Perth. The letter also explained that the City of South Perth would assume responsibility for and management of the project and only spend the allotted $600,000 on the project by doing as much of the works as possible within budgetary constraints. If there were to be cost variations, South Perth proposed discussing this with Canning to see how these expenses would be managed. All of this was dependent on the City of Canning agreeing to the City of South Perth’s request to take over the project: CI10/01740 at page 3.

**City of Canning Officers Recommend City of South Perth Undertake Works**

7.22 In response to the City of South Perth’s request to take over the project, City of Canning Officers submitted a Report to Council at the Ordinary Council Meeting of 24 January 2012 (CI10/03130).

7.23 The Report, ET-007-12 (CI10/03144) *Centenary Avenue Road Improvements Wilson*, detailed that the City of South Perth had requested to take over the project and would assume responsibility for it. It was also noted that the City of South Perth was willing to use the City of Canning’s construction team to carry out the works. It was also specified that preliminary investigations into whether the Black Spot funding could be transferred to the City of South Perth from the City of Canning indicated that this was indeed possible: CI10/03144 at page 1.

7.24 The Officer’s recommendation in the Report read as follows:

   a) *Council advise City of South Perth of its approval to undertake works along Centenary Avenue, in the City of Canning, as detailed on Plan No’s S416-1 and S416-2.*

   b) *Council provide the City of South Perth with a quote to undertake the works along Centenary Avenue:* CI10/03144 at page 3.
Clause 3.14 of the Standing Orders

7.25 Councillor Mason sought a ruling from the Mayor that the item was out of order based on clause 3.14 of the City’s Standing Orders, which reads:

_A motion to the same effect as any motion, (other than a motion moved in pursuance of a report of a committee of the Council) which has been decided in the negative by the Council shall not again be entertained within a period of 3 months unless an absolute majority of the Councillors signify to the CEO in writing before a meeting their consent to the motion being entertained at that meeting._

7.26 Councillor Mason was of the view that the motion of 24 January 2012 was to the same effect as the motions of 11 August 2011 and 13 December 2011 to not proceed with the project and return the Black Spot funding to the government.

7.27 The evidence shows that Mayor Delle Donne agreed with Councillor Mason and ruled that the item was out of order based on clause 3.14. He further ruled that item ET-007-12 could not, as a result, be entertained (CI10/03130 at age 98).

Analysis

_A Failure by Councillors to Understand the Issues Before Them_

7.28 It appears from the evidence that the reasoning, in part, behind Council’s decision to not adopt the Officer Recommendation of 13 December 2011 was two-fold. Firstly, that the majority of the works were in the City of South Perth and secondly that the City of South Perth had not contributed to the project in any way.

7.29 I find that, had Council properly read the report presented to them (ET-115-11; CI10/03143), it would have been clear that there were two separate and distinct stages of works to be carried out. The first was partly in the district of the City of Canning and partly in the district of the City of South Perth. This was, at that stage, fully funded by a government grant, thus requiring no financial contribution from South Perth. The second stage was entirely within the district of the City of
Canning and would be the subject of a request for further funding from the
government. In the circumstances, there was no reasonable basis for Council to
ignore the Officer Recommendation and prevent the project from proceeding. The
decision demonstrates a complete lack of regard for the information provided to
the Council.

7.30 I agree with the findings in the Authorised Inquiry Report and with the submissions
of Counsel Assisting in his Written Closing Submissions that some Elected Members
failed to ensure that they fully understood the Officer’s Report of 24 January 2011
dealing with the transfer of the Black Spot grant, along with responsibility for the
Centenary Avenue project, to the City of South Perth.

7.31 The City of Canning Officer’s Report at the 24 January 2012 Ordinary Council
Meeting made it clear that the reason for the Council’s earlier rejection of the
Centenary Avenue project – because the majority of the works were primarily to
be conducted in the City Of South Perth and Council believed South Perth had not
contributed in any way to the project – was no longer a basis for rejecting the
recommendation.

7.32 As submitted by Counsel Assisting, the following findings of facts are clear from the
evidence:

1. the intersection was dangerous (being a Black Spot);
2. residents of the City of Canning were users of that road;
3. funds were available for the project from Black Spot funding;
4. any concerns regarding budget run over would be minimised as the City
   of South Perth had indicated it would limit the works initially to the
   allocated funding – letter from City of South Perth 13 January 2012
   (CI10/01740);
5. the City’s workforce was under-utilised and available to be used – page
   2 of Report ET-007-12 (CI10/03144); and
6. having South Perth pay for the construction crews would have shifted
   that burden from the ratepayers of Canning.
7.33 I note the concerns raised by lawyers for Mayor Delle Donne in the Written Submissions in Reply, where it is argued that the Mayor’s actions in relation to the project stem in part from the Mayor’s fear that the budget for the project would run over:

…it is noted that on 21 January 2014 it was acknowledged in the council minutes that a cost over-run of $120,000 took place on the project the subject of the Black Spot funding…It is submitted this adds weight to the concerns of Mayor Delle Donne and the Council that the project was always vulnerable to a cost overrun: CI10/03688.

7.34 I note further that in the Written Submissions in Reply prepared for Councillor Barry it is argued Councillor Barry’s concerns stem from the overruns that occurred during the Nicholson Bannister Road project:

Councillor Barry referred to concerns the Council had regarding budget over runs for this project, similar to the concerns regarding the Nicholson Rd/Bannister Rd project…It is submitted these concerns have been realised. Attached is ET-010-14…That Report details that the cost estimate for the Stage 1 of the project had increased from $600,000 to $720,000, requiring a $60,000 contribution from the City of Canning. Even allowing for expected inflationary increases in costs since the Council was considering the matter, a 20% increase in the estimated cost of the project is significant: CI10/03687.

7.35 I do not accept these concerns as a legitimate basis for the Council’s failure to act in the best interests of residents. Little weight can be given to the fact that the fears expressed by the Mayor and other Councillors concerning a cost overrun on the project materialised in some form some years later. This does not provide vindication of those fears. The fears were based on previous experiences with projects and the cost overruns associated with them, particularly when those projects involved works that spanned local government districts.

7.36 What is relevant to consider here is that Council was prepared to reject this program, in part, based on previous, but unrelated events, and not upon any direct evidence that indicated this particular project was likely to experience similar cost overruns. On the contrary, this project had had its scope of works decreased to ensure that it came within budget and the City of South Perth was going to use its best endeavours to carry out the works within budget. The lack of engagement by
the Council with the Administration to determine the likelihood of there being a cost overrun for this project demonstrates a failure to properly enquire as to whether there was any proper basis for the fears held. While historical examples can prove beneficial in identifying potential problems for future programs, they ought not be used as an alternative to making proper due diligence enquiries.

7.37 Overall, I am of the view that there was no reasonable basis for the City to refuse to consider the request from the City of South Perth to be permitted to carry out works in the City of Canning’s district. By failing to properly consider the matter, the Council’s decision rendered redundant the time and effort spent by the City’s Officers preparing the submission, making the application and obtaining the grant.

Clause 3.14 of the Standing Orders

7.38 I further accept the submissions of Counsel Assisting that it was inappropriate for the Council to reject the Officer’s Recommendation to approve the transfer of the Black Spot grant to the City of South Perth to undertake works along Centenary Avenue under Clause 3.14 of the Standing Orders.

7.39 Council should have recognised that the matter the subject of the Officer’s report and recommendation was markedly different from previous motions dealing with works on Centenary Avenue. The recommendation before the Council for it to advise the City of South Perth of its approval to undertake the works contemplated in the project was not a motion to the same effect as a previous motion that had been decided in the negative within the previous 3 months.

7.40 The recommendations in Report ET-007-12 (CI10/03144) were based on a letter from the City of South Perth dated 12 January 2011 (CI10/01740). The relevant ‘previous motion’ was passed at the Ordinary Council Meeting of 13 December 2011 (CI10/00995 at pages 94-95) and stipulated that the Council reaffirm its recommendation of 11 August 2011 – i.e. the decision to delete account 53915 Centenary Ave/Manning Road and extend right turn (Item (15) from Special Council Meeting Minutes 11 August 2011: CI10/02840 at page 3. The effect of that
decision was to resolve to return the money provided under the Black Spot Program to the Government and not carry out the works.

7.41 As highlighted by Counsel Assisting in his Written Closing Submissions, the Officer’s Recommendation of 24 January 2012 made no mention of money. Nor did it mention any form of disposition in relation to the Black Spot money. Rather, the recommendation was directed towards giving approval to the City of South Perth to conduct that portion of the works proposed under the project that were located within the City of Canning’s locality, as well as offering an opportunity to the City to quote for the use of its construction team in carrying out works under the project – something that the Report indicated it had the capacity to undertake. As noted in the Authorised Inquiry Report, this offer could have alleviated some of the work shortages expected to occur for the City’s construction workforce when the issue arose during the 13 March 2012 Ordinary Council Meeting through Report ET-040-12 (CI10/03142). I agree with that conclusion.

7.42 Read in context, the Officer’s Recommendation was the first step in a series of discussions that would follow, all designed to allow the City of South Perth to seek approval to take over the program and the funding associated with it. It was envisaged that the granting of consent would facilitate the prompt completion of the project prior to the 30 June 2012 deadline – see letter from South Perth 13 January 2012 (CI10/01740).

7.43 There is no proper basis to see the granting of approval to the City of South Perth for it to undertake works in the City of Canning as having the same effect as the Council’s earlier resolution to return the money to the government and not proceed with the works itself. Quite the contrary, the Officer’s Recommendation was directed to an entirely different matter.

7.44 Overall, the Council’s failure to appreciate the substance and import of the Recommendation reflects an inadequate analysis of the matter and demonstrates poor judgment. The decision to treat the motion to accept the Officer’s Recommendation as being contrary to Clause 3.14 of the Standing Orders was an
error and one that reflects poorly on the Council. The report and request should have been considered on its merits and should have been given adequate consideration. The Mayor’s decision to make this ruling, preventing the works from proceeding, adversely affected both the residents of the City of Canning and the residents of the City of South Perth. The decision was ill considered and showed a lack of respect for the City of Canning Administration staff who prepared the report, the City of South Perth, which was willing to assume responsibility of the project to benefit rate payers and the residents of both districts.

7.45 It is also relevant to note the advice, or lack thereof, from the Administration in relation to this matter. During hearings, Mr Dacombe indicated (at T70) that although he had no recollection of Councillor Mason raising the issue, he thought it unlikely that Mr Sharpe would have intervened following the Mayor’s ruling, but that he would have provided advice if he had been asked. He went on to say that the practice during the Council meetings was that executives would only speak if asked to, although they could attract the attention of the Mayor if they wished to speak.

7.46 The Inquiry received advice from the City that the audio recording for that meeting failed. Thus, there is no independent record available. The Minutes of the Special Council Meeting on 24 January 2012 (CI10/03130) do not record any advice being sought from or provided by either Mr Dacombe or Mr Sharpe: see CI10/03335 at page 98.

7.47 I find that the lack of advice provided in relation to this issue and the practice of not offering advice more generally unless asked is entirely inappropriate and of little value to the residents of the City of Canning. To be blunt, to sit by and say nothing when saying nothing risks the loss of a substantial grant that your own Officers have spent months preparing and that will result in the loss of much needed road improvements strikes me as very poor governance.

7.48 In Written Submissions in Reply prepared on behalf of Councillor Barry, reference is made to the decision by Council not to endorse the recommendation that South
Perth take over the project based on clause 3.14 of the City’s Standing Orders. The Response suggests that any responsibility for error in this regard should fall on former CEO Mark Dacombe for failing to bring the Council’s error in using the clause to the attention of the Council. The Response states:

* Should Counsel Assisting’s recommendation be adopted...it should be made clear that the error was caused by the failure of Mr Dacombe in his capacity as the City’s CEO to identify and bring it to the attention of the Council. That failure is in breach of his responsibilities under s.5.41 (a) and (b) of the Local Government Act 1995 (“the Act”).

7.49 It is clear that Mr Dacombe did have a responsibility under the Local Government Act to bring errors of this sort to the attention of the Council. His responsibility and failure to adhere to this responsibility is noted. However, while the CEO has a responsibility to point out errors when they arise, this does not detract from the fact that the Council failed to properly analyse the information before it. Had it done so, it is arguable that it would have queried whether the recommendation it was about to reject was, as suggested by Councillor Mason, the same as a previous recommendation. Mr Dacombe is not to be blamed for a failure on the part of Councillors to focus on what was being put to them and to do so with care and some degree of critical analysis and focus.

7.50 Mistakes were clearly made here by both Mr Dacombe and some Councillors – mistakes that would not have been made had all parties acted more cooperatively.

7.51 I further note that in the Written Submissions in Reply for Mayor Delle Donne, it is stated that:

*...there was a deliberate policy by certain Administration officers to flout and/or ignore the lawful resolutions of Council.*

7.52 The suggestion that the City of Canning Administration staff ignored the resolutions of Council and made a habit of doing so is not supported by the evidence. In relation to this issue, Council moved a motion on 11 August 2011 to delete the Centenary Avenue account pending the provision of a detailed report on this and a number of other matters. Administration staff prepared this Report and...
Council received it on 13 December 2011. To suggest that officers and/or staff were deliberately ignoring Council’s requests is unsubstantiated.

7.53 I also note in the Written Submissions in Reply prepared on behalf of Councillor Mason that reference is made to the Administration acting contrary to Council’s decision by bringing back the Centenary Avenue item at the 13 December 2011 Council Meeting when Council had voted to delete the item on the 11 August 2011. The submission states:

_Councillor Mason submits that the Inquiry ought to find that after Council’s decisions made at its Special Council Meeting of 11 August 2011 where Councillor Mason moved the motion to delete account no. 53915 being the $600,000.00 traffic management cost for this project, which motion was approved by Council (see Cl1002840) and Ordinary Council Meeting of 13 December 2011 where Councillor Mason moved a motion to reject the officer’s recommendation and that the black spot funds be returned to their source (see Cl100995); it was clear that the City’s administration staff were directed not to proceed with this project yet they acted contrary to this direction._

7.54 Again, this response fails to address the fact that at the Special Council Meeting of 11 August 2011, the Council requested a report within three months on a range of items, one of which was the deletion of account 53915. Clearly, what was envisaged by the Council’s resolution was the provision of a report setting out further information concerning these matters to enable it to make a decision on them once the report had been received. Staff prepared a report for the Council, as requested. The suggestion that staff were acting contrary to the direction of the Council does not accord with the evidence before the Inquiry. Further, the Officer Recommendation put to Councillors on 24 January 2012 should also not be seen as acting contrary to Council direction. The Council decided not to proceed with the project on 13 December 2011. The Officer Recommendation on 24 January 2012 suggested that the project be taken over by another Council. This is not contrary to any Council directions.
7.55 I note further that in the Written Submissions in Reply prepared for Councillor Mason, it is suggested that the 24 January 2012 Officer Recommendation was ‘ultra vires’ as Council had voted to delete the item. The response states:

...given that at earlier council meetings Council had voted to “delete” that item from the budget which effectively meant that the item was no longer on the agenda.

7.56 I disagree. The Recommendation that Council was presented with on 24 January 2012 was not similar to the previous Recommendations in relation to this issue. It did not ignore any previous Council decisions. It addressed the fact that the Council had deleted the item and was proposing that a different local government take over the Project because it had been abandoned by the City of Canning’s Council. It would be stretching it in these circumstances to suggest that the Officer’s Recommendation was ultra vires.

7.57 In the Written Submissions in Reply prepared on behalf of Councillor Mason, it is suggested that Troy Bozich, Manager, Engineering Services for the City of Canning, contravened Council’s directions by contacting the City of South Perth via email on 6 January 2012 in an attempt to keep the project alive. The Response states:

... Mr Bozich, was guilty of misconduct by deliberately contravening Council’s direction not to proceed with this project and to return the grant monies to their source and then by sending an email to the City of South Perth on or about 6 January 2012 apparently suggesting that the grant monies could possibly be transferred to the City of South Perth and then by persisting with his course of conduct by submitting a report to Council for its Ordinary Council Meeting on 24 January 2012.

7.58 Similar concerns are raised in the Written Submissions in Reply prepared on behalf of Mayor Delle Donne:

...evidence suggests it was prepared by Troy Bozich without the authority of either Council or the CEO and that it became the direct basis upon which the Administration submitted a 3rd report Council in respect of this project.

7.59 I note that it is explained in these submissions that the email referred to as being prepared by Troy Bozich was not produced and was never in the possession of the Inquiry.
Without knowing the contents of the email in question, to draw the conclusion that it was the catalyst for the third report presented to Council on 24 January 2012 is speculative and cannot be relied on by me as evidence of any improper conduct on the part of Troy Bozich. I am also not convinced that the conduct referred to was, in any event, improper. It is arguable that if Mr Bozich did indeed send an email to the City of South Perth, he was not trying to keep the project alive contrary to the decision of Council – that is, by trying to get the work done when Canning had decided not to do it. Arguably, Mr Bozich was simply trying to keep the project alive for the benefit of ratepayers in the City of Canning by trying to get someone else to do the work that the City of Canning had decided not to do. I do not see this as acting contrary to Council’s decisions. Again, this is speculative as the Inquiry does not have the email in question.

Conclusions

In relation to the Centenary Avenue and Manning Road Project, I find that the Council failed to understand the information before it, resulting in poor decision making.

The Council was informed that the project was fully funded, by a Black Spot Government grant, at the Special Council Meeting on 11 August 2011. During this meeting a motion moved by Councillor Mason was passed, requesting a detailed report on this item as well as other items outlined in the 2011/2012 budget.

This request was adhered to by the City of Canning Administration and staff who prepared a detailed report regarding the Centenary Avenue project. Report ET-115-11 was presented to Council at the Ordinary Council Meeting on 13 December 2011. This report detailed not only the fact that the project was fully funded but also that the City had sought approval from Main Roads to ensure that the cost of the project would stay within the budget of $600,000 as provided by Government funding.
7.64 To suggest that Councillors were not aware that the project was fully funded or that they feared that the project would run over budget demonstrates to me that Councillors did not adequately read or comprehend the information before them.

7.65 Furthermore, the Council’s reason for not adopting the Officer Recommendation on 13 December 2011 to proceed with the project (ie because the works were in the City of South Perth and they had not contributed anything to the project) was inappropriate. I find that in order for Council to have drawn this conclusion the Council had to have done so by disregarding the facts outlined in Report ET-115-11. The Report clearly stated that the Project had two stages and that the second stage, which was dependant on the first being completely, was entirely within the City of Canning. Also, the project was fully funded and therefore very likely to be cost neutral for both the City of Canning and the City of South Perth assuming it was commenced and completed within the proposed timeframe. To ignore this information caused further delay and demonstrated poor judgement and a failure on the part of the Council to understand relevant information.

7.66 I find further that in relation to the Council’s decision to rely on Clause 3.14 of the Standing Orders, the Council’s failure to appreciate the substance and import of the relevant recommendation reflects an inadequate analysis of the matter and demonstrates poor judgment. The decision to treat the motion to accept the Officer’s Recommendation as being contrary to Clause 3.14 of the Standing Order was an error and one that reflects poorly on the Council. The Mayor’s decision to make this ruling, preventing the works from proceeding, adversely affected both the City of Canning rate payers and the rate payers of the City of South Perth. The decision was ill considered and showed a lack of respect for the City of Canning Administration staff who prepared the report, the City of South Perth, which was willing to assume responsibility of the project to benefit rate payers and the residents of both districts.

7.67 I find further that this error might not have occurred had there been a greater exchange of information between the Administration and the Council. I find the Administration’s stated policy of “saying nothing until asked” most unhelpful and
counter-productive when dealing with issues of considerable concern to ratepayers.

7.68 Overall, I find in relation to this issue that there was a failure to provide for the good government of the residents of the City of Canning.
CHAPTER EIGHT

REFUSE TRUCK PURCHASE
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REFUSE TRUCK PURCHASE

Background

8.1 At the Ordinary Council Meeting on 13 September 2011 (CI10/01682) Council approved a procurement process that included the purchase of new refuse trucks.

8.2 The City of Canning sourced quotes from preferred suppliers for the purchase of new refuse trucks. Four suppliers provided quotes. One did not meet the specifications. Another could not make the required delivery date. Administration staff then conducted a review of the remaining two quotes from Iveco and Hino.

8.3 Based on an assessment of both performance and cost it was determined by Administration staff that Iveco vehicles should be recommended to the Council for approval.

Ordinary Council Meeting 22 November 2011

8.4 At the Ordinary Council Meeting on 22 November 2011 (CI10/03127) Councillors were presented with Report ET-109-11 Replacement of Side Loading Refuse Compactor Trucks: CI10/03168.

8.5 The Officer Recommendation in the Report stated:

a) Council receives the report on Waste Services plant replacements undertaken in the previous financial year,

b) Council accepts the offer from Skipper Trucks offering four (4) IVECO ACCO 2350G/280 6 x 2 cab chassis trucks fitted with SuperiorPAK 25m³ side loading compactors and the Accuweigh Air Transducer Weighing System for a total price of $1,371,640 ex GST.

c) Council authorises the over expenditure for the purchase of these trucks with the additional funding being sources from the Waste Reserve Account.

d) All companies who lodged submissions be advised of (a) above and thanked for their submission: CI10/03127 at pages 57 and 58.
Councillor Barry’s Recommendation

8.6 The Council did not adopt the Officer Recommendation. The explanation for not doing so was that Hino had offered a better warranty:

   *The offer by Hino WA No 3 as per Schedule offers a competitive, recorded reliable alternative with a greater warranty period: CI10/03127 at pages 57 and 58.*

8.7 Instead of the Officer Recommendation being adopted, the Council adopted a motion moved by Councillor Barry. As a result of this motion, Part B of the Officer’s recommendation was to be changed as follows:

   *(b) Council accepts the offer from WA Hino offering four (4) Hino 500 Series 1728 Long Auto 6 x 2 Cab Chassis Trucks fitted with SuperiorPAK 25m3 side loading compactors and the Accuweigh Air Transducer Weighing System for a total price of $1,376,931 ex GST: CI10/03127 at page 58.*

8.8 Mayor Delle Donne and Councillors Mason, Daly, Olsen, Barry, Elliott, Boylen and O’Donnell voted for the motion. Councillors Clarke, Dowsett and Morgan voted against it.

Analysis

8.9 I note that the *Authorised Inquiry Report* makes two findings in relation to this issue:

   **Finding 24**

   The Mayor, Councillors Mason, Daly, Olsen, Elliott, Boylen, O’Donnell and Barry supported a resolution to reject an Officer’s recommendation without giving proper consideration to the advice offered to them by the City’s technical staff, who had considerable expertise in this area

   **Finding 25**

   It should have been obvious to Elected Members who voted for Councillor Barry’s motion that Councillor Barry was not in a position to offer any professional expertise in providing advice on the purchase of specialist equipment that would cost in the region of $1.3 million.
8.10 I do not agree with either finding.

8.11 Rather, I agree with Counsel Assisting that there was insufficient evidence before the Inquiry to support the conclusion that the identified Councillors failed to give proper consideration to the advice offered to them in the Report.

8.12 A review of Report ET-109-11 (CI10/03168) reveals that two important aspects of the Report were missing. Firstly, it fails to identify what the basis for efficiency gain was in relation to the Iveco truck already in the City’s fleet. Secondly, it simply asserts at page 3 that the Iveco truck is considered to be the better vehicle, without stating any reasons for why this is the case.

8.13 When regard is had to the attachment to the Report, it is also noted that the two trucks have very similar features.

8.14 Absent the Report clearly identifying why the Iveco truck was superior to the Hino truck, I find that the Council had little before it to determine what it was that made the Iveco the preferred vehicle in the mind of the Officer.

8.15 Further, the comments made by Councillor Barry in support of his motion cannot properly be seen as being in the nature of professional expertise or advice. I find that Councillor Barry did no more than refer to a number of matters (many of which were contained within Report ET-109-11 (CI10/03168)) and note some historical matters relating to the performance of the existing fleet vehicles.

8.16 Moving a motion that is different to an Officer Recommendation cannot be considered “offering professional expertise”. Councillor Barry simply referred to issues raised by the Report and offered a personal opinion. He did not profess to be providing, nor can he be seem to be offering, an expert opinion.
8.17 In Written Submissions in Reply, lawyers for Councillor O’Donnell suggest that Council’s decision to select the Hino truck in preference to the Iveco was a decision properly made with regard to the information available:

It is submitted that the inquirer…ought to make a positive finding that the determination of the council to select Hino truck ahead of…the Iveco, and thus act contrary to the officers recommendation, was a decision properly made on all the information then available to it…:

8.18 It is further suggested that a finding should be made that:

…it was appropriate and proper for council, including Councillor Megan O’Donnell, to reject the recommendation by the council officer that the Iveco truck be preferred to the Hino.

8.19 The submission invites me as the Inquirer to find that Council’s decision to reject the Officer Recommendation was proper.

8.20 No basis for such a finding is provided in the submission received from Councillor O’Donnell. The submission simply suggests that Council’s decision was correct. Without any evidence to suggest that the correct vehicle was in fact chosen, I am unable to make such a determination.

8.21 In Written Submissions in Reply received from Ms Lyn Russell, written in her capacity as CEO of the City of Canning, Ms Russell challenges the submission of Counsel Assisting in relation to this matter.

8.22 To repeat, Counsel Assisting submitted that:

... examination of ET-109-11...reveals that 2 important aspects of the report were missing...failed to identify what the basis for efficiency gain was...simply asserts ... that the Iveco is considered to be the better vehicle without stating any reasons.

8.23 Ms Russell suggests that the Report does in fact address these two issues. She cites paragraph 332 of the Authorised Inquiry Report, which reads:

This replacement truck is already demonstrating efficiency gains on a daily basis where an hour per day is saved in travelling time. This has meant that an
additional 120 bins can be serviced per day on average and will allow the service to incorporate the yearly additional bins (from growth) to be accommodated without increasing the fleet or staff numbers over the next few years: Report ET-109-11 – CI10/03168.

8.24 The passage identified does not deal with the problem raised by Counsel Assisting. The Report did not identify why the Iveco was demonstrating efficiency gains – only that it was. For example, there was nothing in the Report attributing those gains to a larger bin, better engine, smoother gear ratios etc.

8.25 Absent the identification of the basis for the efficiency gains, the Council was effectively being asked to choose between two vehicles that shared almost identical features. Evidence given by some Councillors (T773) was to the effect that they understood the efficiency gains to be due to bin size – and, further, that the Hinos ultimately selected shared the same bin size.

8.26 In such circumstances Council's decision to choose the vehicle that had been part of the City's fleet for some time with a demonstrated level of performance but with a greater warranty does not seem unreasonable.

Conclusions

8.27 Despite the Iveco truck being the preferred choice by Administration staff, the Council determined that a greater warranty was of more value and voted instead to purchase the Hino truck.

8.28 Although this motion went against the Officer Recommendation, consideration was given before the alternative motion was passed. Hence, I find that Finding 24 in the Authorised Inquiry Report, suggesting that proper consideration was not given, has not been established.

8.29 I find that Councillor Barry moved the motion to purchase the Hino truck based primarily on the greater warranty that it offered. In doing so he was expressing a personal opinion. He was not purporting to be an expert on the purchase of
specialist equipment. Hence, Finding 25 in the Authorised Inquiry Report, which suggests that Councillor Barry was offering professional expertise on the purchase, has also not been established.

8.30 In the circumstances, I find that, although the Officer Recommendation was not followed, there is no evidence to suggest that the Council was not acting in the best interests of the City of Canning residents or that the Council failed to provide for the good government of the persons in the City of Canning district in deciding as they did.
CHAPTER NINE

THE SOUTHERN METROPOLITAN REGIONAL COUNCIL
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THE SOUTHERN METROPOLITAN REGIONAL COUNCIL

Background

9.1 The Southern Metropolitan Regional Council (the “SMRC”) is a statutory local government authority established under section 3.61 of the Local Government Act 1995. Established in 1991 as the South West Metropolitan Regional Waste Management Council, the authority changed its name to the SMRC in 1998.

9.2 The SMRC is made up of local governments located in the Southern area of the Perth metropolitan region. The City of Canning was a founding member of the SMRC and remained so until 19 February 2009 when its membership was withdrawn by the City of Canning Council.

9.3 Relevant to this Inquiry, the SMRC operates the Regional Resource Recovery Centre (the “RRRC”) which receives, recycles and processes waste from member local governments. It is responsible for developing environmentally sustainable waste management solutions and seeks to assist the state government with its objective of achieving zero waste by 2020.

9.4 The City of Canning leased industrial zoned land to the SMRC in 2000 to facilitate the construction of the RRRC. The lease agreement required that the SMRC pay rent to the City of Canning.

Loan Liability

9.5 The City of Canning, and the other member councils, entered into a legal agreement to contribute loan funds that were needed by the SMRC to fund its operations. The operations included the construction of the RRRC facility. The City of Canning’s loan liability is in the vicinity of $15 million dollars and remains outstanding. According to Former CEO Dominic Carbone, the $15 million dollar loan contribution is approximately 27% of the RRRC facility: CI10/00184 at page 36.
Odour Complaints

9.6 The RRRC has been operational since 2005. From the evidence before the Inquiry it is clear that there have been significant odour issues within the City of Canning arising from the RRRC’s operations and location.

9.7 Significantly, the Department of Environment and Conservation served an environmental protection notice on the SMRC in 2006, requiring the refurbishment of the RRRC’s bio-filters.

9.8 In 2009 a second notice was issued, again relating to odour emissions from the facility. This notice required the SMRC to engage a qualified engineer to review the operations of the RRRC and outline strategies designed to reduce odour causing emissions.

9.9 Despite these two notices, complaints from local residents continued. This resulted, quite rightly, in City of Canning Councillors becoming more involved with this issue as they sought to address concerns raised by local residents. In the October 2008 Mayoral election, for example, Mayor Joe Delle Donne actively campaigned in the area affected by the odour emissions. The evidence also shows that this issue was of considerable importance to Councillor Bev Olsen, who lobbied extensively on behalf of local residents to address what was clearly a significant local issue.

Alternative Waste Management Options

9.10 As a result of on-going and quite justified complaints from residents regarding odours emitted from the RRRC waste disposal facility, the City of Canning Council began investigating alternative methods for waste disposal.

9.11 At the Ordinary Council Meeting on 4 November 2008 (CI10/02842), Council unanimously decided to authorise the Mayor and the City’s Acting CEO, Andrew Sharpe, to investigate alternative waste disposal sites (CI10/02842 at page 32).
9.12 At the Ordinary Council Meeting on 2 December 2008 (CI10/02843), Council unanimously voted to authorise a request for quotations from qualified consultants to research and prepare a Strategic Waste Management Plan: CI10/02843 at page 45 and page 46.

Ability to Withdraw and Potential Consequences

9.13 On 13 January 2009 at the Ordinary Council Meeting (CI10/03150), Council received Report CM-008-09 – *Investigation of Alternative Waste Management Options for the City of Canning* (CI10/03177). The Report analysed whether it was possible for the City of Canning to withdraw from the SMRC and from the RRRC project and any legal consequences arising from any decision to so.

Withdrawal from SMRC

9.14 Report CM-008-09 concluded that the City could withdraw from the SMRC but specified that a 12 month notice period needed to be adhered to in order for the withdrawal to take effect. Further, it was explained that withdrawal would not result in any legal consequences if done in accordance with certain required procedures: CI10/03177 at page 5.

Withdrawal from RRRC Project

9.15 The Report also indicated that it was open to the City to withdraw from the RRRC project but that termination of waste deliveries to the RRRC could result in an action for damages for breach of contract and an injunction that might require the City of Canning to continue delivering waste to the RRRC: CI10/03177 at page 5.

9.16 The financial consequences that would stem from terminating waste delivery to the RRRC waste facility were also outlined in the Report. It was noted that the City could be required to share any loss flowing from the financial failure of the project.
arising from the City’s decision to withdraw. The consequences specified in the Report included:

...the cost of a fresh business plan, proportional liability for any operating deficit and ongoing annual contributions to borrowings until paid off: CI10/03177 at page 6.

9.17 The Report also stated that advice received by the City suggested that withdrawal from the SMRC and the RRRC project would have some positive effects, as withdrawal would limit complications arising from the City taking action to improve the odour issues associated with the RRRC facility.

Mayor to Seek Second Legal Opinion

9.18 The Officer Recommendation provided in the Report recommended that Report CM-008-09 be received by Council (CI10/03177).

9.19 Despite this, Councillor Olsen (seconded by Councillor Daly), moved a motion to give authority to Mayor Delle Donne to seek a second legal opinion concerning alternative waste management options for the City of Canning. The decision was carried unanimously.

Second Legal Opinion from Hardy Bowen Lawyers


9.21 The Council was advised that they could expect the Report by mid-February.

9.22 The Council unanimously voted to receive the Report and call a Confidential Forum to discuss the options outlined in the Hardy Bowen legal opinion when that opinion was received.
Enforcement Action against the RRRC

9.23 At the same Ordinary Council Meeting of 10 February 2009 (CI10/03152) Council also received Report SRS-040-09 (Legal Action in Response to Odour Issues): CI10/03216.

9.24 Council resolved to take enforcement action against the RRRC under sections 181 and 182 of the Health Act and Scheme No 40 of the Town Planning Scheme.

9.25 Council also resolved to notify the Department of Environment and Conservation (DEC) that the RRRC was not compliant with Condition 5.1 of the DEC Licence Condition and that enforcement action needed to be taken.

9.26 Councillors Clarke, (Faye) Morgan and Wibberley voted against the motion.

Decision to Withdraw

9.27 On 19 February 2009 Elected Members were telephoned and notified of a Special Council Meeting to be held that evening. On the same day, Mayor Delle Donne and Acting CEO, Andrew Sharpe, met with representatives from Hardy Bowen and received the Final Report of Advice that Mayor Delle Donne had requested from Hardy Bowen.

9.28 Nine Elected Members attended the Special Council Meeting: Mayor Delle Donne, Councillors Barry, Clarke, Mason, Olsen, Elliott, Wibberley, Wheaton and Faye Morgan. There was no agenda for the Meeting.

9.29 Councillors present moved a motion to adjourn for fifteen minutes to read and review the confidential report from Hardy Bowen: CI10/03160.

9.30 Representatives from Hardy Bowen gave a presentation to Council. Following this presentation, Councillor Mason expressed his intention to move a motion.
9.31 Acting CEO Andrew Sharpe advised Councillor Mason that the City of Canning’s Administration team had not yet had a chance to review the advice provided by Hardy Bowen and thus had not prepared Recommendations regarding this issue. Despite this, Councillor Mason proceeded to move a motion seconded by Councillor Olsen.

9.32 Councillor Mason’s motion read:

Following the advice and recommendation provided by Hardy Bowen Lawyers in its confidential advice of 19 February 2009, the Acting Chief Executive Officer be instructed to write to the Southern Metropolitan Regional Council (SMRC), instructing them under the provision of the Establishment Agreement, that:

(a) The City of Canning withdraws from the SMRC.

(b) The City is not amenable to direction in relation to the delivery of waste, other than to the Regional Resource Recovery Centre (RRRC), and that if the RRRC is unable to accept the waste, it will be delivered by the City to a site of its choosing.

(c) The SMRC be advised that the City is of the view that there is a dispute in relation to the obligations of the RRRC, having regard to:

(i) the economic sustainability of the facility; and

(ii) the environmental hazards caused by the facility; which requires to be dealt with in accordance with the good faith negotiations in the Project Participants Agreement.

(d) The City should initiate a dispute under the lease in relation to the odour emissions, with a view to determining whether there has been a breach of the lease. (e) A further report be presented to Council outlining the progress of the above matters within one month.

(f) A further report be presented to Council outlining a media campaign to the ratepayers of the City within one month of this motion: CI10/02859 at page 5.

9.33 Former Councillor Faye Morgan put forward a foreshadowed motion suggesting the withdrawal be delayed until April/May 2009.

9.34 Following discussion and questions with Michael Hardy of Hardy Bowen, Councillor Mason agreed to include the word “immediately” in part (a) of his motion. Part (a)
was changed to read, “The City of Canning withdraws from the SMRC immediately” (CI10/02859 at page 7).

9.35 The motion to withdraw from the SMRC was carried by a majority vote. Mayor Delle Donne, Councillors Barry, Elliott, Mason, Olsen and Wheaton voted for the motion. Councillors Clarke, Faye Morgan and Wibberley voted against it.

**Response to Council’s Decision to Withdraw**

9.36 As outlined in the *Authorised Inquiry Report*, following the City of Canning Council’s decision to withdraw, members of the public expressed concerns about the decision and the future waste management options for the City (CI10/02848; CI10/00708). It appears that of particular concern was the fact that the withdrawal would not relieve the odour emissions emanating from the RRRC facility.

9.37 The Chairman of the SMRC also appeared before the Parliamentary Environment and Public Affairs Committee on 26 March 2009, providing evidence on the impact of the City’s withdrawal (CI10/02088 at pages 50 and 51).

**Jandakot Airport Eastern Road Link**

9.38 As part of the Jandakot Airport Master Plan a proposal that an Eastern Link Road be built to improve access to the Jandakot airport was included. Karel Avenue is currently the road that provides access in and out of Jandakot airport. There were a number of unconstructed roads that were identified as potential access roads to the airport. The majority of these unconstructed roads are within the City of Canning boundary.

9.39 It is clear from the evidence before the Inquiry that the Eastern Link Road proposal would be affected by Council’s decision to withdraw from the SMRC.
Request from SMRC for Temporary Closure of Bannister Road

9.40 At the Ordinary Council Meeting of 13 January 2009 (CI10/03150) Council received the proposal for an Eastern Link Road from Jandakot Airport. At this meeting, Council was made aware that the proposed roads might impact on residential lots. As a result, Council decided to hold a Community Forum with potentially affected residents on 29 January 2009. The meeting was intended to discuss all issues surrounding the proposed Eastern Link Road.

9.41 On 26 May 2009 Council received Report CM-108-09 (CI10/03165). Within the Report was a request from the SMRC to temporarily close a portion of the Bannister Road reserve. The RRRC’s security gate and weighbridge was situated in the middle of this road reserve. There is no public access possible through this area.

9.42 Council did not support the request from the SMRC to close a portion of Bannister Road to the public. Rather, they requested that the SMRC find alternative access arrangements. (Minutes of Ordinary Council Meeting of 26 May 2009 at page 96 – CI10/03154).

Closure of Johnston, Lothian and Govan Roads

9.43 At the Ordinary Council Meeting of 28 June 2011 (CI10/03174) Council decided to close the unmade, but reserved, Johnston, Lothian and Govan Roads pursuant to the provisions of the Land Administration Act 1997. These roads had been reserved as the preferred alignment for the future Jandakot Eastern Link Road. The decision by the City of Canning Council effectively made those roads inaccessible for use in the Eastern Link Road to Jandakot Airport.

Objections to Proposed Road Closures

9.44 The SMRC lodged an objection in relation to the City’s decision to close the roads. The City’s Eastern Link Road proposal suggested a thoroughfare be put straight
through the middle of the RRRC recycling facility on an unmade portion of Bannister Road. This proposed thoroughfare would adversely affect the RRRC facility – hence the objection by the SMRC.

9.45 An objection was also received by the Minister for Planning. This objection was outlined by CEO Mark Dacombe in a report he submitted to Council on 8 November 2011: CE-043-11 Jandakot Airport Eastern Link Road (CI10/03220).

9.46 In March 2012 a submission prepared by Allerding and Associates, on behalf of the SMRC, was submitted to the City of Canning: CI10/03309. The submission offered a detailed response to the City’s proposal to use portions of Bannister Road for the Eastern Road Link and outlined how this would negatively impact on the SMRC’s/RRRC’s operations.

9.47 I note from the evidence before the Inquiry that Bannister Road is where the weighbridge for the RRRC is located. Without a functioning weighbridge waste could not be accepted and a bridge relocation would cost approximately one million dollars (CI10/03309 at pages 6, 12 and 14).

Analysis

9.48 Finding 19 of the Authorised Inquiry Report provides:

*The Inquiry has found that it was not appropriate for the Council to have given Mayor Delle Donne authority to personally obtain the second legal opinion on what was essentially a technical matter.*

9.49 I agree with this Finding and with the submission of Counsel Assisting in his Written Closing Submissions, wherein he states that if it is accepted that it was not open to the Council to authorise the Mayor to obtain legal advice, then such authorisation was *ultra vires*. If, on the other hand, it is accepted that the Council did have the power to authorise the Mayor, it was, in any event, unnecessary to do so. On either basis, it is open to conclude that Finding 19 was properly made.
9.50 As outlined by Counsel Assisting in his Written Closing Submissions, the City’s legal services policy (CM108: Cl10/03218) makes no provision for Elected Members to obtain legal advice, written or otherwise from the City’s solicitor.

9.51 I note that Mayor Delle Donne gave evidence in hearings that the Minutes of the Ordinary Council Meeting of 13 January 2009 (Cl10/03150) did not correctly reflect the Council’s resolution (T555).

9.52 Counsel Assisting has suggested that this assertion by the Mayor ought to be rejected when regard is had to the fact that the Minutes of the 13 January 2009 Ordinary Council Meeting were unanimously confirmed and adopted as accurate during the Council’s Ordinary Council Meeting of 27 January 2009. I agree and note that the Mayor was present and was the chair for this meeting.

9.53 Reg. 9(1) of the Local Government (Rules of Conduct) Regulations 2007 is a rule of conduct, and is not, by itself, a source of authority for intervention by the Council in Administration activities.

9.54 When regard is had to the functions of the CEO, sections 5.41(a) and (b) of the Local Government Act 1995 establish that it is for the CEO to provide advice or ensure that advice is given to the Council. The basis for this is to ensure that there is an opportunity for advice which has been obtained to be properly considered by the Administration in an overall context before being provided to Elected Members.

9.55 Nothing in the wording of sections 2.7 – 2.10 of the Local Government Act 1995 provides express authority for the Mayor to obtain legal advice.

9.56 Counsel Assisting has argued that, in the alternative, if it was open for the Council to rely on Reg. 9(1), it was not necessary for the Council at its Ordinary Council Meeting of 13 January 2009 (Cl10/03150) to authorise the Mayor to obtain the second legal opinion concerning alternative waste management options for the
City. Mr Sharpe as Acting CEO was present at the meeting and well able to obtain the advice. I agree.

9.57 I have not found, nor have I been provided with any authority for, the proposition that Reg. 9(1) allows the Mayor or the Council to interfere with activities that are clearly intended to be undertaken by the Administration. Should said authority exist, however, I agree with Counsel Assisting that this was not a situation that could justify interference of this sort. Mr Sharpe, as Acting CEO, was able to do what was required of him in these circumstances.

9.58 Lawyers for the Mayor did not address this in their Written Submissions in Reply. Submissions on behalf of Councillor Mason suggest that the City’s Legal Services Policy is on its face an internal working document only and does not directly bind the Elected Members. This submission does not, however, identify the basis for any authority to engage in what was effectively a matter for the Administration. As stated, no such authority has been brought to my attention.

9.59 Finding 20 of the Authorised Inquiry Report provides:

The decision taken by the Council to relinquish its membership of the SMRC was ill considered and made with unreasonable and unnecessary haste. It is apparent to the Inquiry that a majority of Elected Members had taken the view that it was politically advantageous to divorce themselves from the problems associated with the SMRC/RRRC, rather than stay and work with them (and the other member Councils) to find a solution to reduce the effect of the odour emissions.

9.60 I disagree in part. On the available evidence before me, I find that the decision to withdraw from the SMRC was not ill-considered. I do, however, agree that the decision was made with haste. In particular, the failure to allow the Administration sufficient time to review the advice from Hardy Bowen and then refer back to the Council any concerns it might have about the advice and the consequences of adopting it again shows a failure to integrate Council and Administrative decisions, concerns and, ultimately, actions of the sort expected by residents.
9.61 In relation to the issue of proper consideration, I note the following evidence:

(5) Councillor Daly said that she seconded a motion in 2007 to withdraw from the SMRC (T206). Mayor Delle Donne also referred to the 2007 consideration of withdrawal (T559) as did Councillor Barry (T1008) and Councillor Mason (T1090-T1091).

(6) Councillor Olsen (at T398) said the City had reflected on withdrawing from the SMRC for 12 months at least.

(7) The City had conducted some consideration of alternative disposal options in April 2007 (T555-T556 and T768); Alternative Waste Disposal Options for City of Canning April 2007.

(8) The City had received legal advice from two different solicitors setting out a range of issues concerning the proposed withdrawal from the SMRC, some of which extended back to 2008 – Report CM-008-09 (CI10/03177), Report CM-031-09 (CI10/03158) and Report CM-039-09 (CI10/03160).

9.62 I also agree with Counsel Assisting that there were cogent reasons for Elected Members to support the withdrawal (e.g. the ability to prosecute for odour emissions without having to effectively prosecute themselves as a member of the SMRC: CI10/03341 and CI10/03160).

9.63 One issue that does arise from this, however, is why it was necessary to hold the Special Council Meeting on 19 February 2009 and vote on the matter after having only just received the advice from Hardy Bowen. Councillors had, in fact, been given less than a day to review the advice when a vote was called for. It appears that some Councillors had not yet reviewed the advice and it is evident that the Administration had been given no time to review and comment on what would prove to be an important document.

9.64 The evidence before the Inquiry shows that there were different views as to why it was necessary to hold the Special Council Meeting on the evening of 19 February 2009 and vote on the matter after having only just received the advice from Hardy Bowen (Report CM-039-09, CI10/03160):

a) Councillor Olsen – “don’t know what the reasons for calling the urgent Special Council Meeting were”: T398;
b) Mayor Delle Donne – believed they wanted to have the legal adviser present because he was not available later on (T557) and ‘... you got to deal with it. We don’t want another saga like the Willetton Child Care Centre’ (T559);

c) Councillor Elliott – uncertainty about later availability of the legal adviser; the decision was put before us and we had a responsibility to make a decision (T769-T770);

d) Councillor Mason – no specific recollection of why it was necessary to withdraw at that time or on that date (T1092).

9.65 Even if the Council did need to hear from Michael Hardy that night, there was no reason why the Council needed to vote on the matter straight away, particularly given the date from which the decision to withdraw would take effect and in the absence of considered advice from the City’s officers. The effective date of withdrawal from the SMRC under clause 11 of the Establishment Agreement was the end of the financial year after the financial year in which notice was given: see page 14 of Report CM-039-09 (CI10/03160).

9.66 While there had been consideration given to withdrawing from the SMRC for some time, the evidence before the Inquiry establishes that the catalyst for the Council’s decision to vote to withdraw from the SMRC was the advice from Hardy Bowen. In all the circumstances it would have been prudent for the Council to defer dealing with the matter until the Administration had been given an appropriate amount of time to consider the implications of the advice and the impact of any decisions flowing from that advice on the City and its operations.

9.67 There was no satisfactory evidence before this Inquiry that explained why the Council needed to vote on the withdrawal on the night of 19 February 2009.

9.68 A further issue that raises concern in this regard is that the Council voted to withdraw without first having a contingency plan. The Council voted for immediate withdrawal from the SMRC but had not yet determined where the waste would go.

9.69 Lawyers for the Mayor did not address this issue in their Written Submissions in Reply. It was submitted on behalf of Councillor Barry that it had been evident to
Council for several years that its membership of the SMRC was not in the best interest of residents. A similar submission was made on behalf of Councillor Mason. These two submissions do not address my fundamental concern, outlined above, that the Council acted with haste on the night before they had had the benefit of advice from the City’s Administration regarding the legal advice, the consequences of withdrawal and the contingency plans necessary to move the City forward.

In the circumstances, I find that the Council acted with undue haste on 19 February 2009 to resolve to withdraw from the SMRC.

Finding 21 of the Authorised Inquiry Report provides:

At Council’s Ordinary Meeting of 19 February 2009, when the decision was made to withdraw from the SMRC, the Council did not give sufficient consideration to the financial implications to the City of withdrawing from membership.

I disagree. Based on the evidence made available to me, I find that the Council did have before them adequate materials to give sufficient consideration to the financial implications to the City of withdrawing from the SMRC.

The City had received detailed legal advice (Report CM-008-09 (CI10/03177); Report CM-031-09 (CI10/03158) and Report CM-039-09 (CI10/03160)) that addressed a number of financial implications arising from a decision to withdraw: see also CI10/03177 at pages 6, 15–17.

While it is true that the Council did not have before it a detailed report from the City’s Financial Officer, the identification of the financial implications from the legal advice were adequate to inform the Council.

In addition, it is noted that the withdrawal from the SMRC was financially advantageous to the City (T401 and T1009). This material was before the Council and there is no evidence to suggest that it had not been considered.
9.76 Finding 22 of the *Authorised Inquiry Report* finds:

*Council’s attempts to close all unmade road reserves to the east of Jandakot airport were in order to remove the ability of Jandakot Airport to pursue its preferred Eastern Link Road alignment. This would leave the City’s own Bannister Road proposal as the only option open to progress the proposal.*

9.77 I disagree. The conclusion implicit in Finding 22 is not supported by the evidence obtained by this Inquiry.

9.78 Councillor Olsen noted (at T409-T410) that there were logistical traffic flow benefits by adopting the Bannister Road option, particularly as it provided nearby access to Roe Highway. The types of heavy vehicles likely to utilise the new access way to Jandakot Airport would not need to traverse streets more commonly utilised by residents. The impact on preserved bushland would also be minimal. A similar view was expressed by Councillor Boylen (T719-T720), Councillor Elliott (T771) and Councillor Barry (T1015-T1016).

9.79 All of the above seems considered and reasoned. In evidence before me, these Councillors seemed genuinely to be of the view that, based on the materials they had before them as Councillors, their decision was sound. I agree and have no reason to question the veracity of the evidence behind their conclusion that extending Bannister Road was the preferred option.

9.80 Finding 23 of the *Authorised Inquiry Report* provides:

*Council preferred its Bannister Road option because it would impact adversely on the operations of the RRRC.*

9.81 This conclusion is also not supported on the evidence.

9.82 In evidence before me, Councillor Olsen emphatically rejected such an assertion (T410-T411).

9.83 I have no reason to question or doubt Councillor Olsen’s statements in this regard. Ms Olsen struck me as an individual of good character whose only interest here was to assist residents resolve what was an issue of considerable local concern.
While the end result may not have given these residents what they wanted, Ms Olsen’s intentions in this regard cannot be questioned.

Conclusions

9.84 I find that it was inappropriate for the Council to give Mayor Delle Donne authority to personally obtain a second legal opinion from Hardy Bowen Lawyers in relation to withdrawal from the SMRC. In doing so, the Mayor interfered with a role designated for Administrative officers.

9.85 Further, Councillors acted with undue haste by immediately voting on whether to withdraw from the SMRC once the second legal opinion in relation to this matter had been received. Councillors had had less than a day to review the legal advice in question. I note that the Special Council Meeting was adjourned for 15 minutes at the request of Councillor Clarke to enable Councillors to read the advice. This suggests that some Councillors had not had any opportunity to read the advice. The Administration had certainly not been given time to review it and could not, in the circumstances, comment on it.

9.86 I find that by voting when they did, when there was no urgency to do so and without any contingency plan, Councillors acted without the benefit of thorough advice from the City Administration about the legal advice, the full consequences of withdrawal and the contingency plans necessary to move the City forward.

9.87 In the circumstances, the Council failed to allow sufficient integration between the Council and the Administration, making decisions that would have benefited from the expertise of City Officers. In doing so, the Council failed to provide good government to the residents of the City of Canning. Good governance requires cooperation and mutual respect for the roles allocated to those charged with providing good government. In relation to the SMRC, the Council stepped outside of its role and acted without the benefit of expertise from those most able to assist Councillors with their decision making processes.
CHAPTER TEN

LEGAL SERVICES TENDER
CHAPTER TEN
LEGAL SERVICES TENDER

10.1 In relation to this issue, I repeat the following relevant facts as they appeared in the Authorised Inquiry Report, none of which are in dispute.

Background

10.2 The City had a three year Professional Services Contract with law firm McLeods, which was entered into on 1 July 2007. When the Contract expired on 30 June 2010, it was not renewed or renegotiated. It would appear that after this time, the City used McLeods on an ad-hoc basis until such time as new arrangements for the provision of legal services to the City were implemented.

Appointing a Legal Services Provider

10.3 In order to attend to the issue of the City not having a contracted legal services provider, it was suggested that Council give consideration to utilising the WALGA preferred supplier panel for the provision of legal services. The City’s (then) current legal services provider, McLeods, had recently been appointed to the WALGA preferred supplier panel. At Council’s Ordinary Meeting on 12 October 2010, a report was presented detailing this proposal (Report AF-133-10 – CI10/03178).

10.4 The Officers Recommendation in the Report to Council were:

That:

a) The Western Australian Local Government Association (WALGA) be invited to brief the Council on their legal services contract number TPS 0609 (expiry 22 June 2012) at a Confidential Forum.

b) Subject to (a) above a further report be presented to Council on this matter.

10.5 Instead of accepting the Officer Recommendation to receive a briefing on the benefits of using the WALGA preferred supplier panel, the Council chose to conduct a tender process to appoint legal service providers.
10.6 Specifically, the Council passed a motion moved by Councillor Barry, with an amendment proposed by Councillor Mason, in the following terms:

a) Seek expressions of interest from a suitably qualified Lawyer to be employed as an in-house Lawyer, as defined by the Chief Executive Officer.

b) Council apply tendering process from qualified/experienced law firms to undertake the City of Canning’s legal requirements.

c) Council invite WALGA to put forward pricing schedules of those legal firms outlined on WALGA Legal Services preferred supply panel, for consideration.

d) McLeods Barristers and Solicitors be invited to forward an expression of interest and pricing schedule, independent of the WALGA preferred supply panel if they so desire.

e) Council to advertise these expressions of interest for legal services for the City of Canning via and on days and on timeframe to be determined by the Mayor and the Chief Executive Officer.

f) Subject to (a), (b), (c), (d) and (e) above, no further Report be presented to Council on this matter.

g) An ability to include additional firms to the list in the future.

10.7 Tender 37/2010 “Provision of Legal Services” was advertised in The West Australian on 13 November 2010 and closed on the 29 November 2010 (CI10/99815).

10.8 As a result of the tender process, four Tenders were received from the following law firms:

- McLeods Barristers and Solicitors;
- Kott Gunnings Lawyers;
- Jackson McDonald Lawyers; and
- Doyles Construction Lawyers.

10.9 Letters of interest were received from two others:

- Civic Legal; and
- Freehills.
10.10 At Council’s Ordinary Meeting of 22 March 2011 (CI10/03163), the result of the legal services tender was presented in a Report to Council (Report CR-048-11 – CI10/03179).

10.11 The Officer’s recommendation was:

That:

(a) Council resolve to appoint a panel of suppliers for Tender 37/2010 – Provision of Legal Services including the following providers for a three year term, being:

   i. McLeods Barristers & Solicitors
   ii. Kott Gunning Lawyers
   iii. Jackson McDonald Lawyers

(b) A further report be provided to Council detailing the amendment to Policy CM108- Legal Advice with specific reference to how legal service will be obtained utilising the Panel of suppliers detailed in (a) above.

(c) That all successful, unsuccessful Tenderers and parties that lodged letters of interest be advised of Council’s decision and be thanked for their interest in the Tender.

10.12 A motion moved by Councillor Barry subsequently recommended that the Officer's Recommendation not be adopted because:

The new position for Manager Legal and Democracy Services is currently advertised and when appointed should be involved in the selection assessment and will provide further input to the process for the appointment of external legal services.

10.13 Councillor Barry's motion was then put as follows:

a) That no tenders be accepted.

b) Following the appointment of the Manager Legal and Democracy Services a further report is presented to Council on the Provision of Legal Services.

c) That all Tenderers and parties that lodged letters of interest be advised of Council's decision and be thanked for their interest in the Tender.
10.14 After further amendments, neither the Officer’s Recommendation nor Councillor Barry’s alternative motion was adopted. In the end, no tenders were awarded.

10.15 On 4 July 2011 a 'Manager of Legal and Democracy Services' was appointed to the City. At this time no formal arrangement for the provision of legal services to the City existed. However, three providers (McLeods Barristers and Solicitors, Civic Legal Pty Ltd and Hardy Bowen Lawyers) continued to provide legal services to the City.

10.16 Some eighteen months after the original legal services contract expired, a report was presented to Council at its Ordinary Meeting of 13 December 2011 (Report CR-217-11 – CI19/03180) with a recommendation to accept the three law firms that had previously been recommended be invited to brief the Council on their legal services with a view to appointing one or more of them. The recommendation read:

That:

(a) The following suppliers are invited to brief the Council, by mid February 2012, on their legal services, with a view to the Council appointing one or more for a three year term, commencing 1 March 2012:

i. McLeods Barristers & Solicitors

ii. Kott Gunning Lawyers

iii. Jackson McDonald Lawyers

(b) subject to (a) above, a further report be provided to Council detailing the required amendments to Policy CM108 – Legal Advice, with specific reference to how legal services will be obtained utilising a Panel of suppliers: CI10/03180 at page 4).

10.17 When this item came up for consideration, Councillor Barry moved an amendment to the Officer’s Recommendation requiring the addition of another three legal firms to the list. These were:

- Freehills,
- Minter Ellison and
- Civic Legal.
10.18 Part of Councillor Barry's motion called for a requirement for Council to give consideration to other unnamed legal firms who expressed an interest in briefing Council and being added to the legal services panel. The minutes of the meeting indicate Councillor Barry agreed to withdraw that part of his motion after being advised that it would require going to tender again.

10.19 The motion was then put and Council's decision was:

That:

(a) The following suppliers are invited to brief the Council, by mid February 2012, on their legal services, with a view to the Council appointing one or more for a three year term.

i. McLeods Barristers & Solicitors
ii. Kott Gunning Lawyers
iii. Jackson McDonald Lawyers
iv. Freehills
v. Civic Legal
vi. Minter Ellison

(b) subject to (a) above, a further report be provided to Council detailing the required amendments to Policy CM108 – Legal Advice, with specific reference to how legal services will be obtained utilising a Panel of suppliers.

CARRIED

For: The Mayor, Councillors, Mason, Daly, Olsen, Barry, Elliott, Boylen and O'Donnell

Against: Councillors Clarke and Morgan (CI10/00995 at page 107)

Mayor's and Deputy Mayor's Lunch

10.20 The Authorised Persons Inquiry located email correspondence dated 18 August 2011 (CI10/01899), between Councillor Mason and three representatives of Civic Legal. This was before Council's decision to invite Civic Legal “to brief the Council,
by mid February 2012, on their legal services, with a view to the Council appointing one or more for a three year term”. The email read:

Subject: Lunch

Guys

Thanks again for the opportunity to meet and the lunch yesterday, I know the mayor and I found it most informative. I would be interested in following up a few business matters with Richard and wondered if you could supply his contact details as he didn't have a card with him.

Look forward to supporting your expertise when our legal tender items returns to Council

Best regards Bruce Mason.

10.21 This lunch meeting was not disclosed at the Council meetings in which Civic Legal was discussed. Nor was the value of the lunch entered in the City's gift register. The evidence from the Mayor and Councillor Mason before the Authorised Persons Inquiry was that:

- They both attended a luncheon hosted by representatives of Civic Legal in West Perth on Wednesday 17 August 2011, although the Mayor's recollection was that this was at the Parmelia Hotel.
- No declaration or disclosure in the City's gifts register appears for this luncheon. (The value of the luncheon needed to be above $50 to require entry in the gift register).
- No other elected member was apprised of the meeting, its purpose or result.

10.22 Evidence before the Inquiry also revealed that the Mayor had previously engaged Civic Legal to work on his behalf in a private debt recovery action (CI10/01289). Further, the Mayor had used his Council email address and signature block when corresponding with Civic Legal in relation to this matter. Finally, the evidence revealed that the Mayor did not disclose this prior professional relationship to the Council when it was agreed to add Civic Legal to the list of potential legal service providers.
Analysis

10.23 Finding 28 of the Authorised Inquiry Report provides:

It was inappropriate for Mayor Delle Donne to have used his City provided email address and his Mayoral office title in conducting his private business.

10.24 In reviewing the evidence before the Inquiry, Counsel Assisting submitted that the use by the Mayor of his Mayoral email account to conduct personal business was technically a breach of Rule 5.1(c) of the City's Code of Conduct CM-100 (CI10/03471) as that provision does not contain a reasonable personal use provision. Counsel Assisting went on to note, however, that the breach was a minor one.

10.25 The submission made on behalf of the Mayor on this point was also that the use was of a minor nature. Reference was also made in the Mayor’s submissions to Reg. 21(e)(i) of the Local Government (Administration) Regulations 1996. An examination of this provision demonstrates that it applies to interests that need not be disclosed for the purposes of section 5.63(1)(h) of the Local Government Act, which deals with disclosure of financial interests. As such, it is not directly on point. Nonetheless, in the context of reasonable personal use which I take to be the import of the submission, I understand the basis of the argument.

10.26 In view of the evidence obtained by the Inquiry, I am inclined to accept the submissions made by the Mayor. The Mayor did breach Rule 5.1(c) of the City’s Code of Conduct and Finding 28 of the Authorised Inquiry Report was thus properly made out. However, the breach in question was of a minor nature.

10.27 I note further that it would no doubt assist Elected Members in the future if the City’s Code of Conduct were redrafted to acknowledge reasonable personal use of facilities provided by the City.
10.28 Finding 29 of the Authorised Inquiry Report provides:

Mayor Delle Donne and Councillor Mason failed to disclose their luncheon with Civic Legal representatives before the motion dealing with inviting Civic Legal “to brief the Council, by mid February 2012, on their legal services, with a view to the Council appointing one or more for a three year term.”

This was an “interest” that could, or could reasonably be perceived to, adversely affect the impartiality of Mayor Delle Donne and Councillor Mason for the purposes of Regulation 11 of the Local Government (Rules of Conduct) Regulations 2007.

10.29 Regulation 11 of the Local Government (Rules of Conduct) Regulations 2007 reads:

11. Disclosure of interest

(1) In this regulation —

“interest” means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.

(2) A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting attended by the member must disclose the nature of the interest —

(a) in a written notice given to the CEO before the meeting; or

(b) at the meeting immediately before the matter is discussed.

(3) Subregulation (2) does not apply to an interest referred to in section 5.60 of the Act.

(4) Subregulation (2) does not apply if —

(a) a person who is a council member fails to disclose an interest because the person did not know he or she had an interest in the matter; or

(b) a person who is a council member fails to disclose an interest because the person did not know the matter in which he or she had an interest would be discussed at the meeting and the person disclosed the interest as soon as possible after the discussion began.

10.30 Counsel Assisting’s submissions in relation to this issue are convincing and bear repeating here given the quite serious nature of the allegations made in the Authorised Inquiry Report.
10.31 Mayor Delle Donne asserted (at T568) that he did not declare the luncheon because it was not a notifiable gift under Local Government Regulation 30A.

10.32 Councillor Mason said that he did not declare the luncheon because the value was less than $50 (T1097-T1099). Nonetheless, in giving his evidence, Councillor Mason demonstrated that he had an inconsistent approach to whether he would declare a gift that was not necessarily dependent upon its value.

10.33 I agree with Counsel Assisting that it is of concern that Councillor Mason felt that he could approach the question of declaring gifts in such an inconsistent manner. Such an approach does not promote transparency or accountability.

10.34 The email sent by Councillor Mason to Civic Legal on 18 August 2011 (CI10/01899) contains a concerning comment at the end that could give rise to a perception of bias, namely:

   Look forward to supporting your legal expertise when our legal tender item returns to Council.

10.35 During his evidence, Councillor Mason conceded that this had been a bad choice of words (T1096 – 1097, 1099 CI10/03349). I accept the Councillor’s version of events here and do not believe, based on the evidence before me, that his actions demonstrate any ulterior motive or bias.

10.36 The regulation that Mayor Delle Donne was referring to is in fact Reg. 12 of the Local Government (Rules of Conduct) Regulations 2007 which relevantly provides:

   (1) “notifiable gift”, in relation to a person who is a council member, means –

   a) a gift worth between $50 and $300; or

   b) a gift that is one of 2 or more gifts given to the council member by the same person within a period of 6 months that are in total worth between $50 and $300; ...
(3) A person who is a council member and who accepts a notifiable gift from a person –

(a) who is undertaking or seeking to undertake; or

(b) who it is reasonable to believe is intending to undertake,

an activity involving a local government discretion must, within 10 days of accepting the gift, notify the CEO of the acceptance in accordance with subregulation (4)

10.37 I agree with Counsel Assisting that, in the circumstances, the value of the luncheon provided by Civic Legal to Mayor Delle Donne and Councillor Mason did not reach the threshold for notification under regulation 12.

10.38 I also note that the motion on 13 December 2011 by Councillor Barry was inter alia to add Civic Legal to the list of legal firms to be invited to brief the Council on the supply of legal services to the City: see page 106 of the Ordinary Council Minutes, CI10/00995.

10.39 I agree with Counsel Assisting that, as the motion went no further than adding Civic Legal to the list of legal firms to brief the Council, it is difficult to see how the failure by the Mayor and Councillor Mason to disclose to the Council the fact of the lunch could demonstrate some element of favouritism or positive bias at that point in time.

10.40 Likewise, while the conclusion drawn in Finding 29 above is potentially open, given the lunch could potentially amount to an ‘interest’ under Reg. 11, the preferable view is that the mere fact of a lunch, some 4 months before the motion is put, does not amount to an interest that could, or could reasonably be perceived to, adversely affect (their) impartiality, particularly when the motion at the time went no further than an invitation to address the Council.

10.41 The Inquiry received a detailed Written Submission in Reply from McLeods Lawyers that dealt in part with the attendance of the Mayor and Councillor Mason at the Civic Legal lunch, coupled with Councillor Mason’s email (referred to above), submitting that these were matters that could reasonably be perceived to affect
their impartiality and should have been disclosed prior to the resolution of 13 December 2011 because the resolution in question went beyond merely adding another legal firm to the list of firm to make presentations to Council and extended to the item on the agenda itself, namely, the new legal services provider.

10.42 For the foregoing reasons, I prefer the analysis of Counsel Assisting on this matter and consequently find that Finding 29 of the Authorised Inquiry Report is not made out.

10.43 Finding 30 of the Authorised Inquiry Report provides:

There is sufficient indication that Mayor Delle Donne was ‘closely associated’ with Civic Legal within the meaning of Regulation 20(1) and 20(2) Local Government Administration Regulation. However the Mayor failed to disclose at the 13 December 2011 Ordinary Council Meeting his interest rising out of his business relationship with Civic Legal.

10.44 Regulation 20(1) and 20(2) Local Government Administration Regulation provides:

20. Closely associated persons, matters prescribed for (Act s. 5.62)

(1) In subregulation (2) —

client or adviser means a person who supplies, or receives, legal or financial professional services.

(2) A relevant person who, within the previous 12 months, was a client or adviser of a relevant person is a person of a class of persons prescribed for the purposes of section 5.62(1)(ca).

10.45 Evidence obtained by the Inquiry establishes that Mayor Delle Donne was a client of Civic Legal prior to 13 December 2011: T167 and T568.

10.46 Mayor Delle Donne indicated (at T568) that he did not declare that he was a client of Civic Legal because as he understood the Local Government Act 1995 and the Regulations, he could not be deemed to have a ‘close association’, notwithstanding he had paid a bill rendered by Civic Legal for services rendered in the amount of $125.
10.47 The Mayor’s understanding of the operation of Reg. 20 is incorrect. Subregulation 20(1) relevantly provides that for the purposes of subregulation 20(2), a client or adviser means a person who supplies, or receives, legal or financial professional services.

10.48 The Mayor was receiving legal services from Civic Legal and Civic Legal was, in turn, providing such services to the Mayor. Accordingly, pursuant to subregulation 20(2) the Mayor was a class of persons prescribed for the purposes of section 5.62(1)(ca).

10.49 Section 5.62(1)(ca) of the *Local Government Act* relevantly provides:

(1) For the purposes of this Subdivision a person is to be treated as being closely associated with a relevant person if –

...

(ca) the person belongs to a class of persons that is prescribed.

10.50 I agree with Counsel Assisting that merely being a person with a close association does not give rise to having an interest in a matter pursuant to section 5.60 of the *Local Government Act 1995*. Specifically, in order for that provision to be enlivened, the Mayor or a person with whom the Mayor was closely associated would also need to have either a direct or indirect ‘financial interest’ in the matter or have a ‘proximity interest’ in the matter.

10.51 The evidence does not establish that Mayor Delle Donne was to receive any financial advantage by supporting Civic Legal in obtaining work from the City. It cannot be said, therefore, that the Mayor had a ‘financial interest’.

10.52 The Written Submission in Reply from McLeods Lawyers further submitted that Civic Legal could have a financial interest in the matter if it was reasonable to expect that Council would ultimately select them to be the new legal services provider. It was submitted that if such a financial interest existed, relevantly for the purposes of section 5.60 of the *Local Government Act* the Mayor would also have a financial interest which he would have been obliged to disclose.
10.53 Having considered the evidence obtained by the Inquiry on this matter, I am not satisfied that there is sufficient evidence to find that Civic Legal had a financial interest as contended by McLeods. The evidence does not permit me to find, to the requisite standard, that it was reasonable to expect that if the relevant matter was dealt with in a particular way that Civic Legal would actually receive a financial benefit. The evidence shows that at the time there were to be presentations by other law firms and Council still had to consider which firm it would ultimately select, if any.

10.54 Further, the evidence given by Mr Anthony Quahe who was the Managing Principal of Civic Legal (T167) was to the effect that in his discussions with the Mayor and Councillor Mason during the lunch referred to above, he indicated that irrespective of what was being considered internally, the point that he wanted to make was that it was not necessary to put Civic Legal on any panel because they were already on the WALGA panel. Mr Quahe went on to note that, in his view, it was just not necessary to go through an entire tendering process to use Civic Legal’s services. As Mr Quahe stated, Civic Legal’s services could be secured by a letter engaging them on a particular matter.

10.55 I have no reason to doubt the evidence provided to the Inquiry by Mr Quahe.

10.56 Overall, I agree with the analysis submitted to me by Counsel Assisting that the relevant resolution was one preliminary to any substantive decision to be made by the Council that would have warranted disclosure by the Mayor and Councillor Barry of their lunch with Civic Legal. Having determined the resolution of 13 December 2011 to be in the nature of a preliminary decision that preceded the determination/composition of the City’s new legal services provider, it was open to the Mayor, and others who may have had a relevant interest to declare it prior to any substantive motion coming before Council to consider. In that event, there would have been compliance with the relevant statutory provisions.

10.57 Consequently, I find that Finding 30 of the Authorised Inquiry Report is not made out.
10.58 It is arguable, however, that having been a recent client of Civic Legal, this was an ‘interest’ for the purposes of Reg. 11 of the *Local Government (Rules of Conduct) Regulations 2007*, in that it could reasonably be perceived to adversely affect his impartiality.

10.59 In that regard, I agree with Counsel Assisting that the Mayor’s failure to make a declaration in accordance with Reg.11 represents a minor breach for the purposes of section 5.105(1) of the *Local Government Act*.

**Conclusions**

10.60 I find that it was inappropriate for the Mayor to use his City email address and his Mayoral office title in conducting private business with Civic Legal. This conduct breached Rule 5.1(c) of the City’s Code of Conduct. Finding 28 of the *Authorised Inquiry Report* is thus made out. I find, however, that the breach in question was of a minor nature.

10.61 I also find that Councillor Mason failed to declare gifts in an inconsistent manner. While no illegal conduct is suggested here, inconsistency of this sort fails to instil public confidence in elected officials. Transparency is a core feature of good governance.

10.62 I also find that the Mayor’s failure to declare his relationship with Civic Legal in accordance with Reg.11 represents a minor breach for the purposes of section 5.105(1) of the *Local Government Act*. I would also add that, even if it could be found that the Mayor’s actions did not constitute a minor breach of the Act, in the interests of transparency and consistent with the Mayor’s professed concern to ensure that Elected Members knew all the facts to be able to make an informed decision, the Mayor ought to have disclosed that fact prior to the Ordinary Council Meeting of 13 December 2011. To not do so is quite simply a very bad look and one that risks undermining the credibility of Councillors in the eyes of local residents – residents who very much deserve to know that elected Councillors are being completely transparent. Councillors need to be aware of the risks to good
governance attached to public perceptions of improper conduct, even if no improper conduct per se has occurred.

10.63 Overall, I do not agree with the majority of findings made in the Authorised Inquiry Report in relation to this issue. I do not find that Mayor Delle Donne and Councillor Mason breached Regulation 11 of the Local Government (Rules of Conduct) Regulations 2007 in failing to disclose their luncheon with Civic Legal representatives before the motion inviting Civic Legal to brief the Council, by mid February 2012, on their legal services, with a view to the Council appointing one or more for a three year term.

10.64 Further, I do not find that there is sufficient evidence before the Inquiry to demonstrate that Mayor Delle Donne or Civil Legal had a relevant financial interest within the meaning of section 5.60 of the Local Government Act 1995.

10.65 I do find, however, that having been a recent client of Civic Legal, this was an ‘interest’ for the purposes of Reg. 11 of the Local Government (Rules of Conduct) Regulations 2007, in that it could reasonably be perceived to adversely affect the Mayor’s impartiality. In the circumstances, I find that the Mayor’s failure to make a declaration in accordance with Reg.11 represents a minor breach for the purposes of section 5.105(1) of the Local Government Act.

10.66 Overall, I find that in relation to the Legal Services Tender while mistakes were clearly made by the Mayor and Councillor Mason, there was no ulterior or improper motive in relation to their actions. In the circumstances, contrary to the conclusions drawn in the Authorised Inquiry Report, I do not find that there was a failure to provide for the good government of residents in the City of Canning in relation to this issue.
CHAPTER ELEVEN
WILLETTON CHILDCARE CENTRE

Background

11.1 The background facts in relation to this issue are well canvassed in the Authorised Inquiry Report. I agree with the factual summary provided in that Report and repeat all relevant and undisputed facts below.

11.2 The Willetton Childcare Centre (the “WCCC”) was established in 1986. It is a not-for-profit organisation that provides child care services in the Willetton area. It is managed by a volunteer committee of parents on behalf of the Department of Community Development (now called the Department of Local Government and Communities).

11.3 The Department of Community Development (as it then was) built the building that the WCCC now uses. The City has owned the land upon which it is situated since 8 November 1978.

11.4 The Department of Community Development subsequently leased the land back from the City via a 21 year lease for an annual ‘peppercorn’ rent of one dollar.

11.5 In August 2006 the City of Canning received a new draft lease from the Department for Community Development involving the City as lessor and the Department for Communities as lessee. For reasons that are unclear to the Inquiry, this draft lease was never signed.

11.6 In May 2007 the original lease agreement between the City of Canning and the Department of Communities expired. A ‘holding over’ clause in the original lease agreement provided that the Department of Communities continued to be responsible for the maintenance of the WCCC premises.
11.7 The new draft lease was provided to McLeods Barristers and Solicitors who subsequently provided advice to the City of Canning in May 2008 highlighting concerns. The new draft lease was then referred back to the Department of Community Development. Between June 2008 and May 2010, numerous discussions were had between the City and the Department regarding the appropriate terms for the new draft lease.

11.8 There is no evidence before the Inquiry to suggest that any delays in this regard were due to any failure on the part of McLeods.

11.9 What is clear from the evidence is that nothing was presented to the Council until September 2010 – some three years after the expiry of the original lease.

Ordinary Council Meeting 14 September 2010

11.10 At the Ordinary Council Meeting of 14 September 2010 (CI10/03131), the Council was presented with Report CS-086-10 (CI10/03145).

11.11 The Report outlined a new draft lease for the WCCC. It recommended as follows:

That:

a) A new lease be entered into with the Department for Communities through the Minister for Community Services on the terms detailed in Report CS-086-70 and summarised as follows:

i) Use – Child Care Centre;

ii) Term – 10 years plus 10 year option;

iii) Rental – The equivalent of annual rates payable to the City as if the land was rateable, inclusive of any Emergency Services Levy;

iv) Outgoings – responsibility of the lessee;

v) Maintenance and Insurance – responsibility of the lessee; and

vi) Lease costs – responsibility of the lessee.

b) Authority be given for the signing and affixing of the Common Seal to the above lease agreement between the City of Canning and the Minister for Community Services (CI10/03145).
11.12 A comment in the conclusion of the Report reads:

_Given the amenity provided to the community by the facility it is recommended that a new lease be entered into within the parameters detailed in this Report._

11.13 The Council did not accept this Recommendation. Instead, the Council passed a motion, moved by Councillor Olsen, that the item be moved to a Council Forum for “further discussion on the lease to the Willeton Child Care Centre”.

11.14 Councillor Olsen’s motion was passed unanimously.

_Council Forum 25 November 2010_

11.15 A Council Forum to discuss the WCCC lease was held on 25 November 2010 (CI10/00612).

11.16 Geoff Moor, the City’s Manager of Recreation Services, conducted a presentation on the issue to those Elected Members who attended. Mr Moor provided them with further information in relation to the location, area leased, relevant background on the lease and the current lease proposal of 10 years with a 10 year option (CI10/00612 at pages 1 and 2).

_Follow up Email from Fiona Armstrong_

11.17 On 20 December 2012, following the Forum, the City’s then Executive Client and Customer Services, Fiona Armstrong, emailed Mayor Delle Donne regarding the WCCC lease (CI10/00580).

11.18 That email read:

_We had a good meeting this morning with the President of Willeton[sic] Child Care. They are reporting strong demand and few vacancies. Dept of Communities has just upgraded the building (new roof etc) and they are now pursuing Lotterywest for funding to upgrade kitchen area._
Dept of Communities do not currently charge them any rent although they are aware of and expecting to pay the rates equivalent in rent when the new lease is drawn up. There is no advantage to them of leasing directly from us (as Dept currently picks up legal fees as well). They are keen to secure a 5 + 5 lease as a minimum. If this is ok, we will progress the lease with the dept on a 5 +5 basis and have it ready for council approval in January.

The forum had also asked for information on the centre's charges:

They currently charge families $70.00 per day or $300.00 per week for child care. These fees apply to all age groups and include meals which comprise of morning tea, lunch, afternoon tea and for those children still in our care late in the day a late snack. The centre is licensed to care for 48 children daily. Families are charged a one off $20.00 enrolment fee to cover administration costs and children’s hats for sun care etc: CI10/00580.

11.19 Having reviewed the evidence, I agree with the comments made in the Authorised Inquiry Report that in order to comply with legislation relating to the preparation of meals, the City’s Health Local Laws, and requirements of the Department for Communities relating to kitchen amenities for child care centres, the WCCC had applied to Lotterywest for a grant to refurbish the centre’s kitchen, which required upgrading in order to meet these legal requirements. Further, a condition that Lotterywest had imposed on the issuance of a grant was that the City provide confirmation that a new lease would be entered into between the Department for Communities and the City.

11.20 To evidence this support, Mark Dacombe, as CEO, sent a letter to Lotterywest dated 21 December 2010 stating:

Currently, the renewal of the lease between the City of Canning and the Department for Communities is receiving consideration and it is intended that a new lease will be formalised in the New Year: CI10/01789.

Ordinary Council Meeting 18 January 2011

11.21 Following the Council Forum of 25 November 2010, an Officer’s Report (Report CS-004-11 – CI10/03146) was presented to Council at its Ordinary Council Meeting of 18 January 2011.
11.22 The Report recommended that Council agree to sign the draft lease, now with a five year lease period with an option to renew the lease for a further five years. The previous Recommendation was for a 10 year lease with 10 year option to renew.

11.23 As explained in the Authorised Inquiry Report, aside from the five year terms, the recommendation was consistent with the advice CEO Mark Dacombe had sent in his earlier 21 December 2010 letter to Lotterywest.

11.24 The full Recommendation to Council was:

That:

a) A new lease be entered into with the Department for Communities through the Minister for Community Services on the terms detailed in Report CS-004-11 and summarised as follows:

i) Use – Child Care Centre;

ii) Term – 5 years plus 5 year option;

iii) Rental – The equivalent of annual rates payable to the City as if the land was rateable, inclusive of any Emergency Services Levy;

iv) Outgoings – responsibility of the lessee;

v) Maintenance and Insurance – responsibility of the lessee; and

vi) Lease costs – responsibility of the lessee

b) Authority be given for the signing and affixing of the Common Seal to the above lease agreement between the City of Canning and the Minister for Community Services.

11.25 The Council did not accept this Recommendation. Instead, Council passed a motion, moved by Councillor Mason, that:

MOVED Councillor Mason, Seconded Councillor Barry, that this item be deferred to a Council Forum to allow Council to address Section 3.58 of the Local Government Act 1995 in relation to the Lease, Rent, Sub-letting, Maintenance and Rubbish Collection and disposition of the site.

11.26 The motion was passed unanimously.
Section 3.58 of the Local Government Act 1995


11.28 I note that the Officer’s Report to Council (CS-004-11) did not raise any issues with reference to section 3.58: CI10/03146. I will address this in due course below.

11.29 Section 3.58 outlines the steps a local government is required to take when disposing of property. It defines the term ‘dispose’ as, “…to sell, lease, or otherwise dispose of, whether absolutely or not…” and the term ‘property’ to mean “…the whole or any part of the interest of a local government in property, but does not include money.”

11.30 As highlighted in the Authorised Inquiry Report, whilst the requirements of section 3.58 of the Act appeared relevant to the City, as it was proposing to “…lease…part of the interest of a local government in property…”, the provisions did not actually apply to the proposed disposition to the Department of Communities as an exemption exists in Regulation 30(2)(c)(ii) of the Local Government (Functions and General) Regulations 1996 in relation to dispositions to government agencies. That regulation reads:

30. Dispositions of property excluded from Act s. 3.58

(1) A disposition that is described in this regulation as an exempt disposition is excluded from the application of section 3.58 of the Act.

(2) A disposition of land is an exempt disposition if —

...

(c) the land is disposed of to —

...

(ii) a department, agency, or instrumentality of the Crown in right of the State or the Commonwealth;...

11.31 The Officer’s Report did not make this clear. It is also evident from the Minutes for this meeting (CI10/03133) that Councillor Mason’s motion to move the issue to
another Forum was put and voted on without any consultation with a City of Canning Officer.

Lotterywest Grant Approved

11.32 During this period, a Lotterywest grant to the WCCC for an amount of approximately $132,000.00 was approved to enable the WCCC to undertake its kitchen upgrades. The payment of this grant was contingent upon the signing of a new lease.

Advice Sought from External Sources

Legal Advice from McLeods

11.33 On 8 April 2011 the City sought legal advice from its legal advisers, McLeods, regarding the issues surrounding the now expired lease and the ongoing tenancy arrangements the WCCC had with the Department for Communities.

11.34 The response from McLeods, dated 13 April 2011 (CI10/01792), outlined to the City that:

1. Whilst the Minister for Communities remained in possession of the premises, the use of the premises was now subject to a periodic tenancy (due to the expiration of the original lease in 2007) which could be terminated by the City with one month’s notice;

2. If this occurred, the entire premises, including the building and any improvements would become the responsibility of the City; and

3. The legal advice confirmed the City was exempt from applying the requirements of section 3.58 of the Act for the disposition of the property.

Advice from Landgate

11.35 On 10 May 2011, having received this legal advice from McLeods, the City sought further information and advice from Landgate in relation to the current valuation
of the land and buildings and indicative rental that could be obtained from the premises based on a number of alternative scenarios.

11.36 Landgate’s response detailed three scenarios for the City to consider. It is considered that these scenarios were presented in accordance with the instructions from the City:

_Fair Rental for the existing premises as a child care centre (to a commercial operator)_

The market rental for a child care centre is based on a rate per child per annum. Our market evidence for childcare centers indicate a rental rate of $1300 to $1400 per child per annum net of outgoings is applicable for the subject premises.

Based on the subject premises being licensed for 48 children a rental in the range of $62,400 to $67,200 per annum is applicable to the subject premises.

_Fair rental for the existing premises for an alternative use_

Based on the rezoning of the premises to a commercial or retail zoning it may be possible to utilise the premises for an alternate use.

Based on the plans provided, the building area is approximately 355 square metres. The location of the subject site is considered quite secondary with limited street front exposure.

We consider retail or commercial use of the site would be unlikely unless it formed part of an extension to the existing Southland Boulevard Shopping Centre. This would require the sale of the land to the adjoining owner which would seem an unlikely scenario.

Our recent research into suburban offices indicate suburban office rates in the range of $250 to $300 per square meter per annum for profile areas such as Belmont, Booragoon and Myaree. The conversion of the existing premises into offices would at best yield a rental of say $200 per square metre per annum net, taking into consideration the location of the premises. This option results in an annual rental that is similar to the market rental for the existing use as a child care centre. Therefore it would not be economically viable to undertake the cost of converting the premises for office use. In addition we are of the opinion the leasing market for a childcare centre in this location in Willetton would be stronger than the leasing market for an office in this locality.

_Fair ground rental for the lease area_

Based on our previous conclusions above, we consider the current use of the site for a child care centre to be the highest and best use. Therefore we consider the option to demolish the existing improvements and lease the land on a ground rental to be economically unviable (CI10/01793).
11.37 The letter from Landgate concluded, amongst other things:

As requested this rental is on the basis that the premises’ is leased on the open market to a commercial operator.

11.38 Having reviewed the evidence, I agree with the factual summary provided in the Authorised Inquiry Report that, at this point, the City had approached the matter of the lease renewal with a view to entering into a new lease on a commercial rent basis. It is also apparent that the Council did not see any value in continuing with an arrangement whereby the City would lease the premises to the Department for Communities, who would then lease the premises to the WCCC. It would also appear that the Council’s preference was for the City to lease the premises directly to the WCCC.

Council Forum 29 June 2011

11.39 During the Council Forum on 29 June 2011 (CI10/01794) Councillors present witnessed a presentation outlining four options of fair rental if the WCCC leased directly from the City.

11.40 Four options were presented to the Council. They were:

- Continue with peppercorn rent;
- Adopt annual rent equivalent to Council rates;
- Adopt a new rental amount based on precedent rental rates for other community facilities; and
- Adopt a new rental amount based on a new sliding scale formula.

Ordinary Council Meeting 12 July 2011

11.41 The matter was again presented to the Council for a decision at its Ordinary Council Meeting of 12 July 2011: CI10/03135. This was done via Report CS-041-11 (CI10/03147), outlining a new lease for the WCCC.
11.42 This Report outlined five possible options. However, no option was outlined as the preferred option in the Officer’s Recommendation: CI10/03147 at page 5.

11.43 Evidence provided by some Councillors during the public hearings indicated that the omission of a preferred option lead the Council to refer the issue to a Council Forum for the third time because Councillors felt they required more information (T389-390, T47, T763, T1002, T1084).

Dealings with Lindsay Holland

11.44 The evidence shows that the now considerable delay in finalising the WCCC lease caused increased frustrations with people connected to the WCCC – in particular, the President of the WCCC, Lindsay Holland.

11.45 On a number of occasions Mr Holland attended Council Meetings, asked questions during public question time and attempted to seek clarification on when the lease would be finalised.

Public Question Time

11.46 Mr Holland attended the Ordinary Council Meeting on 26 July 2011 (CI10/03125). Both the audio and Minutes from the Ordinary Council Meeting of 26 July 2011 indicate that Mr Holland challenged the Council about the lease during public question time. He informed Council that the WCCC had until February 2012 to have a new lease in place or they would lose access to the $132,000 Lotterywest grant to renovate their kitchen (CI10/03125 at paragraph 4, page 8).

11.47 The questions Mr Holland asked were put on notice. He was provided with a written response on 23 August 2011 (CI10/01796). A review of that letter demonstrates to me that Mr Holland did not receive any clarification in relation to the questions raised by him. It simply noted the responses that were provided to Mr Holland during public question time on 26 July 2011.
11.48 Mr Holland again attended Ordinary Council Meetings on 9 August 2011, 23 August 2011 and 13 September 2011. He again asked questions during public question time.

11.49 The evidence shows that during exchanges between Mr Holland and Mayor Delle Donne on these dates, Mr Holland was seeking answers about the tenure of WCCC.

11.50 During the Inquiry’s public hearings evidence given by Mark Dacombe, Councillor Morgan and Councillor Boylen, described Mayor Delle Donne’s interactions with Mr Holland during public question time as insensitive and unacceptable. Mark Dacombe stated:

...a completely unnecessary level of animosity, pugilism” and that “...the personal interactions were rude...” (T82).

11.51 Councillor Morgan was also of the opinion that Mr Holland was not treated well:

I thought he was treated very badly...the manner the Mayor dealt with him. The language...He was very dismissive of Mr Holland’s questions and his concerns and he just kept saying ‘it’s confidential. I can’t discuss it’ (T682).

11.52 Councillor Boylen also stated that Mr Holland was treated unfairly and with unwarranted suspicion:

...basically a man who always acted with real decorum and respect towards Council was treated in a very high handed manner and with suspicion...” (T717).

11.53 The Inquiry was also played an audio recording of one such exchange between the Mayor and Mr Holland on 9 August 2011 (CI10/02078). Having listened to that audio tape during the course of public hearings and having reviewed it again subsequently I find that the tone used by the Mayor when speaking to Mr Holland was indeed combative and disrespectful.
Review of Community Use Buildings: Ordinary Council Meeting of 13 September 2011

11.54 During the Ordinary Council Meeting of 13 September 2011 (CI10/01682) Council was presented with Report CS-054-11: Review of Community Use Buildings (CI10/03148). The Report outlined a land and property asset review of the City of Canning’s assets and set out the scope for the proposed review.

11.55 Mr Holland again attended this meeting and asked questions of the Council. Having reviewed the minutes for this meeting it appears that few answers were provided and that the Council was of the view that they could not respond due to a belief that the matter was confidential: see pages 9-10 of the Minutes of 13 September 2011 (CI10/01682).

WCCC Becomes a Part of Community Asset Review: 13 December 2011

11.56 During the Ordinary Council Meeting of 13 December 2011 (CI10/00995) the Council was presented with Report CE-047-11: Land and Property Asset Strategy Action Plan: CI10/03149.

11.57 This Report, presented by the City’s Executive City Futures, Dr Mike Mouritz, was intended to seek Council approval for the development of a plan that would catalogue, assess and report on future action needed to adequately manage the City’s assets and landholdings.

11.58 It appears from the evidence that the WCCC become a part of this asset plan, resulting in the lease remaining undetermined and leaving the future of the WCCC in a shroud of uncertainty. The Council resolved that it would not consider any further lease requests until the review was undertaken.

11.59 Council’s decision to incorporate the WCCC into the asset plan and interpret dealings with the WCCC lease as confidential, resulted in further delay and left interested parties uninformed and uncertain about the future of the WCCC: CI10/00732; CI10/00228.
Ordinary Council Meeting 24 January 2012

11.60 As outlined in the Authorised Inquiry Report, the subject was revisited at Council’s Ordinary Meeting held on 24 January 2012 at which a report was submitted entitled ‘Land and Property Asset Strategy Action Plan Update’ (Report CE-003-12 – CI19/03151).

11.61 The Council voted as follows:

MOVED the Mayor, Seconded Councillor Daly,

(a) That Council receives Report CE-003-12 and adopts by issuing of a tender for Land and Property Asset Action Plan Update to develop via a business case process.

(b) For Council to assess the likely benefits and returns prior to implementation with a regular reporting of progress to Council Forums.

CARRIED

For: The Mayor, Councillors Daly, Olsen, Morgan, Barry, Elliott, Boylen and O’Donnell

Against: Councillor Mason

11.62 It appears that this decision supported calling for tenders for suitable companies to conduct the land and property asset review.

11.63 At the same Council meeting, another report titled ‘Consultation with Community Lease Holders and Regular Users of Council Community Halls’ (Report CS-006-12 – CI19/03219) was presented to the Council. It sought approval to consult with community groups that had a lease on a building within the City or were a regular user of a community hall or centre.

11.64 A motion to have this item deferred was carried unanimously: page 91 of the Minutes of 24 January 2012 (CI10/03130).
Ordinary Council Meeting 27 March 2012

11.65 The subject of the WCCC was again revisited at the Ordinary Council Meeting on 27 March 2012: CI10/00753.

11.66 The Council was presented with Report CE-023-12 – Lease with Department for Communities for Willetton Childcare Centre (CI10/03155). This Report was marked “confidential for elected officials”. It detailed the advice from McLeods and Landgate, discussed above. It also made reference to the WCCC’s plan to upgrade the kitchen area of the premises and noted that the Lotterywest grant was still available because Lotterywest had now waived the requirement that a lease be in place before the grant is given. All Lotterywest now required was some confirmation that the building would remain for community use.

11.67 In response to this, Council passed a motion as follows:

The City confirms that it intends to continue to provide a community use facility at 41 Burrendah Drive Willetton... (CI10/03155 at page 2).

Involvement of the Department for Communities

11.68 Report CE-023-12 (CI10/03155) also explored the continued involvement of the Department for Communities in future lease negotiations with the WCCC. It stated that the Department for Communities provides some support to the WCCC. Nonetheless, it noted, from the City of Canning’s perspective, “… having the Dept for Communities lease and then sublet the building does not provide any advantages”: CI10/03155 at page 4.

11.69 The Report suggested Council should consider leasing directly to the WCCC without the Department for Communities:

...consideration should be given to streamlining the lease arrangements whereby Council would lease directly to the organisation managing the centre and not through a third party. This is not to be construed as Council excluding the Dept. for Communities but rather acknowledging the competence of the group running the Willetton Childcare Centre: CI10/03155 at page 4.
11.70 The Report also recommended the negotiation of a one year licence:

That:

(a) Council resolves that in the interests of good governance, it authorises the Acting Chief Executive Officer, in conjunction with the Mayor, to discuss with Department for Communities and Willetton Childcare Association Inc., opportunities to establish a 1 year licence for use.

(b) Following the above discussion, a further report to Council outlining the terms of the licence and proposed rental to be presented for Council for approval.

(c) Subject to the successful agreement of a licence, Landlord approval for the building works as proposed in the attached plans will be granted.

(d) All efforts are to be made for the above to be completed in a timely manner to ensure no disruption to the operation of the Childcare centre: CI10/03155 at pages 6 and 7.

11.71 Council did not adopt this Officer Recommendation.

11.72 Instead, the Council accepted a motion put forth by Councillor Olsen. The motion sought to end to the Department for Communities’ involvement in the lease for the WCCC and deal directly with the WCCC to establish a 1 year licence. The motion read:

(a) The City give notice to the Department of (sic) Communities that the City is terminating the periodic tenancy by written notice and when this occurs the property reverts to the City.

(b) Council resolves that in the interests of good governance, it authorises the Acting Chief Executive Officer, in conjunction with the Mayor, to discuss with Willetton Childcare Association Inc., opportunities to establish a 1 year licence for use.

(c) Subject to the successful agreement of a licence, Landlord approval for the building works as proposed in the attached plans will be granted.

(d) All efforts are to be made for the above to be completed in a timely manner to ensure no disruption to the operation of the Childcare centre: CI10/00753 at page 57.

11.73 Having reviewed this evidence, I agree with the finding in the Authorised Inquiry Report that this decision, when put into effect, would have ended the Department for Communities’ role as a party to the lease.
Email of 28 March 2012 Updating Parties on Council’s Decision

11.74 On 28 March 2012, a day after the Ordinary Council Meeting, the City’s Executive Client and Customer Services, Fiona Armstrong, emailed Lindsay Holland and Rob Davie (the representative for the Department for Communities), updating them on the WCCC lease: CI10/01813.

11.75 In the email Ms Armstrong discussed Council’s decision to not consider any new lease requests while an asset review was being conducted. She also explained that the way forward was the discussion of a 1 year licence for use with the intention of discussing the lease again when the asset review is completed: CI10/01813.

April 2012 Meeting

11.76 On 5 April 2012, Mayor Delle Donne and Acting CEO, Andrew Sharpe, met with representatives of the WCCC and the Department for Communities. During this meeting it was established that the Department for Communities did not want to be excluded from the lease arrangements, the WCCC required the continued involvement of the Department in order to function and provide the services it provided. Further, a 1 year licence was not acceptable to either party.

Ordinary Council Meeting 26 June 2012

11.77 Council again considered the WCCC lease at the Ordinary Council Meeting of 26 June 2012: CI10/01816.

11.78 Council was presented with Report CS-064-12 (CI10/03156). The Report outlined the three main issues put forward by WCCC and the Department for Communities:

1. Involvement of Department for Communities

Both the DFC and the WCCA request that the DFC enters into the new lease with the City of Canning and that the WCCA continues to sublet from the DFC. Since the arrangement would be short term, there is no disadvantage to Council in pursing this approach. To the contrary, there may be some advantage. The DFC explained that they had
recently been successful in establishing an ongoing maintenance programme which would see funds available for upgrade works at Willetton Childcare Centre.

2. Length of contract & continuity of service

Discussion also centred on the length of contract. Concerned with continuity of service and addressing the current uncertainty, both parties expressed a preference for a longer-term arrangement. Whilst the WCCA would have preferred a lease of 10 years plus, the DFC appears willing to accept a 3 year arrangement.

3. Rental fee

Neither the DFC nor WCCA have paid a rental fee for the facility historically. During discussions in 2010 both were aware that the Council had moved all new community leases to a rental equivalent to rates. This would have equated to a rental fee of approximately $3,000 for Willetton Childcare. However, as part of the review of community use buildings Council is also considering new charging models that will bring both sustainability and equality to all of the City's groups.

11.79 The Report also outlined the implications of Council’s 27 March 2012 decision to exclude the Department for Communities as a party to the lease and suggested that the City would be at an advantage if the Department remained the lessee:

...it is proposed that Council allows DFC to remain in the intermediary role as lessee of the premises. This has advantages to the City of Canning, in terms of the DFC being responsible for the maintenance of the building: CI10/03156 at page 4.

11.80 The Officer then recommended a three year lease as follows:

(a) Council approves the Acting Chief Executive Officer to finalise negotiations with Department for Communities for terms and conditions of a three year lease of Willetton Childcare Centre based on the following criteria:

(i) Council approves the sublease of the premises to Willetton Child Care Association for the purpose of continued service to the community.

(ii) Department for Communities and the City of Canning agree the maintenance required based on the DTZ building condition report, the maintenance budget available from Department for Communities and taking into account the short term lease proposed.
(iii) The lease does not exempt the lessee from the obligation for repairs and maintenance relating to fair wear and tear.

(iv) Based on the Department for Communities contribution to building maintenance and repairs and the short term nature of the arrangement, a rental fee equivalent to Council rates on the premises is established with the Department responsible for all outgoings.

(v) Any conditions of lease as may be recommended by Council’s solicitors as necessary or desirable to protect the City’s interests.

(b) Authority be given for signing and affixing of the Common Seal to lease and sublease documents.

(c) A further information report be presented to Council when the matter is finalised (CI10/03156 at pages 1 and 2).

11.81 Council rejected the Officer’s Recommendation, resolving instead to re-affirm its previous decision to terminate the periodic tenancy the City had with the Department for Communities and to negotiate a 3 year lease directly with the WCCC. This was done via a motion from Councillor Barry, which read as follows:

Council RESOLVES to re-affirm its position in relation to CE-023-12 via the following;

That;

(a) The City give notice to the Department for Communities that the City is terminating the periodic tenancy by written notice and when this occurs, the property reverts to the City.

(b) Council RESOLVES, in the interest of good governance, it authorises the Mayor, in conjunction with the Acting Chief Executive Officer, to discuss/negotiate with the Willetton Childcare Association Inc, the opportunities to establish a 3 year Lease made up of a 2 year Lease with a further 1 year (Option of the City of Canning) on a monthly basis, with any fees or lease payments to be negotiated by the Mayor in conjunction with the Acting Chief Executive Officer.

(c) Subject to a successful agreement of a Lease, Landlord approval for building works as proposed in previous attached plans will be granted.

(d) All efforts are to be made for the above to be completed in a timely manner to ensure little or no disruption to the operation of the Childcare Centre.

(e) A further report be presented to Council within two (2) months of meeting held 26 June 2012.
11.82 The motion was carried by a majority vote.

Analysis

11.83 I have greatly benefited from the Written Closing Submissions of Counsel Assisting and generally agree with the conclusions and analysis set out by him in those submissions.

11.84 I note that from the evidence that the Council was not made aware of the events surrounding a new lease until it was brought to its attention at the Ordinary Council Meeting of 14 September 2010: see, for example, T190-T191, T378, T536, T678, T803 and T1080.

11.85 The failure to alert Councillors to what was clearly a significant local issue is unacceptable. In circumstances such as these, there would have been a real risk that Councillors would be asked questions from residents about this issue. To not ensure that all Councillors were aware that there was a potential problem brewing and adequately briefed on the issue until quite late in the piece seems somewhat myopic. Indeed, it begs the question whether some of the tensions that did arise in the years that followed would have been avoided if the Administration had simply taken more care to ensure that the Council was better advised of past events in relation to the WCCC lease.

11.86 It may well have been the case that the Administration simply didn’t know what was happening in relation to the lease. Not that this is a sufficient justification for poor communication. As noted by Counsel Assisting, evidence obtained by the Inquiry indicated that the expired WCCC lease was not the only lease to go unnoticed: see, for example, T276, T378, T549 and T998.
11.87 It is unacceptable that the City’s record keeping systems were not adequate enough to keep a proper check on the status of leases (see also T1475) on City assets, particularly as they were a source of considerable income.

11.88 Having reviewed the evidence, I agree with Counsel Assisting that the Council faced a number of challenges dealing with this issue and that there was a considerable delay in moving matters forward. Those challenges were sometimes self-inflicted and sometimes the result of a failure on the part of the Council and the Administration to work cooperatively. The result, overall, was a failure to provide for the good government of the residents of the City of Canning.

11.89 The views of Councillors as to why so many delays kept occurring are as follows:

(1) Councillor Dowsett said (at T465) that the Council handled this matter ‘pathetically’ and blamed 4 or 5 councillors including the Mayor and that (at T466) he could not fathom why it took so long;

(2) Mayor Delle Donne indicated that he had no explanation for why this matter took so long to resolve (T550);

(3) Councillor Boylen said it was a ‘debacle’ (T713) due to antagonism from councillors, particularly the Mayor and Councillor Mason (T714-T715);

(4) Councillor Elliott noted that every time one issue was answered, another one seemed to arise (T757-T758);

(5) Councillor Clarke indicated the delay involved a level of procrastination and 3 or 4 councillors, including the Mayor, had certain ideas about the asset review program (T802);

(6) Councillor Barry described the matter as being like an open wound (T998) and one matter would lead to another (T999); and

(7) Councillor Mason was of the view that is was just one issue after another that required further information to be requested and so on (T1088).

11.90 All of the above explanations reveal governance that was at best chaotic. There is a great deal of “blaming”; very little “solution finding”. Overall, what is evidenced is very little cooperation, resulting in confusion and poor decision making.
11.91 The evidence shows that during the course of dealing with this item, the Council referred the matter to a number of forums for further information:

1. *On 14 September 2010 the Council referred the matter to a forum which was held on 25 November 2010 (CI10/01784)*;

2. *On 18 January 2011 the Council referred the matter to a forum which was held on 29 June 2011 (CI10/01794)*;

3. *On 12 July 2011 the Council referred the matter to a confidential forum which was held on 21 July 2011 (CI10/00648)*.

11.92 As was apparent from the Minutes of various Council Meetings, there was a great deal of frustration on the part of members of the community associated with the WCCC who were trying to get adequate information from the Council as to what was happening with the WCCC lease and when it was going to be resolved.

11.93 I did not hear any satisfactory explanation from anyone during the course of this Inquiry that justified so many deferrals and delays. Nor did I receive any valid justification to explain why members of the public were left in the dark for so long.

11.94 In relation to the resolution on 12 July 2011 referring the matter to a Confidential Forum, I find that the assertion at p2:41 [116] of the *Authorised Inquiry Report* is not entirely supported by the evidence. Contrary to the assertion that at the Ordinary Council Meeting of 12 July 2011 a Report (CS-041-11 – CI10/03147) was presented with a Recommendation that would have allowed the Council to move forward with the matter, and provide some clarity to the WCCC on where they stood, when regard is had to that report it is apparent that the Recommendation omitted reference to which of the several options identified in the report was the preferred one – see (CI10/03147 at page 4).

11.95 Evidence given by Mr Dacombe sought to justify this omission on the basis that the Administration had become exasperated by the process at that point and decided to simply put several options before the Elected Members so that they could then debate the issue (T80-T81). He went on to say that it was not unusual in local
government to present options in that manner and that it was not an illegitimate approach (T81).

11.96 This explanation is problematic. Exasperation is not a sufficient reason to stop doing what must be done. Rate payers expect and deserve more, as do the Councillors who are ultimately charged with making decisions. The Report in question failed to properly assist Elected Members to understand which of the options was preferable and this, in turn, added to the delay attending to this matter. Evidence from Elected Members indicated that the lack of a preferred option meant they needed further information (T389-T390, T547, T763, T1002 and T1084). That information was not forthcoming from the Administration. It should have been.

11.97 The Minutes of the 12 July 2011 Ordinary Council Meeting dealing with this item failed to properly reflect the reasons for the confidentiality with which it was dealt (CI10/03135 at page 46). The evidence before the Inquiry more generally shows a troubling state of confusion on the part of Councillors as to what was confidential in relation to the WCCC lease (see for example T198 and T276) and when information could or could not be given to concerned residents.

11.98 This, in turn, resulted in increased frustration on the part of people connected with the WCCC like Mr Holland: T83, T201, T275, T472-T473, T538-T539, T548, T761 and T1003.

11.99 In relation to confidentiality, in the Written Submission in Reply on behalf of Councillor Mason, it seems to be suggested that the Council cannot be blamed for any confusion in relation to confidentiality or the failure to disclose information to the public arising from that confusion because the responsibility to educate the Council fell on Mr Dacombe:

    ...Mr Dacombe...failed to satisfy his...duties...with respect to advising the Council of the need to specify reasons why the issue of the lease of the Willetton Childcare Centre was to be treated as a confidential item in accordance with s5.23 (3) of the Act.
11.100 This argument fails to explain why Councillors didn’t simply ask for clarification about what their obligations were. Arguably, a more cooperative relationship would have resulted in the types of conversations that answer any queries in this regard.

11.101 Further, this response fails to address section 4.2 of the City’s Standing Orders. This section grants the Council the authority to determine if information can be disclosed. It reads:

Every matter dealt with by, or brought before the Council sitting otherwise than with open doors, shall be treated as strictly confidential, and shall not without the authority of the Council be disclosed to any person other than the Mayor, Councillors, or employees of the Council (and in the case of employees, only so far as may be necessary for the performance of their duties) prior to the discussion of that matter at a meeting of the Council held with open doors.

11.102 Councillors had the authority to determine if a matter should be disclosed. Clearly, there were some aspects surrounding the WCCC leasing issue that needed to remain confidential. If Council wasn’t sure what was or was not, they could simply have relied on the expertise of those Administrative Officers with the experience to respond to this type of request for information. Council could then have determined what information could be disclosed. This would have allowed residents to know that something was actually being done to address the situation. What is evident here is an almost complete lack of cooperation between the Council and the Administration, resulting in a failure to engage with the public. To suggest that this was entirely the fault of CEO Mark Dacombe is unjustified.

11.103 In the circumstances, I find that this failure to communicate led to unnecessary delays and considerable confusion, resulting in a failure to provide for the good government of residents in the City of Canning by the Council and the Administration, collectively and individually. As publically elected leaders and those most directly dealing with concerns by the community, the Council should have shown leadership on this issue and sought the necessary guidance and input of the Administration. The Administration, in turn, should have offered the advice and support clearly needed.
11.104 In relation to Mr Holland, Counsel Assisting submitted that it is open to find that Mayor Delle Donne failed to have a proper appreciation of the history of this matter and that this failure coloured his dealings with Mr Holland in an adverse manner. Counsel Assisting provides the following evidence in that regard:

1) At page 16 of his interview during the Authorised Persons Inquiry (CI10/00190) the Mayor noted that the WCCC had acted unreasonably in waiting 3 years after their lease had expired to renew it;

2) As noted at page 11 of the Minutes of the Ordinary Council Meeting of 9 August 2011 (CI10/03138), Mayor Delle Donne remarked to Mr Holland “… the Department failed in its duties as far as I understand, in relation to the Lease being expired 3 years ago, you are aware of that. Now you saying because of that this Council has to move heaven and earth to accommodate you as an Association.”

3) At page 17 of his interview during the Authorised Persons Inquiry (CI10/00190) the Mayor noted that the fact that there was no urgency in renewing the lease until 3 years after it had expired indicated that there was no urgency.

11.105 I agree with Counsel Assisting’s overall conclusions in relation to these comments by the Mayor. Specifically, in relation to 1) above, that the WCCC had acted unreasonably in waiting 3 years after their lease had expired to renew it, the Mayor is factually incorrect. The City received a draft lease from the Department in 2006, following which there were discussions and negotiations until 2010. There were active discussions and, in any event, there was nothing the WCCC could do in its own right. Their interests were being advanced by the Department for Communities and this had been taking place for some time. No one had waited three years before acting, as claimed by the Mayor.

11.106 In relation to 2) above, again, the Mayor is factually incorrect. There was no failure on the part of the Department in relation to its duties. The Department was doing what was required of it and was proactive in that regard by attempting to renew the lease, commencing with the provision of a draft to the City prior to the expiration of the original lease.

11.107 In relation to 3) above, this too is factually incorrect based on the evidence. A great deal was being done. On the evidence, the Mayor’s error stems from the
fact that he felt that the WCCC had acted unreasonably in waiting 3 years after the expiration of the lease before agitating the matter. This is not the case. The evidence shows that a draft lease was given to the City before the original lease had expired. In other words, the Department as lessee had taken steps to renew the lease for the benefit of the sub-tenant (WCCC). In the circumstances, no fault can be attributed fairly to the WCCC for the fact that the City (not the WCCC) had made errors when renewing the original lease before it had expired. Further, it is incorrect to suggest that the WCCC did not act with urgency until 3 years after the original lease had expired. Negotiations between the City as lessor and the Department as lessee had been ongoing between 2006 and 2010. The WCCC cannot be criticised for not doing anything in these circumstances. As the Mayor noted to Mr Holland, the WCCC was not a party to the original lease. This was used as a basis to refuse to provide certain information to the WCCC. What ability the WCCC had to directly influence matters is thus unclear given their status as sub-tenants. By laying the blame for delay at the feet of the WCCC, when in fact it should have been at the feet of the City’s Administration, the Mayor unfairly accused Mr Holland and the WCCC of failing to act and showed a failure to appreciate the history relevant to this matter.

11.108 Overall, the Mayor’s comments in relation to this issue reveal a troubling level of confusion and factual error. I am of the view that this failure to understand the facts, combined with what was, by this time, a deteriorating relationship between members of the Council and the Administration probably triggered much of the tension between the Mayor and Mr Holland (discussed below). This does not, however, excuse the Mayor’s behaviour in relation to Mr Holland.

11.109 Mr Dacombe’s evidence was that he felt the manner in which the Mayor dealt with representatives from the WCCC (and Mr Holland, in particular) demonstrated “...a completely unnecessary level of animosity, pugilism” and that “...the personal interactions were rude” (T82). Similar evidence was given by Councillor Morgan (T682), Councillor Boylen (T717) and Councillor Clarke (T814).
11.110 Mayor Delle Donne, in response, indicated that Mr Holland was very hard to deal with (T538) and that he acted unreasonably (T551). Councillor Barry gave similar evidence (T998 and T1002). Further, in Written Submissions in Reply on behalf of the Mayor, it is argued that Mr Holland was creating the cause of any drama surrounding the matter by creating a false crisis in order to get the lease extension resolved. It is further submitted on behalf of the Mayor that Lindsay Holland was rude in interactions with the Mayor, taking a belligerent tone towards Mayor Delle Donne.

11.111 There is no evidence to support these assertions. On the contrary, evidence provided during the public hearings suggests that it was the Mayor who was high-handed and dismissive in his responses to Mr Holland during public questions.

11.112 These “justifications” for the Mayor’s behaviour in relation to Mr Holland also fail to acknowledge that the Mayor is an elected official. Mr Holland is not. He is no more, in these circumstances, than a member of the public trying to get answers to an issue of considerable public importance.

11.113 If Mr Holland, as a member of the public was frustrated and “lashed out” (and I do not suggest here that he did so), then so be it. Mr Holland was clearly passionate and concerned about the families utilising the WCCC and utterly unable to get a clear answer from the Council as to what went wrong with the renewal, why things were taking so long and when they would be resolved. As a member of the public he is entitled to get answers and be as passionate about it as sees fit. As an elected official, however, it is the Mayor’s responsibility to be accountable, deal with the situation and address it. It is entirely inappropriate for a Mayor or any other elected member of the Council to ridicule or be dismissive of a non-elected member of the public. The very real risk in doing so is that members of the public will cease to feel that they can approach Councillors. When this occurs, good governance principles fall away.

11.114 Having reviewed the evidence I should say that the Mayor’s conduct did strike me as out of character. In evidence before the Inquiry during the public hearings, the
Mayor stuck me as calm and dignified. He did not strike me as someone who “lashed out” as a matter of course or as someone with a hostile or difficult personality type. It may well be that the Mayor’s actions in relation to Mr Holland are the culmination of considerable frustration arising from a situation that had gotten out of hand and that appeared to have no end in sight. This does not excuse the Mayor’s behaviour but it may go somewhat towards contextualising what does appear to be behaviour that is otherwise out of character.

11.115 In the circumstances, I find that the Mayor’s conduct in relation to Mr Lindsay Holland represents a failure to provide good government. This type of conduct jeopardises the need for very open lines of communication between the public and Elected Members.

11.116 In relation to the Council’s decision at its Ordinary Council Meeting of 18 January 2011 following a motion by Councillor Mason to refer the WCCC lease to another Forum to consider the impact of section 3.58 of the Local Government Act, I note that this was done without any prior consultation with the City’s Officers: T79 and T1083.

11.117 Mr Dacombe’s evidence on this point was that he was probably not aware of the content of section 3.58 of the *Local Government Act 1995* at the time of the meeting (T79 and T1194-T1195). This is unacceptable. Councillors need to know that their CEO is aware of those legislative provisions that determine how best to proceed. Any failure on the part of Mr Dacombe in this regard risks undermining confidence in his decision making abilities.

11.118 Notwithstanding this, it is clear from the Minutes of the Forum held on 1 February 2011 (CI10/00631) that the Council was provided with advice as to the non-applicability of section 3.58. It is also clear, however, that Council failed to understand that advice. This then again begs the question: why wasn’t there some sort of conversation then and there to address what was clearly confusion on the part of some Councillors. Given the delays already surrounding this item, the Council ought to have engaged in constructive dialogue with the City’s Officers to
deal with this question. The Administration, in turn, should have ensured that everyone knew what their legal obligations actually were. It would have been appropriate for this issue to have been raised prior to the Ordinary Council Meeting.

11.119 What we see here is a systemic inability on the part of the Council and the Administration to work cooperatively. The relationship seems beset by problems, with the result that both are acting as separate and unrelated entities, rather than in a constructive manner to resolve what was clearly an important issue for the community.

11.120 The combination of delay and an unexplained and unwarranted concern for confidentiality demonstrated a failure on the part of both the Council and the Administration to efficiently progress an important item for the community. The matter was complicated on a number of levels, which in part explains some of the delay. Nonetheless, it is considered that poor engagement by the Council and the Administration prevented the effective exchange of information.

11.121 In relation to the motion by Councillor Mason on 18 January 2011 to defer the item to a forum to consider the impact of s3.58 of the Local Government Act, Councillor Mason asserts that CEO Mark Dacombe failed in his obligations as CEO to inform the Council the s 3.58 did not apply. The response asserts that Mr Dacombe did not have a sound understanding of legislative provisions.

11.122 I find that CEO Mark Dacombe did indeed have an obligation as CEO to have a sound understanding of legislative provisions. He should have informed Council that s3.58 did not apply where the lessee was a State Government instrumentality. Further, he did fail to bring this to the attention of Council and this was less than is expected of a competent CEO. Advising Council about provisions of legislation directly applicable to decision-making would seem to be a basic function.

11.123 Mr Dacombe’s failings in this regard are clear – something he himself conceded during hearings before the Inquiry. However, fault cannot entirely be attributed to
Mark Dacombe. Section 3.58 was not addressed as an issue of concern in the Officer’s Report relevant to the WCCC. It was not in the original Officer’s Report that went before Council. This caused Councillor Mason to move his motion. If the Officer had addressed it, the matter would never have required Councillor Mason’s motion and Mr Dacombe, in turn, would not have needed to turn his mind to the issue of s.3.58 at that time. Also troubling is the fact that when the decision was made to pass Councillor Mason’s motion the Council failed to consult with the City Officer’s prior to making the decision to (once again) defer the item to a Forum.

11.124 Other Written Submissions in Reply on behalf of Councillors also seem to assert that most if not all of the poor decisions relevant to this issue are entirely the result of the incompetence of Mark Dacombe. I reject these assertions.

11.125 For example, in Written Submissions in Reply on behalf of Councillor Mason, it is asserted that Mark Dacombe failed in his duties as CEO for "...failing to ensure that the City maintained a correct and up-to-date register of assets within its boundaries, including the listing of the property where the Willetton Childcare Centre was housed."

11.126 Despite having a responsibility to keep abreast of affairs and goings on within the City of Canning, the evidence reveals that the lease in question had lapsed long before Mark Dacombe commenced as CEO with the city of Canning. It would be most unfair to place all blame on Mr Dacombe as CEO for maintaining an up to date register of assets. Doing so would not have prevented this lease from lapsing.

11.127 The relevant issue here is the practices in place before Mr Dacombe started. These practices led to this particular lease falling through the gaps. The fault lies with the Administration in the broader general sense for failing to have ensured that proper processes were in place. Mr Dacombe could be fairly criticised, if having become aware of the deficiencies in the system, he did nothing about them. That is not the case here.
11.128 It is also stated that Mark Dacombe failed in his duties as CEO:

...by failing to ensure that the City’s administration staff properly exercised their functions with respect to promptly dealing with an expired lease and managing it’s instructions to its lawyers, McLeods, in obtaining a replacement lease in a timely fashion.

11.129 To assert that Mark Dacombe is to blame entirely for the failure to address the leasing issue is, again, a stretch. The lease had expired and McLeods had had dealings with the lease long before Mark Dacombe commenced as CEO.

11.130 In Written Closing Submissions in Reply on behalf of Councillor Mason, it is suggested that Mark Dacombe failed to act professionally under his contractual duties by failing to engage with Lindsay Holland to keep him apprised of where Council decision. I reject this assertion. Lindsay Holland attended public question time seeking answers regarding the status of the WCCC lease. It was Mayor Delle Donne who was responsible for answering questions during public question time and it was the manner of his responses that led to further frustrations in relation to this matter.

11.131 It is difficult to see what Mr Dacombe could have done that the Mayor and the Council could not do. There seems to be some concern here that Mr Dacombe mismanaged the matter by leaving it in the hands of his Executive, Fiona Armstrong, when he should have dealt with the matter personally. There is no evidence that indicates Ms Armstrong was doing a poor job or that anything she had done was a direct cause of the problems that arose. In those circumstances, it is difficult to see what Mr Dacombe could have done that would have changed things, particularly given the veil of confidentiality that was being used to stifle public discussion.

11.132 In Written Closing Submissions in Reply on behalf of Councillor Barry, it is asserted that that delay of the lease must be viewed in light of the necessity to conduct the City’s asset review. In Written Closing Submissions in Reply on behalf of Councillor Olsen, a similar argument is advanced.
11.133 Whilst the Asset Review was necessary, in the circumstances it was open to Council to deal with this issue in a different manner. Having identified the City’s role in the delay, the Council could have dealt with this matter separately from the Review. This lease could have been segregated from all other leases in order to right the wrongs of the past. This would have dealt with the immediate concerns of the community in a much better way.

11.134 I do find, however, in relation to the failure to articulate a preferred option in Report CS-041-11, Mark Dacombe failed in his duties as CEO by facilitating a report of one of his officers going to Council without any recommendation being made.

11.135 The failure to identify a preferred option did result in further delay in attending to this matter. Mark Dacombe, as CEO, did have a duty to ensure that officers presenting reports to Council provided the best information to the Council in order to make a decision. The Administration should have ensured that the content of Reports to Council addressed all relevant matters in sufficient detail.

Conclusions

11.136 In the concluding comments of his Written Closing Submissions, Counsel Assisting writes that there was a level of dysfunctionality between the Council and the Administration that existed in both directions that adversely impacted on the delivery of good government to the residents of the City of Canning’s district when dealing with the WCCC. I agree.

11.137 I cannot envisage a situation more evident of an overall level of systemic dysfunctionality than the failure by both the Council and the Administration, collectively and individually, to meet the very clear, and thoroughly justified, needs of the Willetton Child Care Centre. The errors made, the attitudes displayed towards local residents and the ultimate, unjustified, delays in settling a simple leasing document are indicative of a failure to provide good government at all levels. Residents with an interest in this issue deserved much, much better.
11.138 Finding 16 of the Authorised Inquiry Report provides:

_There was no rational reason for Council to have not recognised the significant interest the WCCC had in the outcome of any assessment of its lease. Council should have openly and honestly stated its position to plan for its future and provide information to its community members on whether it could continue to deliver services. The WCCC had a right to receive this information and Council acted unreasonably by denying them access._

11.139 I agree in part with this finding. Contrary to this Finding, I do not believe that Councillors failed to recognise the significant interest the WCCC had in the outcome of any assessment of its lease. Rather, I am of the view that the Council was aware of the WCCC’s concerns but that the Council failed to address these concerns in a way that was timely and accountable to the needs of local residents. Common sense did not prevail here.

11.140 The Council should have openly and honestly stated its position to plan for its future and provide information to its community members on whether it could continue to deliver services. It did not. This is unacceptable. The WCCC had a right to receive this information and Council acted unreasonably by denying them access.

11.141 Further, the Administration waited until August 2010 to provide Council with a new lease for the WCCC, even though the original lease had expired in 2007. I find that the failure to alert Councillors to what should have been obvious was a significant local issue prior to this, is also unacceptable.

11.142 Further, it is indicative of weak administrative structures that the City’s record keeping systems were insufficient to keep a proper check on the status of leases.

11.143 I find, in relation to the failure to articulate a preferred option in Report CS-041-11, Mark Dacombe failed in his duties as CEO for facilitating a report of one of his officers going to Council without any recommendation being made. The failure to identify a preferred option did result in further delay in attending to this matter. Mark Dacombe, as CEO, did have a duty to ensure that officers presenting reports to Council provided the best information to the Council in order to make a
decision. The Administration should have ensured that the content of Reports to Council addressed all relevant matters in sufficient detail.

11.144 Overall, however, I did not receive any satisfactory explanation from anyone during the course of this Inquiry that justified so many deferrals and delays in relation to the WCCC lease. Nor did I receive any valid justification to explain why members of the public were left in the dark for so long.

11.145 I find that that there was a troubling failure on the part of both the Administration and the Council to communicate in relation to the meaning and effect of confidentiality in relation to the WCCC lease and relevant legislative provisions that are designed to assist the Council with its decision making processes.

11.146 I also find it concerning that the Council felt at liberty to ignore Officer’s Recommendations without any consultation or discussion with the Administration about any alternative course of action. This lack of cooperation and communication led to unnecessary delays and considerable confusion.

11.147 I find that the Mayor’s conduct in relation to Mr Lindsay Holland was unjustified and inappropriate. The Mayor’s behaviour represents a failure to provide good government. It jeopardises the need for very clear lines of communication between the public and Elected Members.

11.148 I also find that the Council failed to effectively engage with the community on this issue. There was a lack of leadership throughout and no real accountability to the community to ensure effective and appropriate service delivery. The importance of effective community engagement cannot be underestimated in the delivery of good government. It promotes transparency in decision-making and promotes community confidence in those decisions.

11.149 Based on these conclusions it may be said that in relation to the renewal of the WCCC lease, the City of Canning Council failed to provide for the good government of residents in the City of Canning.
CHAPTER TWELVE

ENGINEERING CONSULTANCY SERVICES TENDER
EXECUTIVE ENGINEERING AND TECHNICAL SERVICES
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Facts

Engineering and Consultancy Services Tender

12.1 The background facts to this issue are outlined in the Authorised Inquiry Report. I repeat all undisputed facts from that Report below.

12.2 The City of Canning advertised for tenderers on 25 September 2010 to provide design works for civil works, road safety audits and traffic signal work. The advertised tender outlined that the City sought to amalgamate the services under one contract and was seeking one service provider for all the services.

12.3 The estimated cost for these services was in excess of $100,000. Hence, a public tender process was required by law under section 3.57 of the Local Government Act 1995.

12.4 The City received seven responses. These responses were assessed by a panel of four Officers, including the Executive Engineering and Technical Services. An evaluation, assessing the suitability of the seven applicants was completed on 1 November 2010: CI10/02882.

Council Considers Tender

12.5 The evaluation Report ET-152-10 (CI10/03184) in relation to the tender was presented to the Council at the Ordinary Council Meeting of 9 November 2010 (CI10/03167).
12.6 The Report revealed that one of the tenderers, Blanchard Consulting Solutions, did not meet the specifications of the tender. It read:

*Blanchard Consulting Solutions, whilst offering the lowest prices, is a consultancy operated solely by Terry Blanchard and has advised that no subcontractors will be utilized. He has not demonstrated sufficient recent experience in civil design and drafting and has not carried out any traffic signal design or street lighting design, which may be required as part of the civil design. He is also not an accredited road safety auditor (CI10/03184 at page 2).*

12.7 Mayor Delle Donne declared an interest in regard to Report ET-152-10, advising of an association with Terry Blanchard of Blanchard Consulting Solutions.

12.8 The evidence shows that the Mayor’s declaration read:

“know the Blanchard family” (CI10/03167 at page 2).

12.9 The Mayor declared that he would consider the Report on its merits and vote accordingly (CI/1003152).

12.10 The Officer Recommendation read:

(a) Council accept the tender from Shawmac Pty Ltd for tender 32/2010 – provision of Engineering Consultancy Services for a three year period effective 10 November 2010 as the most advantageous.

(b) All tenderers be advised of (a) above and thanked for their submission.

12.11 Councillor Barry then moved an amendment from the floor that was seconded by Councillor Olsen. The amendment stated:

*The above motion not be adopted for the following reason:*

(1) *It is not the most advantageous for the City of Canning.*

(2) *In lieu thereof, the following be adopted:*

(a) Council accept the tender from Blanchard Consulting Solutions for a three year period effective 10 November 2010, as the most advantageous.

(b) All tenderers be advised of (a) above and thanked for their submissions (CI10/03167 at page 50).
12.12 Following discussion regarding this motion the Mayor suggested that the matter be referred to the CEO for further discussion. Councillor Barry withdrew his motion and the Mayor then moved a motion that stated:

_The matter be referred to the Chief Executive Officer for further review of the proposal for Consultancy Services in the Engineering Department and a further report be presented to Council (CI10/03167 at page 50)._  

12.13 Mayor Delle Donne’s motion was carried by majority vote. The Mayor and Councillors Barry, Elliott, Mason, Olsen and Wheaton voted for the motion. Councillors Dowsett, Clarke and Morgan voted against the motion (CI10/03167 at page 50).

**Review of Original Tender**

12.14 In accordance with Council’s decision CEO, Mark Dacombe, conducted a further review of the Engineering Consultancy Services Tender (Report ET-170-10, CI10/03185).

**Blanchard Consultancy Given another Opportunity**

12.15 In an email dated 3 December 2010 (CI10/01938), Colin Gomes, the City’s Design Engineer, asked Mr Blanchard to provide further clarification about his ability to satisfy the tender specifications. Mr Blanchard was asked to confirm whether or not he was:

- a Main Roads accredited Toad Safety Auditor;
- qualified to carry out street lighting design; and,
- qualified to carry out traffic signal design.

12.16 In response, via a letter dated 6 December 2010 (CI10/02884), Mr Blanchard confirmed he did not possess the qualifications outlined in the email. He further advised that only a small number of companies provided the specialised services that the tender specifications outlined. He further outlined that alternative methods could be adopted to avoid using specialists and suggested that the best
outcome for the City would be to appoint a panel of consultants that would allow the City to choose work based on the most advantageous price quotes.

Council Considers Tender for the Second Time

12.17 Mark Dacombe completed the review of the matter and Executive Engineering and Technical Services submitted his review as part of Report ET-170-10 (CI10/03185). This was presented to the Council at the Ordinary Council Meeting of 14 December 2010 (CI10/03159).

12.18 The Report detailed that Blanchard Consulting Solutions had been contacted and confirmed that the company did not meet the tender specifications. The Report identified that Blanchard Consulting Solutions would not use sub-contractors and that the company’s sole engineer, Terry Blanchard:

- was not registered with Main Roads WA;
- was not qualified to carry out street lighting designs; and,
- was not qualified to carry out traffic signal designs.

12.19 A copy of Terry Blanchard’s letter of 6 December 2010 was included as Attachment 3 of the Report (CI10/03185 at page 2).

Recommendation to Appoint a Panel

12.20 The Report concluded that the best value for the City would be to appoint a panel of two or three consulting firms – not a sole tenderer as previously specified. It further concluded it was best in these circumstances to re-advertise, as a panel could not be appointed under the existing tender.

12.21 The Recommendation in the Report stated:

"Based on the review by the CEO, it is recommended that no tender be accepted, with a view to obtaining best value for Council, the tender should be readvertised as a panel of consultants."
Recommendations:

That:

(a) Council does not accept any tender.

(b) The tender be re-advertised as a panel of consultants: CI10/03185 at page 3.

Council’s Amendment to the Recommendation

12.22 Councillor Mason moved an amendment from the floor, seconded by Councillor Daly. The amendment read:

The recommendation contained in the Officer’s Report SRS-346-10, which reads:

That:

(a) Council does not accept any tender.

(b) The tender be re-advertised inviting tenderers to submit prices on the basis of a single tender or alternatively as a panel of consultants.

Not be adopted for the following reasons:

1. The time and the cost of the re-tendering.

2. No guarantee that we will receive any more or less tender applications.

In lieu thereof, the following be adopted:

(a) The following companies be invited to join Council’s panel of consultants for the provision of engineering services:

- Blanchard Consulting Solutions
- Porter Consulting Engineers
- GHD Pty Ltd
- Worley Parsons Pty Ltd
- CPG Australia Pty Ltd
- Shawmac Pty Ltd
- Opus International Consultants (PCA) Pty Ltd.

(b) Council give further consideration to other firms who wish to submit in writing an expression of interest to join the panel of consultants for the
provision of engineering services with a report to Council as, or when, such submissions are received.

(c) Council’s panel is not to exclude the WALGA panel of consultants with all purchases from WALGA panel members to be reported to Council as and if the services are required: CI10/03159 at pages 76 and 77.

12.23 Following further discussion with Mr Dacombe, who expressed concerns as to the legality of the motion, an amendment was made to the amendment. The amendment added a clause (d) to the above which read:

(d) that the Chief Executive Officer be authorised to investigate any legal implications of the motion: CI10/03159 at page 77.

12.24 The amended motion was carried unanimously.

Consequences of Council’s Amendment

Notification of Unsuccessful Tenderers

12.25 Following this chain of events, City officers contacted all unsuccessful applicants advising them of the outcome of the original tender process.

Legal Advice from McLeods

12.26 The City’s Design Engineer, Colin Gomes, requested legal advice in relation to the legality of a tender panel from McLeods. He did this on 22 December 2010 via email: CI10/01944.

12.27 Advice was provided by McLeods in a letter dated 12 January 2011: CI10/01947.

12.28 The advice explained that the decision to appoint a panel of consultants in response to the tenders submitted was legally invalid and that, in the circumstances, the City could potentially breach section 3.57 of the Local Government Act, depending of the value of contracts entered into with the members of the panel.
12.29 The advice further noted that, pursuant to sections 2.3-2.8 of the *Local Government Act 1995*, it was arguable whether the appointment of a panel of suppliers was permitted under the *Local Government Act*: para 2.5 at page 7 of the McLeods advice – CI10/01947.

12.30 The McLeods advice concluded by recommending that:

> Council consider revoking its decision of December 14 2010 and then resolve to decline all tenders submitted in response to the RFT: CI10/01947.

**Mark Dacombe Destroys Copies of McLeods Advice**

12.31 In an email to Charles Sullivan dated 20 January 2011, CEO Mark Dacombe requested that all copies of the McLeods advice be returned to him and that any copies of the advice be deleted: CI10/01948.

12.32 When questioned during public hearings about his decision to have the advice destroyed, Mr Dacombe indicated that Colin Gomes was not authorised to obtain the advice. He further added that he considered the advice to be written in language that would have been seen as inflammatory by Council and would have reinforced the view that City staff were working against the Council: T136. Finally, he indicated that he was of the opinion that the advice did not add anything to advice he had already provided to Council: T136; CI10/03515 at page 54.

**Advice sought from WALGA**

12.33 Colin Gomes, the City’s Design Engineer for the City, sought further advice from the WA Local Government Association on 21 February 2011: CI10/01951.

12.34 The advice provided by WALGA explained that, because the original tender was for engineering works that exceeded $100,000.00, it was difficult to justify splitting the tendered work into smaller contracts. The advice concluded that no process should be engaged until the tender process was resolved: CI10/01951.
Recruitment, Executive Engineering and Technical Services

Temporary Appointment of Kevin Jefferies

12.35 Mr Charles Sullivan resigned from his position as Executive Engineering and Technical Services on 10 June 2011.

12.36 Canning CEO Mark Dacombe advised the Council that the engineering portfolio would be temporarily under the control of Kevin Jefferies until this position had been filled: T124.

12.37 I note that in an email exchange dated 7 July 2011 between Mark Dacombe and Councillor Mason regarding Kevin Jefferies’ temporary appointment, Councillor Mason indicated that that he did not support the temporary appointment: CI10/01972.

Councillor Mason’s Motion to Halt Recruitment

12.38 At the Special Council Meeting of 11 August 2011 (CI10/02840), Councillor Mason moved an amendment to the adoption of the Annual Budget, Report CR-137-11 (CI10/03187) that stated:

... (5) That no expenditure of Account 46149 be approved until a Report comes before Council outlining the numbers of employees engaged along with a Job Description and all new possible recruitment of Senior and Technical Positions.

12.39 The motion, carried unanimously, effectively prevented the CEO from recruiting senior and technical positions without first providing a report to the Council.

12.40 This effect of this motion was explained to the Council on 13 September 2011 in Report CE-034-11 (CI10/03189), which stated:

As all non-salary recruitment costs are covered from Account 46149 this has effectively put on hold all recruitment in the interim.
12.41 As explained in the *Authorised Inquiry Report*, the Report went on to explain that without adequate and qualified staff members the progress of the 2011/2012 budget programme could be affected. The Officer Recommendation then sought to have Council release the recruitment funds in Account 4614: T575-T576 and T882.

12.42 The Council unanimously passed a motion that stated:

(b) That the budget provided in Account 46147 Recruitment costs be released in order to enable positions to be filled and a Council Forum to be held in relation to current and new positions to be recruited by the City: CI10/01682 at page 20.

**Administration Seeks Approval to Review Engineering and Technical Services Division**

12.43 At the Ordinary Council Meeting of 27 September 2011 (CI10/03169), Council reviewed Report CE-036-11 – CI10/01975. This Report reported on a Forum held on 20 September 2011.

12.44 Contained in the Report was a section titled “*Engineering and Technical Services draft brief*”, which set out the CEO’s proposal to conduct a review of the Engineering division with the help of an external consultant.

12.45 The Recommendation in relation to this matter sought Council’s approval to engage a consultant to conduct a review. The recommendation stated:

(e) The Council approve the draft brief for the review of the structure of the Engineering and Technical Services Division and note that proposals and quotations will be invited and referred it to the Project Advisory Group for action: CI10/01975 at page 8.

**Councillor Mason’s Motion**

12.46 Instead of adopting the Officer’s Recommendation Council adopted a motion, moved by Councillor Mason, which resolved to immediately advertise for the Executive Engineering and Technical Services position and appointed the Mayor and Councillor Mason to the selections panel: CI10/03169 at page 15.
Mark Dacombe Informs Mayor and Councillor Mason of Headhunting

12.47 In an email dated 14 November 2011 (CI10/02900) Mark Dacombe advised Mayor Delle Donne and Councillor Mason that he had been actively headhunting and had informed Councillors at a November Forum of this fact. Mr Dacombe explained he had approached Mr John King regarding his interest in the position and although Mr King had declined, he had offered to sit on an interview panel as an independent member with expertise.

12.48 In response to this email from Mr Dacombe, Mayor Delle Donne emailed Councillor Mason on 14 November 2011 (CI10/00877) outlining concerns that the CEO was conducting the appointment of an executive without the involvement of the Mayor and Councillor Mason. The email stated:

   Think Mark is trying to take this appointment out of our hand? What do you think? I am of the view that this recruitment was not done in accordance with Council’s resolution?

Mark Dacombe’s Concerns in Relation to Mayor Delle Donne and Councillor Mason Sitting on the Selection Panel

12.49 Mark Dacombe emailed Jenni Law from the Department of Local Government on 22 November 2011 (CI10/01998) expressing concern regarding the Council’s resolution to appoint the Mayor and Councillor Mason to the selection panel.

12.50 Ms Law confirmed under section 5.41(g) of the Local Government Act provided that is was the role of the CEO to choose and elect members to the selection panel (CI10/01998 at page 2).

12.51 The position of Executive Engineering and Technical Services was managed by specialist government recruitment agency, LO-GO. Applicants responded by the closing date, 5 December 2011.
Email of 9 December 2011 from Mark Dacombe to the Mayor and Councillor Mason

12.52 As outlined above in Chapter Five of this Report, on 9 December 2011, Mr Dacombe advised the Mayor and Councillor Mason that any attempt to cancel the Refocus program and place the Mayor and Councillor Mason on the selection panel for the Executive Engineering and Technical Services would contravene the Local Government Act 1995.

Council Votes to Appoint Mayor and Councillor Mason to Selection Panel – 13 December 2011

12.53 As explained in Chapter Five of this Report, on 13 December 2011, the Council voted to appoint the Mayor and Councillor Mason to the selection panel: CI10/00195.

Interviews for Executive Engineering and Technical Services Position

12.54 Mark Dacombe informed Mayor Delle Donne via email on 22 December 2011 (CI10/02906) that the interviews for the Executive Engineering and Technical Services position were scheduled for 9 January 2012.

12.55 The Mayor forwarded this email to Councillor Mason.

12.56 On 5 January 2012 Mark Dacombe emailed Mayor Delle Donne and Councillor Mason advising them that, he would accommodate the Council’s resolution to have them sit on the selection panel along with Mr John King, a representative from LOGO Appointments, with himself as chair – thereby complying with his obligations under the Local Government Act 1995 (CI10/02910).

12.57 Mr Dacombe’s email read:

I would also say that I welcome your involvement as full members of the Panel as I am sure your participation will materially assist the selection of a very high quality appointee.
Applicants Shortlisted for Position

12.58 On 6 January 2012 Mayor Delle Donne and Councillor Mason were provided with a list of all applicants shortlisted for the interview process: CI10/02020.

Mayor Concerned Due Process not adhered to

12.59 On 8 January 2012, the day before the interviews were scheduled to take place, Mayor Delle Donne sent an email to Mark Dacombe expressing concerns that due process has not been adhered to and requested an urgent meeting the following morning to address these concerns: CI10/02021.

12.60 The Mayor, along with Councillor Mason, met with Mark Dacombe on the morning of 9 January 2012.

12.61 The Mayor then provided a summary of this the meeting to Mr Dacombe via email and cc’d all Councillors: CI10/02022.

12.62 In that email the Mayor explained that he was of the opinion that due process had not been adhered to and that, as a result, he and Councillor Mason felt it was inappropriate for them sit on the selection panel during the interview process.

Outcome of Interviews

12.63 Despite the late withdrawal of Mayor Delle Donne and Councillor Mason the scheduled interviews for the Executive Engineering and Technical Services position proceeded as scheduled.

Mark Dacombe Suspended as CEO

12.64 As discussed in Chapter Five of this Report, Mark Dacombe was effectively suspended as CEO on 30 January 2012.
12.65 No report had yet been drafted and as Mr Dacombe was no longer able to carry out his duties he could not have signed off on any report that was ultimately drafted. In the circumstances, no appointment was made in relation to the Executive Engineering and Technical Services.

**Second Attempt – Recruitment, Executive Engineering and Technical Services**

12.66 At the 27 March 2012 Ordinary Council Meeting, Acting CEO Andrew Sharpe advised the Council of his intention to readvertise for the Executive Engineering and Technical Services position. He confirmed this via an email to all Councillors dated 31 March 2012: CI10/01917.

12.67 The position was advertised on 31 March 2012 in the *Weekend West Australian*. The application closing date was advertised as being 16 April 2012.

12.68 Eight applications were received. Three applicants were short listed. One of the shortlisted applicants was Terry Blanchard.

12.69 The interviews were conducted on 30 April 2012. Acting CEO Andrew Sharpe, Anne Lake (a contracted Human Resources consultant) and David Harris, Director of Infrastructure for the City of Gosnells, all sat on the interview panel.

12.70 Councillor Mason was appointed to this selection panel as a result of the 27 September 2011 resolution discussed above. However, he only sat as an ‘observer’ and disclosed an impartiality interest, stating that he knew Terry Blanchard.

12.71 Councillor Mason was advised by Andrew Sharpe and Anne Lake that he was merely an observer and could not take part in the selection process.

12.72 Mayor Delle Donne was also scheduled to sit as an observer, but was unable to attend. He did, however, submit an impartiality disclosure stating that he knew Terry Blanchard: CI10/03166 at page 3.
The Mayor disclosed as follows: “one of the applicant’s sons is married to my daughter.”

Preferred Candidate Determined

At the Ordinary Council Meeting of 22 May 2012 (CI10/03166), the Council was presented with Report CE-046-12 (CI10/03192)

The Report named and recommended the preferred candidate for the position of Executive Engineer and Technical Services.

Councillor Barry’s 13 Questions

Councillors received the agenda for the 22 May 2012 Ordinary Council Meeting on 18 May 2012. After receiving the agenda Councillor Barry submitted via email a list of 13 questions (CI10/01923) to Andrew Sharpe. The email was also sent to the Mayor. The email read:

Dear Andrew,

In relation to CE -046-12, Could you please answer the following questions in relation to the above subject matter (keeping in mind the Terms of Reference of the Ministers Inquiry, and given that there are NIL items either Tabled or Attached to this Report).

Given that LO-GO conducted the previous LATE 2011 Engineering Executive recruitment program, and which for some reason fell away, and were presumably a Specialised recruiting agency, can you please explain the following questions.

(1) Apart from any possible monetary saving, what other critical benefits did the City derive from conducting the Recruitment process in-house as opposed to using outside Independent recruitment agencies as the City has used on most occasions that I recall.

(2) Were LO-GO invited to re-convene their previous process and if so, did they decline. Did we notify them of the abandonment of the previous Engineering Executive recruitment contract with them and what has that cost the City. Have we breached that Contract with this new In-house process?
(3) Was this Decision of recruitment made by you or in consultation with the Mayor and should not have Elected Members been advised of this new selection process or was there no need to consult with Elected members. (Please explain what section of the L G Act pertains, if this is the case.)

(4) Can you please explain what was the Criteria of the selection of the Evaluation Panel Members, given that I /We know Council resolved that the Mayor / Deputy Mayor be authorised to sit on the assessment panel if they so desired.

(5) What was the Documented reason that Cr Mason Declared an Impartiality Disclosure and were any other Declarations forthcoming by participants during the interviews.

(6) Were all 8 applicants afforded an initial interview or were they culled on the basis of the content of their Application details.

(7) Could you please supply a list of all applicants and their qualifications?

(8) Were the previous applicants from the LO–GO process invited to re submit their applications, and if not, why not, or were they advised of the City’s new recruitment process and advised of the reasons why they need not apply.

(9) Were Selection Panel Members renumerated for their attendance, if so, who and how much.

(10) Given that IPEWA was purportedly requested to put forward the names of someone to act as an Expert (please provide that communication) and also another LG Engineer (who did not attend please provide communication), could this suggest that the selection process was deficient to at least the of One or More Experts (with due respect)

(11) With Due respect to yourself, Could you please tell me what experience you have in the City’s recent past as being part of the selection process for Senior City Management Positions.

(12) Could you please provide me with the Qualifications of Ms Lake and Mr Harris have in relation to their Profession and Senior Employee selection (recent) as opposed to the Candidates, and how or why they were appointed.

(13) Could you please provide a detailed breakdown of the other 2 candidates Qualifications and CV’s

Kind Regards

Graham

12.77 All Councillors were provided with the answers to these questions at the Ordinary Council Meeting of 22 May 2012 (page 58 of the Minutes – CI10/03166).
Officer Recommendation

Councillor Mason Withdraws from Chambers

12.78 Prior to the debate regarding the Recommendation Councillor Mason declared an interest and withdrew from Council chambers: CI10/03440 at page 6 and 58.

Motion Moved to Adopt Recommendation

12.79 Councillor Morgan moved a motion, seconded by Councillor Clarke, that stated:

The Council, pursuant to section 5.37(2) of the Local Government Act 1995, accepts the recommendation of the Acting Chief Executive Officer, to employ the preferred candidate as the City's Executive Engineering and Technical Services on a five (5) year Performance Based Contract, subject to the terms and conditions as determined by the Acting Chief Executive Officer and detailed in Report CE-046-12: CI10/03166 at page 58.

Recommendation Rejected

12.80 During deliberations Councillor Barry suggested that panel members had a relationship with the preferred candidate: CI10/03440 at page 87 and 88.

12.81 After much debate, the Council resolved to reject the Officer’s Recommendation: CI10/03166 at page 59.

12.82 Councillors Elliott, Boylen, Morgan and Clarke voted for the motion and Mayor Delle Donne, Councillors O’Donnell, Daly and Barry voted against it. The motion was lost on the casting vote of the Mayor: CI10/03166 at page 59.

12.83 Councillor Barry attempted to foreshadow a motion to restart the recruitment process using a recruitment agency. Advice from Acting CEO Andrew Sharpe explained that was ultra vires (CI10/03166 at page 60).
12.84 Councillor Barry then moved a motion, seconded by Councillor Daly that stated:

_That the Acting Chief Executive Officer’s Recommendation was not adopted for the following reason:_

_Because of the lack of information provided in the report as per disclosure and information supplied to Elected Members (CI10/03166 at page 60)._ 

12.85 I note in that regard the comments of Councillor Boylen during debate on this issue:

CR BOYLEN: _I wish to speak for the motion Mr Mayor. Having listened to all that was said I haven’t heard anything that actually provides any substance to not accepting this recommendation. It’s very clear that we’ve been put forward to Council a properly qualified engineer. If we look at how the person was selected, they were selected by a panel made up of engineering expertise of human resource expertise, and also with the acting CEO someone with a very good knowledge of the business of the City of Canning. Had we gone to an independent office to help with the selection – and remember they would have had to also involve the acting CEO in his role for this appointment – what would we have got – we would have got them bringing in engineering expertise and bringing in human resources people. The human resources people being there primarily – well most importantly to ensure that the whole process was properly observed as well as participating on the panel, we have got exactly the same outcome by having this done in house as we would have through having so called experts or specialists. We’ve gone through the process properly, it’s been quite clearly documented, how we got an engineer that we needed. In terms of persons being – could someone have been unfairly cut out, there is a whole transparent process all open to appropriate review. No, we haven’t received a whole lot of attachments, it’s not our business and I think as – lets ignore Joondalup as the Inquiry into the City of Canning would seem to indicate from the terms of reference given to us by the Minister that Councillors need to be aware of their own role. It is not appropriate for us to receive all the documentation, the appointment of this position – to this position is ultimately the role of the CEO. Yes, we get all the documentation – the contracts of the CEO was appointed, that’s different, because a CEO is appointed by our Council, there is a big difference. There is nothing here to suggest that there is any impropriety – yes they may know each other, they may have worked with each other, they have all been in local government for a long time and for better or for worse it’s a fairly small pool particularly at the senior level. So, I see nothing that indicates that there has been any conflict of interest, I see nothing that indicates any impropriety, and I believe that we had a very qualified panel make the selection: (Audio Transcript Ordinary Council Meeting, 22 May 2012) (CI10/83440)._
12.86 The motion was carried by a majority vote. The Mayor, Councillors Barry, Daly and O’Donnell voted for the motion. Councillors Elliott, Boylen and Morgan voted against it.

Analysis

Issues of “Undue Influence” – the Mayor’s Relationship with Terry Blanchard

12.87 The issues discussed above by me in relation to the Engineering Consultancy Services tender and the Executive Engineering and Technical Services were canvassed in that section of the Authorised Inquiry Report under the heading “Part 4: Improper or Undue Influence”.

12.88 At all material times, Mr Terry Blanchard was the father-in-law of Mayor Delle Donne’s daughter (T616).

12.89 Clause 2.1(d) of the City’s Code of Conduct (CI10/03471) relevantly provides:

Council Members, … who exercise a recruitment or other discretionary function will make disclosure before dealing with relatives or close friends and will disqualify themselves from dealing with those people.

12.90 During the course of dealing with a number of matters relating to Mr Blanchard and his business, Blanchard Consulting Solutions, Mayor Delle Donne made a number of different declarations of interest in relation to Mr Blanchard (CI10/01907). On one occasion, the Mayor declared: “Know the Blanchard Family” CI10/01907 and CI10/01907. On another occasion the Mayor declared: “Mr Blanchard’s son is married to my daughter” (CI10/03166).

12.91 During public hearings, the Mayor gave evidence that the reason for the change in description was:

... as the thing moves forward, obviously every time I review what’s before me and what I’m supposed to vote on, that I set forward to – to disclose, which – I have an obligation to disclose (T616).
12.92 The *Authorised Inquiry Report* focuses extensively on the relationship between the Mayor and Mr Blanchard.

12.93 In relation to clause 2.1(d) of the City’s Code of Conduct, the *Authorised Inquiry Report* finds at Finding 48 that:

*Mayor Delle Donne acted contrary to clause 2.1(d) of the City’s Code of Conduct in that he failed to immediately exclude himself from the recruitment process when he became aware that Mr Blanchard, his daughter’s father-in-law, was an applicant for the Executive Engineering and Technical Services position.*

12.94 I do not agree with this Finding.

12.95 As noted above, Mr Blanchard was the father-in-law of the Mayor’s daughter. Strictly speaking, such a relationship is not, on its face, one involving a “*relative or close friend*”. Hence, in the circumstances, in relation to clause 2.1(d), I agree with Counsel Assisting that on a strict literal interpretation of clause 2.1(d), there was no obligation on the part of the Mayor to disqualify himself from dealing with this matter.

12.96 I do, however (again agreeing with Counsel Assisting), find that from the point of view of open and accountable governance, the Mayor ought to have brought the nature of his connection to Mr Blanchard to the Council’s attention. The Mayor’s failure to do so risks the perception that he was trying to hide something. As I have previously said, perceptions matter. Negative perceptions, even if unfounded, undermine public confidence in the motives of their elected officials and this, in turn, risks dissuading the public from engaging with these same public officials – a situation that undermines the benefits of local government more generally.

12.97 It also seems to me that had the Mayor been more forthcoming, more perceptive himself of “how this might look” many of the concerns raised in the *Authorised Inquiry Report* in relation to the Engineering Services would not have been an issue.
warranting scrutiny. In that regard, I note that overall in relation to the issues canvassed by me above, the Authorised Inquiry Report finds as follows:

**UNDUE OR IMPROPER INFLUENCE**

207. Under section 2.7(1) of the Local Government Act 1995, it is the role of the Council to govern a local government’s affairs and to be responsible for the performance of the local government’s functions. Section 3.1(1) of the Act provides that: “The general function of a local government is to provide for the good government of persons in its district.”

208. Put broadly, Regulation 7(1) of the Local Government (Rules of Conduct) Regulations 2007 (the Regulations) prohibits a person who is a council member from making improper use of the person’s office as a council member with the intent, purpose and aim of gaining directly or indirectly an advantage for the person or any other person; or causing detriment to the local government or any other person.

209. Regulation 3(1) of the Regulations sets out general principles to guide the behaviour of a person in his or her capacity as a council member. These principles are that a person in such capacity should: (a) act with reasonable care and diligence; (b) act with honesty and integrity; (c) act lawfully; (d) avoid damage to the reputation of the local government; (e) be open and accountable to the public; (f) base decisions on relevant and factually correct information; (g) treat others with respect and fairness; and (h) not be impaired by mind affecting substances.

210. Although it is not a rule of conduct that the general principles referred to in regulation 3(1) of the Regulations be observed by Elected Members, those principles provide an indication of some of the standards of conduct which can reasonably be expected of Elected Members. Accordingly, those indicated standards can play a part in examining and determining whether the conduct of an elected member or a group of Elected Members has been improper.

**FINDING 51**

Mayor Delle Donne, Cr Mason and Cr Barry made improper use of their office as council members with the intent and purpose of gaining directly or indirectly an advantage for the Mayor’s daughter’s father-in-law and, in so doing, caused a detriment to the local government and the persons selected as preferred applicants.

12.98 This is a serious allegation – perhaps the most serious of any allegation or Finding raised in the Authorised Inquiry Report.
12.99 I am mindful in reviewing this issue that I am bound to apply the standard of proof outlined in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, wherein Dixon J said:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences.

12.100 Applying this standard, I cannot conclude on the evidence before me that Mayor Delle Donne, Councillor Mason and Councillor Barry made improper use of their office as Council members, with the intent and purpose of gaining directly or indirectly an advantage for the Mayor’s daughter’s father-in-law and, in so doing, caused a detriment to the Local Government and the persons selected as preferred applicants.

12.101 The above should not be seen as suggesting, however, that quite serious mistakes were not made by Councillors and the Administration in relation to these issues or that these mistakes did not result in the provision of bad government to the residents of the City of Canning. My findings in this regard are provided below.

**Engineering Consultancy Services Tender**

12.102 Finding 43 of the *Authorised Inquiry Report* reads:

> Cr Barry acted inappropriately by attempting to replace a tender assessment panel’s recommended candidate with an alternative candidate without due regard to suitability, capability and conformity with the tender specifications.

12.103 The evidence shows that Councillor Barry’s motion during the Ordinary Council Meeting of 9 November 2010 to reject the Officer’s Recommendation in Report ET-152-10 (CI10/03184) and replace it with one whereby Blanchard Consulting Solutions would be appointed as the successful tenderer proceeded on the basis that Councillor Barry considered the City would get better value by accepting the cheapest tender (CI10/00178 and T1036).
12.104 At page 50 of the transcript of 9 November 2010 meeting (CI10/03436), following questions from Councillor Barry, the Council was advised that the objective of the tender was to provide for a supplier to cover staff leave in the design office and to cover activities that would from time-to time normally have quotes obtained. It was also hoped to get the design program 6-12 months ahead of the construction program.

12.105 At page 51 the Council was informed that Blanchard Consulting Solutions was considered unsuitable against the tender specifications because it was a single person operator (he could not perform all the required services and it accounted for why he was less expensive).

12.106 At page 52 it is clear that Councillor Barry is challenging the processes used for the tender evaluation. The concerns raised by Councillor Barry were speculative as he did not have before him a copy of the tender evaluation report. On this evidence, while it is open to find that Councillor Barry risked intruding into the administrative role of the City in tender evaluations, I cannot conclude that Councillor Barry had any ulterior motive when doing so. Indeed, it is arguable that had the tender evaluation report been provided as part of the Officer’s Recommendation, many of Councillor Barry’s concerns might have been alleviated. There was no reason the Council should have been left in the dark on this issue. More information from the Administration would arguably have addressed many of Councillor Barry’s concerns.

12.107 Notwithstanding my conclusion as to the lack of any ulterior motive on the part of Councillor Barry, I cannot accede to the request made in Written Submissions in Reply on his behalf not to make an adverse Finding. Councillor Barry did interfere in an administrative process. I accept, however, that better information from the Administration might have avoided interference in the first place.

12.108 At page 53 the debate moves to include opposition to Councillor Barry’s motion followed by consideration of a panel arrangement at page 54, resulting in Councillor Barry withdrawing his motion at page 55. A motion is then passed sending the entire issue back to Mark Dacombe for review and consideration.
12.109 These motions raised issues that required advice to the Council on both the legalities and practicalities of substituting an unsuccessful tenderer for the successful one.

12.110 It was a matter for the CEO, Mr Dacombe, to provide such advice or at least seek an opportunity to obtain it. At page 55 Mr Dacombe indicates he was prepared to take another look but proffers no comment on how that might impact on the already concluded tender evaluation process. This matter ought to have been raised for the Council’s consideration prior to them voting to send the matter back to the CEO for further review.

12.111 On the evidence available, while it can be concluded that Councillor Barry acted inappropriately in attempting to substitute a different successful tenderer because doing so interfered with an Administrative function, I also find that Councillor Barry’s actions may not have been necessary had there been a better flow of information from the Administration to the Council. Without this information and without more support from the Administration the Council was effectively left to decide on an issue without really knowing whether they could actually do, legally or logistically, what was being proposed.

12.112 There appears to have been a considerable amount of confusion in relation to what could or could not be done here. In the circumstances, it would have been preferable for all concerned to step back, ensure that all necessary information (legal and otherwise) was available. No action of any sort should have been taken until this had occurred. Good government requires this level of cooperation and communication.

12.113 Finding 45 of the Authorised Inquiry Report provides:

> By directly nominating its own selection of City engineering consultants, without any process to consider suitability, or without consideration being given to whether or not the decision was appropriate or lawful, Council interfered in the administration of the City.
12.114 I agree with this Finding. The Council was interfering with what were clearly administrative decisions. I find again, however, that when the facts surrounding this issue are further analysed, the actions of the Administration are also problematic.

12.115 In relation to this Finding, Councillor Olsen submitted that there was nothing impermissible or improper in the Council’s decision to nominate the consultants. Nor was there any “improper” interference. Furthermore, it was submitted that such interference, “...is not indicative of any failure to provide for the good government of the persons and the district of Canning” (CI10/03699).

12.116 I disagree. This comment, intentionally or not, admits that Council did interfere in the role of the Administration. Interference does fail to provide good government as it blurs the line between those duties assigned to the Administration and those assigned to the Council. When this occurs, delays are inevitable, tensions rise and necessary decisions required by residents are avoided.

12.117 I note in relation to Finding 45 above that the Council proceeded to nominate all 7 respondents to the advertised tender. Of the seven respondents, only Blanchard Consulting Solutions was considered to lack sufficient experience and staff qualifications to carry out the works required under the tender specifications with all other tenderers demonstrating sufficient experience and staff qualifications (Report ET-152-10 – Provisions of Engineering Consultancy Services (CI10/03184 at page 1). I agree with Counsel Assisting that in so far as Finding 45 criticises the Council’s consideration of the membership of the panel, 6 of the 7 members were considered to be suitable.

12.118 The criticism is thus only valid in so far as it relates to the inclusion of Blanchard Consulting Solutions. It should be noted, however, that it would have been open to the City to utilise Blanchard Consulting Solutions in a more limited capacity by only entering into contracts for works that it was qualified to undertake.
12.119 In the circumstances, I agree that by proceeding in the manner in which it did, the Council independently determined to create a panel of 7 consultants, without putting the matter out to tender. I agree with Counsel Assisting that it is not so much the lack of process to consider suitability that gives rise to the interference in the administration of the City; rather, it is the fact that the Council unilaterally sought to establish such a panel. This is a decision that should have been left to the Administration, with the Council having no role in the creation of that panel.

12.120 The Council’s failure to consider the lawfulness of the decision forms a second aspect of Finding 45. It is here that the Administration’s actions are found wanting.

12.121 As part of the resolution on 14 December 2010 (Ordinary Council Minutes – CI10/03159 at pages 77 and 78) to invite a list of companies to join the Council’s panel of consultants for the provision of engineering services an amendment was made to specifically authorise CEO Mark Dacombe to investigate any legal implications of the motion.

12.122 I agree with Counsel Assisting that it is a somewhat cumbersome approach to resolve to do something, and in the same resolution, allow further investigations to consider the legal implications of the decision you have just made. It would have been far wiser from a good governance perspective to have investigated the legal implications of the decision before it was made, rather than after.

12.123 Evidence obtained by the Inquiry establishes that the City’s Design Engineer, Mr Colin Gomes, sent an email to McLeods on 22 December 2010 seeking legal advice pertaining to the Council’s resolution on this matter. Advice was subsequently provided by McLeods in a letter dated 12 January 2011 (CI10/01947).

12.124 When questioned about this advice, Mr Dacombe indicated that he had not authorised Mr Gomes to seek it. Further, he was ‘livid’ when he found out because he considered the advice to be couched in language that would have been seen as inflammatory by the Council and which would have reinforced the view of some Elected Members that staff were working against them (T136 and T1200-1202).
12.125 Mr Dacombe took the view that the advice did not add anything to the advice that he himself had previously given the Council and determined effectively to not receive the advice. He further instructed that all soft copies of the advice be deleted and all hard copies be returned to him, with the only copy remaining to be placed on the Council’s files (T137; email 19 January 2011 from Mark Dacombe to Charles Sullivan instructing that all copies of the McLeods advice be destroyed (CI10/01948)).

12.126 Counsel Assisting concludes that it was a serious error for Mr Dacombe not to have brought that legal advice to the Council’s attention.

12.127 I agree for the reasons submitted by Counsel Assisting. Mr Dacombe’s concern that he would inflame the situation by providing the advice (T138, T1322) does not provide an adequate basis to justify the non-provision of the advice. Nor does the fact that the advice was similar to that which he had already given (T136) or that he had decided that the proposal could not happen (T148-T149).

12.128 The City’s legal services policy (CM 108, CI10/03218) required advice received from the City’s solicitors to be brought to the Council’s attention. It was not to the point that the advice had not been obtained with the authority of the Council or the CEO.

12.129 The failure by Mr Dacombe to bring the advice to the attention of the Council deprived the Council of the opportunity to consider and reflect upon it. The situation created could well have given rise to a potential breach of Reg.12 of the Local Government (Functions and General) Regulations 1996. It is not to the point that Mr Dacombe had already given similar advice (I note that he had no legal qualifications or training). The advice, albeit to the same effect as that given by Mr Dacombe, would have carried more weight coming from the City’s solicitors.

12.130 It is also clear that difficulties caused within the Administration as a result of Mr Dacombe not providing the advice to the Council began to manifest themselves soon thereafter.
12.131 In particular, emails from Mr Gomes (to Troy Bozich on 14 December 2011 (CI10/01950) and email thread to WALGA commencing 21 February 2011 (CI10/01951)) reveal that he was prepared to continue to seek advice from various quarters without the knowledge or consent of Mr Dacombe.

12.132 Having sought authority from the Council to investigate any legal implications of the motion, it was incumbent on Mr Dacombe to bring that advice to the Council.

12.133 In Closing Written Submissions in Reply filed on behalf of Mr Dacombe, it is submitted that, although Mark Dacombe acknowledges that he should have brought the legal advice to the attention of Council, “…the characterisation of the error as “serious” is, in Mr Dacombe’s submission, unwarranted.”

12.134 I disagree. This Report has shown throughout a breakdown in the relationship between the Administration and the Council. I find that much of the resulting dysfunction can be attributed to a failure to communicate and work together. Blocks in the flow of information, a “don’t talk until asked to” mentality on the part of the Administration and a fear of inflaming the situation resulted in distrust, suspicion and a failure to get things done. In these circumstances, I find that Mr Dacombe’s failure to let the Council know what he knew is indeed serious and further evidence of poor interaction with the Council. There is also some force in the argument that this failure on the part of Mr Dacombe should be noted as a factor in Council’s potential breach of the Local Government Act 1995. Had the information been made available to Council their actions and decisions may well have changed.

12.135 The Council should have followed up its own resolution authorising Mr Dacombe to investigate the matter. It did not. As explained by Counsel Assisting, concerns expressed by Elected Members of the Council about resolutions not being implemented and followed through demonstrate that the Council kept a watchful eye on outstanding matters. This is a matter that the Council ought to have followed up more rigorously given the potentially serious consequences of any illegal decisions.
Overall, there was a lack of clear communication between the Council and the Administration in terms of the best way forward for the Engineering Consultancy Services Tender. Discussions about whether it was better to proceed by way of a sole provider or a panel ought to have been had prior to the tender being advertised, not after a successful applicant had been determined and publically identified (through the agenda and the Minutes).

Conducted in the manner in which it was, the process was wasteful and unnecessarily prolonged, resulting in a failure to provide good government.

Recruitment, Executive Engineering and Technical Services

In relation to this issue I repeat the Findings provided by me in Chapter Five of this Report – particularly as they pertain to the Council’s relationship with Mr Dacombe and the lack of information provided to the Council on the legality of the Mayor and Councillor Mason being appointed to the selection panel.

I again highlight here Finding 49 of the Authorised Inquiry Report which provides:

Mayor Delle Donne and Cr Mason failed to disqualify themselves after being advised by the CEO that their participation in the selection process for the Executive Engineering and Technical Services position was inconsistent with the Local Government Act 1995.

I agree. As explained by Counsel Assisting in Written Closing Submissions, the relevant advice given by Mr Dacombe is to be found in his email of 9 December 2011 to Mayor Delle Donne and Councillor Mason raising concerns about the notice of motion to cease Refocus (CI10/02096).

For the reasons previously outlined by me in Chapter Five of this Report, Mr Dacombe correctly advised that the Council had no authority to direct that any Elected Member be appointed to a selection panel and accordingly, both the Mayor and Councillor Mason should have disqualified themselves, absent an invitation from Mr Dacombe.
12.142 The email from Mr Dacombe to Mayor Delle Donne and Councillor Mason dated 5 January 2012 providing a full list of applicants for the Executive Engineering Position and identifying the members of the selection panel (CI10/02910) is capable of being construed as a form of invitation by Mr Dacombe to both the Mayor and Councillor Mason to sit on the selection panel.

12.143 In particular, the comment “I would also say that I welcome your involvement as full members of the Panel as I am sure your participation will materially assist the selection of a very high quality appointee” can be seen as an invitation to both the Mayor and Councillor Mason to sit on the panel in a manner not inconsistent with the provisions of the Local Government Act 1995.

12.144 In such circumstances, I find that between 13 December 2011 (the date of the resolution) and 5 January 2012 the Mayor and Councillor Mason should have disqualified themselves on the basis of Mr Dacombe’s advice.

Recruitment, Executive Engineering and Technical Services Second Attempt

12.145 In relation to this issue, while I find no ill will on the part of any Councillor the evidence again reveals that by this stage the relationship between the Council and the Administration was such that no one seemed to trust anyone. This is best evidenced by Councillor Barry’s list of 13 questions to Mr Sharpe.

12.146 Overall, I find the debate evident throughout to evidence a working relationship very much in crisis. Good government cannot be provided in circumstances where every decision raises suspicions.

12.147 One other issue that needs to be addressed relates to the conclusions provided at pages 4:59 [190] to [191] in the Authorised Inquiry Report:

190. Notwithstanding the purported legal advice, with Cr Mason’s absence (EXH 173) from the Council chamber during debate on this item, the Mayor and Cr Barry were able to attack the recruitment process without Cr Mason providing his ‘observations’ of the integrity of the process. Presumably, Cr Mason’s role as an ‘observer’ on the panel would include “independent
scrutiny” on behalf of Council. With Cr Mason absent and unable to add to the debate on the integrity of the process it is difficult to determine why Cr Mason was appointed to the panel as an observer.

191. The inference that the Inquiry has drawn is that Cr Mason removed himself in order to benefit the Mayor and Cr Barry by enabling them to attack the integrity of the process without Cr Mason being in a position to be called on to provide his ‘observations’. His declaration of an “interest” is confusing and unwarranted considering he had fulfilled the Acting CEO’s conditions that he sits on the panel only as an ‘observer’.

12.148 I reject these conclusions. Like Counsel Assisting in his Written Closing Submissions, I do not consider Councillor Mason’s absence from debate to hold the same conspiratorial connotation as appears above at [190]-[191] of the Authorised Inquiry Report. While it is true that other Elected Members were unsure of the precise reason for Councillor Mason’s absence, there is insufficient evidence on the balance of probabilities to infer that his absence was a devious attempt to facilitate the rejection of the Officer’s Recommendation.

Conclusions

12.149 Contrary to the Findings in the Authorised Inquiry Report, I do not find that Mayor Delle Donne acted contrary to clause 2.1(d) of the City’s Code of Conduct by failing to immediately exclude himself from the recruitment process for the when he became aware that Mr Blanchard, his daughter’s father-in-law, was an applicant for the Executive Engineering and Technical Services position.

12.150 On a strict literal interpretation of clause 2.1(d), there was no obligation on the part of the Mayor to disqualify himself from dealing with this matter.

12.151 I do, however, find that from the point of view of open and accountable governance, the Mayor ought to have more clearly brought the nature of his connection to Mr Blanchard to the Council’s attention at first instance.

12.152 I further find that Mayor Delle Donne, Councillor Mason and Councillor Barry did not make improper use of their office as council members with the intent and
purpose of gaining directly or indirectly an advantage for the Mayor’s daughter’s father-in-law.

12.153 In relation to the Engineering Consultancy Services Tender, I do not find that Councillor Barry had any ulterior motive when he moved a motion during the Ordinary Council Meeting of 9 November 2010 to reject the Officer’s Recommendation in Report ET-152-10. I find that had the tender evaluation report been provided as part of the Officer’s Recommendation, many of Councillor Barry’s concerns might have been alleviated. There was no reason the Council should have been left in the dark on this issue. More information from the Administration would arguably have addressed many of Councillor Barry’s concerns.

12.154 Notwithstanding my finding as to the lack of any ulterior motive on the part of Councillor Barry, I cannot, however, accede to the request made in submissions on his behalf not to make an adverse finding. Councillor Barry did interfere in an administrative process. I accept, however, that better information from the Administration might have avoided interference in the first place. Without this information and without more support from the Administration the Council was effectively left to decide on an issue without really knowing whether they could actually do, legally or logistically, what was being proposed. Good government requires this level of cooperation and communication.

12.155 I also find that by directly nominating its own selection of City engineering consultants the Council interfered in the day to day administration of the City. I note, again, however, that when the facts surrounding this issue are further analysed, the actions of the Administration are also problematic.

12.156 Interference by Elected Members of the sort evident here fails to provide good government as it blurs the line between those duties assigned to the Administration and those assigned to the Council. When this occurs, delays are inevitable, tensions rise and necessary decisions required by residents are avoided.
This was a decision that should have been left to the Administration, with the Council having no role in the creation of the panel in question.

12.157 In relation to the legalities of this decision, and the decision by the City’s Design Engineer, Mr Colin Gomes, to seek legal advice from McLeods pertaining to the Council’s resolution on this matter I find that it was a serious error for Mr Dacombe not to have brought the resulting legal advice to the Council’s attention.

12.158 The failure by Mr Dacombe to bring the advice to the attention of the Council deprived the Council of the opportunity to consider and reflect upon it. The situation created could well have given rise to a potential breach of Reg.12 of the *Local Government (Functions and General) Regulations 1996*.

12.159 I also find that the Council should have followed up its own resolution authorising Mr Dacombe to investigate the matter given the potentially serious consequences of any decisions made by it in relation to this issue.

12.160 I find that overall there was a lack of clear communication between the Council and the Administration in terms of the best way forward for the Engineering Consultancy Services Tender. Conducted in the manner in which it was, the process was wasteful and unnecessarily prolonged. This resulted in good government not being provided to the residents of the City of Canning.

12.161 In relation to the recruitment of the Executive Engineering and Technical Services, I find that Mr Dacombe correctly advised that the Council had no authority to direct that any elected member be appointed to a selection panel. That invitation occurred on 5 January 2012. In such circumstances, I find that between 13 December 2011 (the date of the resolution) and 5 January 2012 the Mayor and Councillor Mason should have disqualified themselves on the basis of Mr Dacombe’s advice.

12.162 In relation to the second attempt at recruiting the Executive Engineering and Technical Services, while I find no ill will on the part of any Councillor the evidence
again reveals that by this stage the relationship between the Council and the Administration was such that no one trusted anyone. The Council, in these circumstances, took it upon itself to question extensively and ultimately intrude into subject areas that are best managed by the Administration. Good government cannot be, and was not, provided in circumstances such as these.

Finally, I do not consider Councillor Mason’s absence from this debate to hold the same conspiratorial connotations suggested at paragraphs [190]-[191] of the Authorised Inquiry Report. While it is true that other Elected Members were unsure of the precise reason for Councillor Mason’s absence in relation to this particular issue, there is insufficient evidence on the balance of probabilities to infer that his absence was an attempt to facilitate the rejection of the Officer’s Recommendation.
CHAPTER THIRTEEN

WILLETTON SPORTS CLUB
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WILLETTON SPORTS CLUB

Background

13.1 The background facts in relation to the Willeton Sports Club (the “WSC”) are clearly set out in the Authorised Inquiry Report. I repeat any relevant undisputed facts from that Report below.

13.2 The WSC was established in 1975.

13.3 The WSC leased a building and sporting grounds from the City of Canning. Its facilities included sporting grounds for a number of sports, change rooms and a licensed bar with facilities to serve meals.

Lease Agreement

13.4 The terms of the lease agreement required the WSC Board of Management to cover the cost of the building loan from the City, operate and maintain the premises and pay all utility bills incurred.

13.5 The lease with the City was scheduled to expire in 2015 (Cl10/01747).

2009–2010 Period

13.6 During 2009–2010 changes in senior staff saw a deterioration in the financial record keeping of the WSC. As noted in the Authorised Inquiry Report the evidence shows that in reduced revenue and the resignation of members of the Board of Management.

13.7 As further explained, Godfrey Lowe was elected as a new board member in January 2010. He became President in March 2010. By all accounts his nomination and appointment as President were very well received.
13.8 In August 2010 a local businessman, Ian Marshall, examined the finances of the WSC. His findings (dated 13 September 2010) revealed that the WSC was in a poor financial state and was likely to be trading in a position of insolvency in the very near future.

President John Tidman

13.9 In February 2011 Godfrey Lowe resigned from his position as President of the WSC Board. He was replaced by John Tidman. Ian Marshall was appointed as Business Manager of the WSC.

13.10 Andrew Sharpe, an employee of the City of Canning was asked to re-join the Board to assist the WSC with financial matters. His appointment to the WSC was approved by resolution of the City of Canning Council.

13.11 Under this new management the WSC increased its annual turnover from approximately $400,000 to $900,000. However, the funds that were generated went to paying off debts and unpaid accounts.

New Business Plan

13.12 A number of opinions were sought regarding the options available to WSC and its viability going forward. The Board determined that the only way the Club could continue was to seek a loan of $256,000.00. This loan would allow for all outstanding debts to be paid and for the building to be refurbished. The board approached the City of Canning to underwrite the loan.

Formal Request for Support

13.13 On 22 August 2011, John Tidman sent a letter to Canning CEO Mark Dacombe formally requesting support from the City of Canning: CI10/01161.

13.14 The letter outlined two options for the City to consider.
13.15 The first option involved the City agreeing to underwrite a loan that would avoid WSC insolvency. The second option involved placing the WSC into administration. This would result in the WSC being closed.

Andrew Sharpe Resigns from WSC Board

13.16 Andrew Sharpe resigned from the Board of the WSC on 12 September 2011 as the request to the City for financial assistance created a conflict of interest. As Chief Financial Officer at the City of Canning he could no longer remain on the board of WSC.

Deputation to Council

13.17 At a Special Council Meeting on 22 September 2011 (CI10/01912), John Tidman and Ian Marshall were given approval to make a deputation to Council to formalise their request to underwrite the loan. Councillors were provided copies of the WSC’s business plan and a report that outlined the expected future income of the Club, projected earnings and how the WSC planned on servicing the loan they were seeking to secure.

Advice Provided by Andrew Sharpe

13.18 During this the deputation Andrew Sharpe, in his capacity as Executive Corporate Services was asked if the Council was able to underwrite the loan to the WSC without a full audit being conducted.

13.19 Mr Sharpe provided the following advice:

...you’d have to comply with section 6.20 of the Local Government Act because it is not on our budget and you would have to advertise that fact that we were looking to borrow, the terms of the borrowing, and then you would have to have a submission period and then you would bring that back to Council. In terms of good governance you would have to make sure as a Council that you undertook your due diligence and you – at the moment the proposal that’s before you has no guarantee and if – if at a future date there was default on the loan you would have no security for recovery...
...there’s nothing precluding you giving consideration to the request and advancing the loan, as it currently stands, but from a good business perspective and doing due diligence you would have to question whether that would be the right decision to make (Audio extract from 22 September 2011 Special Council Meeting: CI10/02074).

Council’s Decision

13.20 A motion was put to the Council in the following terms:

(a) The Willetton Sports Club be advised that in order for Council to give the request for financial assistance due consideration it requires independently audited financial statements to the 30 June 2011, together with current financial statements to the 31 August 2011.

(b) Subject to (a) above the following additional information is also requested: details of the security that will be provided to support the loan borrowing and a business plan that address the sustainability of the Club moving forward.

(c) The Chief Executive Officer be authorised to place a suitable notification in the Canning Times and Examiner Newspapers outlining Council’s decision regarding its position with the Willetton Sports Club.

(d) The Chief Executive Officer write to the affiliated Clubs advising them of the decision of Council.

(e) a further report is presented to Council on the outcomes of (a), (b), (c), (d) and above. “

13.21 The motion was carried unanimously.

13.22 Regrettably, the WSC was declared insolvent on 30 October 2011.

Analysis

13.23 The evidence shows that the Council had long supported the WSC and was keen to ensure its survival.

13.24 The evidence also shows that in relation to this issue the Council worked cooperatively and effectively with Andrew Sharpe to ensure that all information
needed to understand and address the issues the WSC presented was available and discussed in an open and frank manner.

13.25 I agree with Counsel Assisting that the Council’s decision regarding the need for an independent audit of the WSC’s books was warranted in the circumstances, particularly given the previous involvement of the City’s Executive, Andrew Sharpe.

13.26 I also agree that Andrew Sharpe’s evidence on this point (T858-T859) indicates that he was familiar with the financial situation of the WSC and was concerned that the Council should be presented with the true financial position. I accept that the cautious approach adopted by Mr Sharpe was one that he would have adopted as a matter of course for any organisation seeking funding in similar circumstances.

13.27 It is evident from the advice provided by Andrew Sharpe, in his capacity as Chief Financial Adviser, his intention was to warn Council of the risk in underwriting the loan. His overriding concern was that a decision to underwrite the loan might not be in accordance with good governance practices. Overall, his advice warned that if the Council was to accept the WSC loan request as it, this might not be a diligent decision as there was a very real possibility that the WSC would default on the loan.

13.28 All Mr Sharpe really suggested was that the Council conduct an independent review of the WSC’s financial position.

13.29 This advice was financially prudent, considered and given objectively. It is the type of advice expected from the City’s Chief Financial Officer.

Conclusions

13.30 I find that Councillors were entitled to rely upon the prudent advice provided by Andrew Sharpe in relation to the Willetton Sports Club. That advice simply called for a prudent approach before agreeing to any loans to the WSC. The advice was legally sound.
13.31 In the circumstances, I find that as regrettable and disappointing as the Council’s decision may have been to the public and indeed the Council, in terms of the consequences that flowed from this decision for the WSC, the Council did nothing other than rely upon advice provided to it by its Officers.

13.32 I further find that the Council’s actions were sound in every sense as was its proven ability to work with the Administration in relation to this issue.

13.33 In relation to the Willeton Sports Club, there was no failure to provide good government to the people of Canning.
CHAPTER FOURTEEN

REGULATORY SERVICES
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REGULATORY SERVICES

Review of the City’s Regulatory Services

14.1 In 2011, the City of Canning commissioned a review of its regulatory services. Consultancy firm “Planning Context” conducted the review, which formed part of the Refocus Organisational Reform Program.

14.2 The Review revealed deficiencies in relation to the performance of the City’s regulatory planning functions.

14.3 The Review highlighted that during the period September 2010 to February 2011 the number of planning and development applications that Council considered exceeded the number considered by other local governments in Western Australia.

14.4 The Western Australian Local Government Association (WALGA) has set the best practice standard for the amount of development applications that should be reviewed by the Council at less than 10%. The Canning Council was being referred and was reviewing 43% of all items and 32% of all development applications.

14.5 Overall, the Review recommended that Council focus on matters of a strategic nature and allow simple regulatory applications to be approved by the Administration under delegated authority.

14.6 “Delegated Authority” refers to the giving or assigning authority to someone to carry out specific activities. The person delegating the authority remains responsible for the task, but the person who receives the delegation carries out that task. This is standard practice in local government.
Lack of Confidence

14.7 As outlined by Counsel Assisting in his Written Closing Submissions, and as detailed throughout this Report, evidence obtained by the Inquiry indicates that there were significant trust and confidence issues held by a number of Councillors in relation to the competence of the Administration (see, for example, T193-T194, T198, T233 and T239. See also pages 4, 5, 28, 49, 65 and 74 in Review of Regulatory Services Group Report, May 2011 (CI10/01870).

Analysis

14.8 As is clear from the Review of Regulatory Services Group Report, the Council was heavily involved in matters that could have been reviewed by Administration staff under delegated authority.

14.9 Having reviewed the evidence, I find that this situation is, to a large degree, not surprising.

14.10 I agree with Counsel Assisting that while it is true that there were a greater number of regulatory services applications being referred to the Council, it would seem the main reason for this was inadequate use of delegations to ensure that sufficient discretion existed at the Officer level to avoid the need to burden the Council with unnecessary matters. There is little doubt that, had proper delegations been in place, many of the planning and regulatory matters that came before the Council could have been dealt with by the Administration – see for example T689, T716, T786-T787, T1119-T1120 and the evidence of Commissioner Reynolds at T838-T839.

14.11 Having said this, it is also clear that in order for delegations to be effective, it is necessary for a Council to have a sufficient level of confidence in Administrative staff to carry out those delegations competently and effectively.
14.12 It is clear on the evidence available that Councillors for the City of Canning lacked confidence in the Administration and that the situation was deteriorating. The result was a breakdown in necessary lines of communication between the Council and the Administration.

14.13 In these circumstances, it is arguable that Council concluded that it was better equipped to determine operational matters.

14.14 Unfortunately, Council’s decision to do so results in a blurring of responsibilities between the Council and the Administration that is not in the best interests of local residents. The types of delays caused by Council second guessing or acting in the role of Administrative Officers is bound to cause frustration and confusion about who does what in the minds of residents seeking assistance with planning applications etc.

14.15 As was apparent from the evidence of Commissioner Reynolds (T838-T839) and submissions made on behalf of the City of Canning, changes to the delegations, particularly the planning delegations have brought about significant improvements to the City’s operations. In particular, I note from the Written Submissions in Reply filed on behalf of the City that in 2011, the number of planning reports presented to Council was 483. Following the revised delegations implemented in mid-2012 this number reduced to 396 and in 2013 following further review and improvements being made to the delegations, this number reduced to 96. I also note that the number of development applications processed by delegated authority has risen from approximately 60% in 2011 to around 90%.

Conclusions

14.16 I find there was an inadequate use of delegations at the City to allow Officers to avoid the need to burden the Council with matters best dealt with by City Officers.

14.17 I further find that the degree of Council interference with regulatory matters is partly explained by a deteriorating level of trust between the Council and the
Administration and a lack of confidence on the part of the Council in relation to some Administrative staff.

14.18 Overall, I find that the Council picked up matters otherwise within the purview of the Administration because they felt better equipped to resolve them promptly. In so doing, the Council impermissibly interfered in the administration of the City. Said interference could, however, have been avoided had the Council and the Administration worked together to better understand the role of and need for delegated authority and the need for open communication and cooperation. By failing to do so, good government was not provided to the residents of the City of Canning. The result was inefficient planning approvals and otherwise avoidable delays.
CHAPTER FIFTEEN

GOVERNANCE
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GOVERNANCE

15.1 The evidence before the Inquiry identified a number of aspects of the City’s governance procedures that were either inadequate or not in compliance with appropriate legislative requirements. It is appropriate to consider these matters from the viewpoint of their capacity to affect the provision of good government.

Attendance at Council Forums

15.2 The evidence before the Inquiry showed that, for differing reasons, some Councillors did not attend Council Forums (T191-T192, T468 and T681).

15.3 This situation is poor on many levels. Councillors who choose not to attend these meetings risk being unaware of the information presented, particularly in light of the often brief Minutes kept of Council Forums: note, for example, the Minutes at CI10/01784.

15.4 From the perspective of good government, decision-making is enhanced when all decision-makers possess the same information. Councillors can engage and debate more constructively when they have a similar understanding of a matter. This also promotes an opportunity for differing views on a matter to be tested and explored. As a corollary, lacking relevant information can lead to a failure to engage on matters of significance to local residents.

15.5 Accepting that attendance at Council Forums may not always be possible for every Councillor due to work or personal commitments, it is necessary to ensure that those Councillors not in attendance are not deprived of the information presented. By their nature, Forums present an opportunity to receive additional information on a matter under consideration. They are not alternatives to the decision-making process of Council. They are supplementary and allow further exploration of a matter.
15.6 Local governments would benefit greatly by creating practices that ensure all councillors have the same information available to them prior to any relevant decision-making exercise. Whether this takes the form of more complete minutes from Forums, the requirement that presentations be made in hard copy or the audio/visual recording of Forums, it is essential that Councils ensure sure that all Councillors have access to the same information.

**Induction Training**

15.7 The Inquiry received much evidence indicating that Councillors received little, if any, constructive induction training when they were elected to their positions: T259-T260, T270, T308, T340, T439-T440, T498, T519-T520, T700, T706, T732, T804, T870-T872, T1032 and T1131.

15.8 It is not difficult to envisage that a member of the community who seeks to serve that community by becoming a Councillor may not have a great deal of familiarity with Council processes, the relevant legislation or the manner in which the particular local government operates.

15.9 The evidence before the Inquiry revealed that some Councillors received a bundle or box of materials on the night soon after their elections, often with little or no follow up, notwithstanding an open offer to seek assistance from senior employees of the Administration. Given the often busy agendas facing newly elected Councillors, it is not surprising that some simply chose to observe the way that their more experienced colleagues conducted themselves during meetings as a way of “learning on the job”: see, for example, T440 and T709.

15.10 This practice is not without its difficulties, particularly if the conduct being observed is not correct. In that context, the observer would have no framework or reference upon which to compare and determine such matters: T1032.

15.11 A review of the evidence also indicates that notwithstanding the provisions of clause 4.3(b) of the City’s Code of Conduct (CI10/03471), which requires
Councillors to be as informed as possible about the functions of Council, there were varying and often disparate levels of understanding of the relevant legislation and procedures applicable: see, by way of example, Councillor Daly at T234 and T241; Councillor O’Donnell at T281, T298 and T299; Councillor Olsen at T339, T349 and T433; Mayor Delle Donne at T628; Councillor Morgan at T672; Councillor Elliott at T784; Councillor Clarke at T821; Councillor Barry at T1043 and Councillor Mason at T1117.

15.12 This provides a compelling inference that the induction process that applied at the City of Canning prior to and during the relevant period of time being examined by this Inquiry was inadequate. It did not provide a proper foundation for new Councillors to properly understand their roles or how to carry them out.

15.13 In practice, the Administration does not appear to have been able to equip Councillors with the necessary knowledge to carry out their duties, certainly upon their commencement. Many Councillors indicated that upon their commencement they had to devote considerable time to getting up to speed on the issues coming before the Council for decision and that the luxury of time to read their induction materials was often not available.

15.14 I find that no Councillor deliberately went out of their way to avoid familiarising themselves with the relevant materials. In practice, it seems that even with the best intentions, there was insufficient time to properly attend to matters of induction.

15.15 It is noted that the City has proposed moving to a more comprehensive training program for new Councillors including the provision of training for prospective Councillors. This is discussed in Chapter Sixteen of this Report. Such a program appears positive and likely to result in better and earlier trained Councillors. This can only enhance the prospects of good government being delivered.

15.16 Based on what I have seen, I suggest that any induction package be carefully crafted with the Department of Local Government and Communities, the WA Local
Government Association and Local Government Managers Australia. Further, all induction courses should be made mandatory each time a Councillor is elected to Council. Situations change as do learning packages.

**Continuing Education Post Induction**

15.17 The role and obligations placed on a local government Councillor focus around the day to day strategic management of (particularly in a large metropolitan local government like Canning) a multi-million dollar business organisation. In these circumstances, the Council is required to make what can be thousands of formal decisions per year in relation to budget, strategic plans, large developments, as well as a raft of lower level decisions on small developments, statutory approvals and the like. This is no small ask of anyone willing to put their hand up.

15.18 As outlined in Chapter Three of this Report, most Councillors and Mayors in Western Australia receive poor remuneration. Not surprisingly, most are employed elsewhere and many have significant family commitments.

15.19 Councillors appearing before the Inquiry expressed considerable frustration with the volume of reading material placed before them, the complexity of this material, the large number of decisions (often on complex matters) required of them and the relatively short amount of time they were provided in order to “get up to speed” on many of these matters.

15.20 It seems logical that in an environment such as this, a greater priority should be made to ensure that Councillors are given every opportunity to learn as much as possible about their roles, the legislation that governs them and the types of issues they are likely to face.

15.21 Unfortunately, the evidence shows that little concerted effort had actually gone into ensuring that Councillors were necessarily prepared for what is now a quite sophisticated local government environment.
15.22 The City Administration explained to the Inquiry that it placed a high value on training and advised Councillors on a regular basis in relation to training courses available to them. It did this, it advised, via a weekly Councillor Bulletin distributed to all Councillors: T871.

15.23 The Bulletin consists of general information listed under sections. Where applicable, it contains copies of Forum and formal meeting minutes for the perusal of Councillors prior to being dealt with at a formal Council meeting. The general sections of the Bulletin (CI10/00675) were headed:

- “Heads Up” – General Councillor timetables etc.
- “General Items of Interest”
- “Building and Development Approvals for Processing”
- “WALGA/ALGA Reports” – media releases publications etc
- “Minutes”

15.24 Upon examination, there were 51 bulletin’s issued in 2011 and 49 in 2012. While it was also noted that there was no regular section in the bulletin that related to Councillor training, on the whole each bulletin contained a copy of the WALGA LG News publication, which did contain regular information on training courses available through this organization for Elected Members. It was also noted that the volume of information contained within these bulletins was extensive and sometimes exceeded 200 pages.

15.25 A request was made to the City to ascertain how many Elected Members took up the “offer of training” offered in the bulletin. The City advised that it was unable to provide any accurate information or records held on file pertaining to any individual Councillor’s training requests or courses undertaken.

15.26 No one during the course of public hearings mentioned the Bulletin and it was clear that there was little emphasis on continuing education programs more generally.
15.27 This is concerning as it raises the following possibilities, none of which can be considered ideal:

- That due to the volume of information provided the Councillors were unaware of the training available or unable to give the time needed to take further education or simply not interested;
- The City failed to keep proper records on any training undertaken, thus making it difficult to approach Councillors most in need about the opportunities available to them.

15.28 Whatever the reason, the evidence before the Inquiry suggests that further education for Councillors was not a priority within the City of Canning.

15.29 This is unacceptable. Councillors in any modern local government simply cannot do what is required of them if they are buried under a mountain of paperwork, with little time to read what is put before them and if provided little background information and training that allows them to understand what is required of them in the first place.

**New South Wales Elected Member Skill Set**

15.30 This issue is not unique to the City of Canning or indeed local government in Western Australia.

15.31 I note, for example, that in October 2013, the New South Wales Local Government Independent Review Panel released its Final Report into the revitalisation of local government in that State (the “NSW Local Government Report”). The Review Panel was tasked with formulating options for a stronger and more effective system of local government. While the Report provided its conclusions and recommendations on the whole gambit of local government it is noted that it made significant conclusions and recommendations in relation to Elected Member training and development including:

**Box 20: Councillor Development**

- Require the governing body of a council to undertake a periodic audit and self-assessment of its skills base against its role and strategic objectives
• Require individual councillors to undertake similar self-assessments (this could be a simple on-line process)

• Require all councils to prepare, resource and implement a Councillor Development Plan linked to each 4-year Delivery Program and in accordance with a set of principles and professional development targets established jointly by LGNSW and DLG

• Introduce a mandatory component including an extended induction program for new councillors and ‘update’ modules for re-elected councillors, in both cases to be completed within 3 months after each election

• Also require councillors to complete a prescribed number of optional professional development activities during each term – such activities to be selected from a list of approved courses and other options.

15.32 The following recommendation was also included in the NSW Local Government Report:

Amend the legislated role of councillors and mayors … and introduce mandatory professional development programs.

15.33 There is every reason to believe that these recommendations, if legislated in Western Australia, would address many of the issues raised here in relation to the City of Canning. It is also clear that the state already has educational programs in place to meet the needs of any legal legislative amendments of the sort proposed in New South Wales. They merit further analysis.

WALGA Elected Member Training Program

15.34 I note in that regard that the WA Local Government Association offers a formalised Elected Member Training Program focusing on the core skills and attributes required of an effective elected member.

15.35 This program allows formal accreditation for WALGA’s Diploma Course for Elected Members in WA.

15.36 While in an ideal world it would be desirable for all Elected Members to be involved in training at the diploma level, the practicalities of the role and
obligations placed on Elected Members through time, workload and family commitments, make this a pathway that would not be attainable by all (at least in the short term).

15.37 A more attainable and immediate outcome would be for all Elected Members to undertake the intermediate level of training as provided in the Elected Members Skill Set (EMSS). This would provide each elected member with a practical level of knowledge in the basics of the role and obligations of being an effective elected member and provides a perfect springboard to the Diploma Course should the elected member wish to undertake such course of study.

15.38 WALGA’s EMSS acknowledges and recognises that it is based upon the Australian Government’s EMSS, as created through the Industry Skills Council.

15.39 The Skill Set Requirements consist of 3 separate units.

<table>
<thead>
<tr>
<th>Unit Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>LGAGENE302A</td>
<td>Contribute to Effective Decision making</td>
</tr>
<tr>
<td>LGAGENE501A</td>
<td>Undertake Councillor Roles and Responsibilities</td>
</tr>
<tr>
<td>LGAGENE503</td>
<td>Perform the role of an elected member</td>
</tr>
</tbody>
</table>

15.40 The content of these units are worth highlighting here.

15.41 **LGAGENE302A – Contribute to Effective Decision making**

This unit focuses on decision making processes and the knowledge and capabilities of those working within it. It further identifies the existence of external and personal interests and influences on Councillors when exercising the decision making role.

15.42 The Elements and Performance Criteria of this unit are summarised by WALGA as follows:

<table>
<thead>
<tr>
<th>Element</th>
<th>Performance Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identifying problems or issues requiring response</td>
<td>Categorise/Prioritise</td>
</tr>
<tr>
<td></td>
<td>Causes/influences</td>
</tr>
<tr>
<td></td>
<td>Needs/expectations</td>
</tr>
</tbody>
</table>
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15.43  **LGAGENE501A – Undertake Councillor Roles and Responsibilities**

This unit focuses on knowledge required in relation to legislation, policy and procedure as well as the differing roles and responsibilities of both Council and Administration when carrying out the function of a Councillor.

15.44  The Elements and Performance Criteria of this unit are summarised by WALGA as follows:

<table>
<thead>
<tr>
<th>Element</th>
<th>Performance Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify role and working environment</td>
<td>Determine function and scope</td>
</tr>
<tr>
<td></td>
<td>Identify relevant law policy and procedures</td>
</tr>
<tr>
<td></td>
<td>Awareness of Australian political structure and role within</td>
</tr>
<tr>
<td></td>
<td>Role of others and self within Council (local government) environment</td>
</tr>
<tr>
<td></td>
<td>Separation of powers Council/Administration</td>
</tr>
<tr>
<td>Provide support to Council</td>
<td>Participate in meetings/standing orders</td>
</tr>
<tr>
<td></td>
<td>Apply legislation re personal conduct</td>
</tr>
<tr>
<td></td>
<td>Policy decision participation</td>
</tr>
<tr>
<td></td>
<td>Strategic planning/Financial Reporting participation</td>
</tr>
<tr>
<td></td>
<td>Oversight asset/financial management process</td>
</tr>
<tr>
<td>Function effectively</td>
<td>Contribute to community consultation process</td>
</tr>
<tr>
<td></td>
<td>Capacity to deliver and sustain</td>
</tr>
<tr>
<td></td>
<td>Work effectively to resolve problems</td>
</tr>
<tr>
<td></td>
<td>Seek assistance when required</td>
</tr>
<tr>
<td></td>
<td>Represent the community</td>
</tr>
</tbody>
</table>


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309
15.45 **LGAGENE503 – Perform the role of an elected member**

This unit focuses on the basic functions of the local government councillor, operating processes/procedures and the environment in which the task is undertaken.

15.46 The Elements and Performance Criteria of this unit are summarised by WALGA as follows:

<table>
<thead>
<tr>
<th>Element</th>
<th>Performance Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awareness of responsibilities</td>
<td>Difference in role and responsibilities of Councillor/Staff clarified and observed</td>
</tr>
<tr>
<td></td>
<td>Protocols re legislative requirements observed</td>
</tr>
<tr>
<td></td>
<td>Jurisdictional limitations specified and clarified</td>
</tr>
<tr>
<td>Conduct and compliance of</td>
<td>Meeting procedures followed/meetings recorded clearly</td>
</tr>
<tr>
<td>meetings</td>
<td>Decision making in accordance with accepted practices</td>
</tr>
<tr>
<td></td>
<td>Conflict situations identified</td>
</tr>
<tr>
<td></td>
<td>Strategies to avoid conflicts implemented</td>
</tr>
<tr>
<td></td>
<td>Fidelity to Council decisions observed</td>
</tr>
<tr>
<td></td>
<td>Public communication accessible by all</td>
</tr>
<tr>
<td>Legislative responsibilities</td>
<td>External influences identified and standards complied with</td>
</tr>
<tr>
<td></td>
<td>Issues of conflict with other bodies identified and investigated</td>
</tr>
<tr>
<td></td>
<td>Procedures to support and actions delegated</td>
</tr>
</tbody>
</table>

15.47 I note that the performance criteria detailed align closely with the conclusions and recommendations contained in the NSW Independent Review in relation to Elected Member training and education.

15.48 Programs of this sort merit further investigation by the government and the Department of Local Government. Having reviewed the evidence before this Inquiry, it is evident that an educational program of this sort would be of considerable value to anyone choosing to be a local councillor or wanting to work as staff or management. Arguably, many of the mistakes made in the City of Canning would not have been made had at least some of those who appeared before this Inquiry taken the time to engage more critically with their roles and the considerable body of written work focused on ensuring that they know what is expected of them. A module in conflict management would have proven particularly useful.
15.49 Programs of this sort should be mandatory and the *Local Government Act 1995* should be amended accordingly.

**Remuneration for Councillors**

15.50 I preface the above statements in relation to induction and continuing education programs by emphasising that any analysis of this sort should not be taken without further analysis of the remuneration levels for local government members. Current levels are low. This means that, often, Councillors need to work elsewhere. Time is thus necessarily restricted. Preparation in turn also suffers and further learning takes a back seat. This is a situation that can only cause tensions and frustrations. Mistakes in turn will happen and bad government will result. Poor remuneration will also, obviously, limit the range of individuals willing to run for elected office.

15.51 I note, in this regard, recent commentary provided by the WA Local Government Association in its submission to the WA Salaries and Allowances Tribunal (March 2013: http://www.walga.asn.au/tate), wherein it is stated:

*Service as a Local Government Elected Member has traditionally been viewed as a voluntary community service in Western Australia and while this is still the case, there is a need to ensure that serving on Council is not restricted to members of the community who are financially independent.*

*Serving on Council as a Councillor should not become, nor should it appear to be, employment; serving on Council must remain a community service. However, Elected Members should be appropriately compensated for their commitment of time, their contribution to the Local Government and their community service.*

*To not compensate Elected Members appropriately restricts the pool of eligible candidates potentially to the detriment of the Local Government and the local community. This is particularly pertinent in relation to Mayors and Presidents, especially in larger Local Governments where a high proportion of Mayors and Presidents undertake their role on a full-time basis due to the increasing demands of the role.*

*The role of Council members has evolved to require significant commitments of time and energy from Elected Members.*
Section 2.10 of the Local Government Act 1995 defines the role of Councillors as:

**Role of councillors**

A councillor —

a) represents the interests of electors, ratepayers and residents of the district; and

b) provides leadership and guidance to the community in the district; and

c) facilitates communication between the community and the council; and

[d) participates in the local government’s decision-making processes at council and committee meetings; and

e) performs such other functions as are given to a councillor by this Act or any other written law.

The role of a Councillor, as defined by legislation, seems straightforward, but a significant commitment of time is required to adequately perform the role.

The most obvious role of an Elected Member, represented by part (d) of Section 2.10, is participation in Council and Committee meetings: the decision-making processes of the Council. Elected Members are reporting that this role is evolving to require a significant, and growing, time commitment. Not only is attendance and participation required, Elected Members must prepare for meetings by reading reports and agendas and attending briefing sessions. As the complexity of Local Government issues and functions increases, the reading and preparation time required of Elected Members is increasing.

Parts (a) and (b) of Section 2.10 require Elected Members to represent and liaise with residents of the district. Activities of this nature, including attending meetings and functions of community groups and on-site meetings with constituents requires considerable commitment from Elected Members to ensure they are fulfilling their obligations to represent and provide leadership to their community.

As defined by Section 2.8 of the Act, Mayors and Presidents have the following role in addition to their role as a Councillor:

**Role of mayor or president**

The mayor or president —

a) presides at meetings in accordance with this Act; and

b) provides leadership and guidance to the community in the district; and

c) carries out civic and ceremonial duties on behalf of the local government; and
d) speaks on behalf of the local government; and

e) performs such other functions as are given to the mayor or president by this Act or any other written law; and

f) liaises with the CEO on the local government’s affairs and the performance of its functions.

The legislative role of the Mayor or President is in addition to their role as a Councillor. Feedback from Mayors and Presidents suggests that the civic and ceremonial duties undertaken by the Mayor or President require a significant time commitment, as does liaising with the Chief Executive Officer in relation to the affairs of the Local Government.

An increasing number of Mayors and Presidents undertake this role full time. In large Local Governments in the metropolitan area, and in major regional centres, a high proportion of Mayors undertake their role full time or very close to full time and this is a direct result of the increasing workload and expanding responsibilities of Council. …

There are a number of further explanations for the increasing time commitment of Mayors and Presidents. Firstly, there is a growing expectation in the community that the Mayor or President will be working on behalf of the Local Government and its residents at all times.

With the increasing prevalence of technology that facilitates instant communication, such as smart phones and tablets, Elected Members are contactable at all times and constituents are likely to expect an almost immediate response to queries. Secondly, as the number and complexity of Local Government tasks and functions increases, so do the number of meetings and events, including meetings with Government agencies and other stakeholders, often involving significant travel, that Mayors and Presidents are expected to attend.

Additionally, there is an expectation that Mayors and Presidents will be informed about all topics in which the Local Government is involved. This is likely to require significant reading, briefing and preparation time.

As full-time Mayors and Presidents are increasing in prevalence, expectations that the next Mayor or President, or the neighbouring Mayor or President, will also undertake the role full time are likely to increase.

Community expectations that the Mayor or President will be working in the interest of the Local Government and the community at all times is likely to reduce the potential pool of people willing to stand for election to the role if the allowance payable to the Mayor or President is insufficient. Recently, one metropolitan Mayor resigned after one term to find employment with higher earnings than the maximum mayoral allowance. This is not surprising given that the maximum allowance payable to a Mayor or President in Western Australia is less than average full-time earnings.
15.52 The time issues raised in this submission certainly ring true when looked at within the context of the concerns raised in this Report in relation to the City of Canning.

**Public Question Time**

15.53 Finding 52 of the *Authorised Inquiry Report* states that Mayor Delle Donne inconsistently applied the City’s Standing Orders Local Law during public question time to allow personal attacks to be made on Elected Members and employees of the City.

15.54 Differing views were expressed by some of the witnesses as to whether or not the Mayor was inconsistent in the way he applied the Standing Orders to question time – Councillors Boylen and Clarke felt the Mayor was inconsistent (T733-T734 and T822), while Councillor Mason was of the view that the Mayor was consistent (T1122).

15.55 As was pointed out by Counsel Assisting in his Written Closing Submissions, the extracts of the Minutes from Council Meetings that appear at pages 5:8 to 5:16 of the *Authorised Inquiry Report* provide a sufficient basis to demonstrate the inconsistencies complained of by Councillors Boylen and Clarke: CI10/03170, CI10/03157, CI10/03171, CI10/03172, CI10/03173, CI10/03174, CI10/03138, CI10/03137, CI10/01682, CI10/03130, CI10/03175 and CI10/03176.

15.56 Reviewing those Minutes myself, I find that while it is necessary to remember that questions asked on different occasions will necessarily be attended to by different circumstances, it is evident to me that the manner in which Mayor Delle Donne applied his discretion on these occasions was inconsistent. I do not find, however, that this was deliberate or malicious on the Mayor’s part. There is no evidence to support such an assertion. Inconsistency, however, was the end result.

15.57 Good government requires open interaction between residents, their Elected Members and the City Administration. To the extent that a consistent approach is not adopted and applied, instability and insecurity arises. This risks silencing
discussion and limiting the productive articulation of issues of considerable importance.

Minutes and Agendas

15.58 Counsel Assisting submitted in his Written Closing Submissions that the evidence established a practice whereby the City’s Administration (which was responsible for the preparation of agendas and their provision to the Council in advance of each meeting) would identify reports as confidential. The practice thereafter was that, when the Council came to confidential matter during the course of a meeting, it would be deferred to the end of that meeting. At that time, the Council would vote to close the meeting to consider those confidential items. At the conclusion of the consideration of those matters, the Council would vote to reopen the meeting, invariably as the last item before the meeting was closed. Examples of this practice can be seen at T54, T248, T336, T454-T455, T507-T508, T682, T705, T762, T793 and T876.

15.59 There is both a legislative and policy framework that applies to the proper recording of Council decisions. Section 5.23 of the Local Government Act relevantly provides that Council meetings should be open to the public unless subsection (2) applies, in which case subsection (3) requires that the decision to close a meeting or part thereof and the reasons for that decision are to be recorded in the minutes of the meeting. Clause 2.17.8 of the City’s Standing Orders is to the same effect.

15.60 Reg 11(d) of the Local Government (Administration) Regulations 1996 provides that the Minutes of a Council meeting are to include details of each decision made at a meeting. I accept the submission of Counsel Assisting in his Written Closing Submissions that a ‘decision’ for the purposes of Reg 11(d) would include a decision to close a meeting under section 5.23.

15.61 In his evidence, Mr Dacombe indicated that he may not have been specifically aware as at September 2011 of the provisions of section 5.23 (T55). Further, notwithstanding his attempts to gain a working knowledge of the relevant
legislation and provisions, Mr Dacombe conceded that he had “… clearly missed that point” (T56).

15.62 It is clear from the examples of the Minutes referred to above that they do not properly record both the decision to close a meeting or part thereof as well as the reasons for such closure. The practice adopted of noting, “… the Meeting proceed behind closed doors to consider confidential items” does not, in my view, provide sufficient compliance with the requirements outlined above. There is nothing in that statement that articulates the reasons for treating a matter or series of matters as confidential.

15.63 Perhaps allied to the varying levels of understanding of relevant legislation referred to earlier, the evidence before the Inquiry identified that many Councillors were generally unaware of the need for the Minutes to properly record the reasons for confidentiality: see Councillor Daly (T179-T180), Councillor Wheaton (T251), Councillor Olsen (T337), Councillor Dowsett (T455 and T473), Councillor Morgan (T672), Councillor Boylen (T706) and Councillor Clarke (T804). Indeed, there appeared to be considerable confusion about what was actually confidential and what Councillors were supposed to do when a matter was referred to as confidential.

15.64 In his Written Submissions in Reply, Mr Dacombe properly concedes that the Minutes do not comply with section 5.23. It is further said on his behalf, however, that provisions such as section 5.41 of the *Local Government Act* serve a purpose primarily to contribute to an overall legislative framework of employment within a wider framework of governance

15.65 I am satisfied that Mr Dacombe, as CEO, was required to comply with the provisions of section 5.41(h) of the *Local Government Act* and ensure that the Minutes of Council Meetings properly recorded both the decision to close a meeting or part thereof together with the reasons for such closure as set out in section 5.23 of the *Local Government Act*, Reg 11(d) of the *Local Government (Administration) Regulations* and cl 2.17.8 of the City’s Standing Orders. Ensuring
that the Minutes properly recorded the matters prescribed by legislation is an important feature of the framework of governance applicable to local governments. I agree with the submission of Counsel Assisting that given the state of the Minutes as reflected in the examples cited above, Mr Dacombe failed to fulfil his obligations under section 5.41(h).

15.66 A Written Submission in Reply from the City demonstrates that the City has made improvements to the way in which the Minutes record decisions concerning the closure of meetings and the reasons for those closures. Those changes now comply with the relevant legislative provisions and provide greater clarity and assistance to members of the community who wish to follow matters by reading the Minutes. This is discussed further in Chapter Sixteen of this Report.

15.67 There was a further problem identified by Counsel Assisting in his Written Closing Submissions relating to the manner in which the City’s Minutes recorded the reasons for decisions made where they were significantly different from the relevant written Recommendation in an Officer’s Report: see, for example, the Minutes of the Ordinary Council Meeting of 13 December 2011 (CI10/00995) at page 114 and the Minutes of the Ordinary Council Meeting of 26 June 2012 (CI10/01816) at page 55.

15.68 Reg. 11(da) of the Local Government (Administration) Regulations requires the Minutes of a meeting to correctly record the reasons for such decisions. Statements such as “... not the most advantageous option for the City” or “... not in the best interests of all the City of Canning Ratepayers” are simply motherhood statements that beg the question, “why?”

15.69 Counsel Assisting also drew my attention in his Written Closing Submissions to concerns raised by some Councillors about the burden placed on them by the size of the agendas and attachments and the late provision of those materials on occasion. Further, Counsel Assisting noted that some Councillors found the level of detail in the Minutes inadequate and at times failing to reflect adequate transparency of Council’s deliberations.
15.70 It is a necessary consequence of a large agenda with many items that the supporting materials will be voluminous. I note that, since his appointment, Commissioner Reynolds has introduced steps to both reduce the size of agendas (in part through effective delegation and increased collaboration with the Administration) and to decrease the frequency of Ordinary Council Meetings (T844). This practice should be continued and is discussed further in Chapter Sixteen of this Report.

The City of Canning’s Standing Orders

15.71 It was clear from the evidence placed before me that the City had failed to review its Standing Order Local Law in accordance with section 3.16 of the Local Government Act. It was equally clear that over a number of years the City had informed the Department of Local Government via its annual Compliance Audit Returns that it was in the process of reviewing them.

15.72 Observations contained within the Authorised Inquiry Report concerning the City’s Standing Orders containing provisions that are in need of review to better support the City’s governance practices are well made. However, given the current status of the State Government’s local government reform agenda, it is unnecessary for me to go through the Standing Orders provision by provision to identify potential failings.

15.73 It is understood that the City has developed a new set of draft Standing Orders that are in the process of making their way into application. While regular review of the City’s Standing Orders as required by the legislation is not optional and an important feature of providing good government, in all the current circumstances, I see no benefit in making any adverse findings in relation to this particular matter.

“Secret Votes”

15.74 An issue canvassed in the Authorised Inquiry Report and the subject of criticism in that work related to the alleged use of ‘secret votes’ by the Council to determine the membership of external community committees.
15.75 I accept the submissions made to me by Counsel Assisting in his Written Closing Submissions that when the evidence is properly considered, there was no use of “secret votes” by the Council.

15.76 The Minutes of the Ordinary Council Meeting of 25 October 2011 (CI10/02839) demonstrate that Council conducted a secret ballot to determine the proposed representatives to be members of each external committee. No doubt, there are sound pragmatic reasons for conducting the ballot in this way, one of which is to avoid or minimise public embarrassment to the unsuccessful candidates. The Minutes are equally clear that once the balloting process had overtly identified the nominated individuals, Council proceeded to vote to accept the nominations. That vote was open and conducted in accordance with the relevant legislation and City Standing Orders.

Conclusions

15.77 For differing reasons, some Councillors did not attend Council Forums. This situation reflects poorly on the Council on many levels. Those Councillors who chose not to attend risked being unaware of the information presented, particularly in light of the often brief Minutes kept of Council Forums.

15.78 From the perspective of good government, decision-making is enhanced when all decision-makers possess the same information. Councillors can engage and debate more constructively when they have a similar understanding of a matter. This also promotes an opportunity for differing views on a matter to be tested and explored. As a corollary, lacking relevant information can lead to a failure to engage on matter of significance to local residents.

15.79 Practices must be introduced that ensure that all councillors have the same information available to them prior to any relevant decision-making exercise is to be encouraged, particularly when Councillors might be absent from occasions when important information is provided.
15.80 I find that the induction process that applied at the City of Canning prior to and during the relevant period of time being examined by this Inquiry was inadequate and failed to provide a proper foundation for new Councillors to properly understand their roles and how to carry them out.

15.81 I find also that the provision and use of continuing education programs was also lacking. In these circumstances and given what we learned from this Inquiry, I find that the government should, as a matter of priority, investigate the introduction of a mandatory continuing professional development program for all councillors and local government staff.

15.82 I preface the above statement by stating also that any analysis of this sort should be undertaken simultaneously with a review of the current remuneration levels for local government members – levels which are, in my opinion, inadequate given the considerable time requirements now imposed on elected officials.

15.83 I find that Mayor Delle Donne was not consistent in the manner in which he exercised his discretion during public question time. The lack of a consistent approach by the Mayor gave rise to a lack of confidence and in turn, did not assist in the provision of good government. I do not find, however, that this was deliberate or malicious on the Mayor’s part. Inconsistency, however, was the end result.

15.84 I further find that CEO Mark Dacombe failed to comply with the provisions of section 5.41(h) of the Local Government Act and ensure that the Minutes of Council Meetings properly recorded both the decision to close a meeting or part thereof together with the reasons for such closure as set out in section 5.23 of the Local Government Act, Reg 11(d) of the Local Government (Administration) Regulations and cl 2.17.8 of the City’s Standing Orders.

15.85 I also find that the City failed to review its Standing Order Local Law in accordance with section 3.16 of the Local Government Act.
15.86 Finally, I accept the submissions made to me by Counsel Assisting in his Written Closing Submissions that when the evidence is properly considered, there was no use of “secret votes” by the Council as suggested in the *Authorised Inquiry Report*. 
CHAPTER SIXTEEN

GOOD GOVERNANCE IN THE FUTURE – THE CITY’S ADMINISTRATIVE REFORM AGENDA
16.1 The Terms of Reference specifically require me to examine the prospects of good
government being provided in the City of Canning in the future.

16.2 I have been assisted in this regard by detailed Written Submissions in Reply from
the City acknowledging that there were a number of administrative deficiencies
established by the evidence obtained by the Inquiry, but explaining that following
the publication of the Authorised Inquiry Report the City of Canning it had
implemented, or was in the process of implementing, “... a wide ranging systemic
campaign of improvements which ... radically change(d) the way (it) manages its
business”.

16.3 These reforms merit consideration.

16.4 In terms of improvements to better decision-making by local governments, the City
highlights that since the suspension of the Council and the appointment of
Commissioner Reynolds in November 2012, changes have been made to the
layout, format and style of the City’s reports. One such change has reduced the
volume of attachments and additional documentation that had previously
accompanied reports. In addition, the information that is now provided is more
targeted to the needs of the decision-maker, thereby allowing faster and better
decision-making.

16.5 These changes represent a positive step forward and go some way to addressing
concerns raised by Elected Members about the reports, both as to their form and
content.

16.6 The City has also reviewed the delegations given to officers and has made it clear
through the Commissioner that if further delegations are required or other
changes are needed to effectively utilise those delegations, such changes will be considered (T838).

16.7 This too is a positive. The effective use of delegations is a proactive measure to ensure that minor or routine matters are handled at an appropriate level and not unnecessarily taking up the time of Councillors.

16.8 The City also explains that the introduction of Agenda Settlement Briefings has improved the timeliness and quality of decision-making at the City and has added to the transparency of decisions made. It appears there is now significant collaboration between the officers and the Commissioner, creating a positive working relationship between them. Many issues are now resolved prior to Council meetings, reducing the need for additional questions and delay caused by the need for further information.

16.9 It appears that the use of Agenda Settlement Briefings has also encouraged community participation in Council business. The City advises that their less formal environment provides more scope for direct community engagement with the Commissioner, CEO and Executives. There is also increased clarity in the setting of agendas, ensuring clear delineation between Administrative and Council involvement in the preparation of agendas. Agendas are now significantly reduced in size, due to a combination of effective delegations, improved report formats, more constructive communication and, importantly, new automated software (T838).

16.10 Another way in which the City has taken steps to increase community participation is to review the number of confidential items dealt with. The Minutes of meetings now reflect the reasons for confidentiality in accordance with section 5.23 of the Local Government Act. Clear and succinct reasons enable the community to appreciate why certain items are dealt with confidentially and reduce the likelihood of frustrations arising. The Minutes now also correctly reflect decisions to close a meeting or part of a meeting and the reasons for such closure as well as the reasons for departing from an Officer’s Recommendation. The City has also
implemented a practice of signing the Minutes the day after they are confirmed at a Council meeting.

16.11 The City has also reviewed its corporate and administrative policies as part of its governance program, including the creation of a Policy Registry to manage version control and consistency of policy making/review. It is understood that a review of the City’s human resources and engineering policies has also commenced, but not yet concluded. Such steps, including a centralised register, are likely to reduce or eliminate criticisms by a number of Elected Members about whether changes have or have not been made to policies in accordance with Council resolutions. Further benefits in terms of consistent application of policy and decisions made pursuant thereto are also likely to follow.

16.12 Following criticisms regarding the allocation of finances and resources, the City has also transitioned its annual budget from a purely operational focus with scrutiny of annual costs to a sustainable strategic long-term view of the City’s finances. The City has also secured the services of a local government audit accounting specialist who has significant experience. There also appears to be greater communication during the preparation of annual budgets with enhanced clarity for both senior management and the Commissioner. These enhancements to the existing frameworks and procedures provide a solid basis for future financial management.

16.13 Another area of improvement by the City relates to employment reviews for the CEO and all Executives. The City has implemented a structured review process commencing with an agreed identification of focus and goals for the relevant individual in July/August each year; a mid-year review in December/January; and a final, thorough review, in July of the following year. A development plan is also agreed upon for each officer and reviewed every six months. These changes represent a significant improvement over the previous ad hoc system.

16.14 The City has also indicated that it intends to develop a comprehensive induction program for Elected Members. This program is expected to be run over a three-month period following Council elections and cover a number of key topics such as
the roles and responsibilities of Elected Members; legislative requirements; governance; conflicts of interest and disclosures; council meeting procedures and local laws; leadership; customer service; financial management and budgets; planning laws and processes; integrated planning and reporting requirements, company directed training; community engagement; media relations; learning and development (including pre-election training for those interested in standing for local government election) and audit and risk management.

16.15 There was much criticism during the Inquiry’s public hearings of the level of outstanding business and whether and to what extent it ultimately played a role in the cessation of the Refocus program and the departure of the former CEO Mr Dacombe. The City advises that upon his appointment, Commissioner Reynolds set about identifying unimplemented Council resolutions. Within four months, he had successfully resolved them to a level that was much more manageable. Again, it is undoubtedly due to the leadership of Commissioner Reynolds and the positive culture he helped to create that it was possible for him and the Administration to effectively work through these matters and resolve them. In turn, the Administration was equipped with the tools and the environment to progress matters including the introduction of InfoCouncil software which will be used to track the implementation of Council resolutions.

16.16 The City has also taken steps to enhance the capacity building of its senior personnel by instigating a leadership development program for the Commissioner, CEO and Executives. The City’s Written Submissions in Reply indicate that the program will be expanded in 2014 to encompass senior management and then other staff. The provision of support programs such as this positions the City well to meet the challenges of the future by equipping staff with a clear vision and the tools to achieve that vision.

16.17 The City has also streamlined its executive positions and made changes that allow the CEO to recruit employees without the need for Council approval of those appointments. The CEO has established a new set of executive competencies, undertaken recruitment with assistance from external consultants, committed to a
merit-based approach and ensured there are formal contracts for appointments. Together with the new review process referred to previously, the appointment and review of executives is thus much enhanced.

16.18 The City has also adopted a more formal approach to risk management, including ensuring its practices comply with the *Local Government (Audit) Regulations*; progressing the implementation of a risk program; increasing the Risk Management Coordinator’s position to full-time; delivering training to executives and senior management to assist them to apply risk management strategies to their business planning; the creation of a number of operational and strategic risk registries and the implementation of a comprehensive risk reporting framework.

16.19 The City is also proceeding with implementing a Risk Management Safety System reporting tool to improve risk reporting (including occupational health and safety hazard reporting); updating a number of the City’s Plans to ensure they link with other Plans and developing ongoing training and manuals. Concerns raised regarding risk management during the public hearings noted the slow pace at which policies were being developed and implemented. It is encouraging to see that the City has developed a significant body of resources to date and that it intends to continue to develop them.

16.20 The City has also adopted a more formal approach to the completion of Compliance Audit Returns, ensuring that they are actively managed during their compilation and that greater scrutiny is applied to information gathered and input into the returns. Executives are now required to sign a declaration that the relevant information is, to the best of their knowledge, correct. These modifications are likely to eliminate the inclusion of erroneous information identified by the Inquiry in previous returns.

16.21 During 2014 the City intends to centralise the procurement of legal services and to lift the standard of legal service delivery to its internal customers. The intention is to create more formal processes for procuring legal advice with the Senior Legal Advisor to oversee the internal delivery of legal advice, provide a central
communication point for external legal providers and ensure requests are recorded in the City’s Legal Advice Register.

16.22 The City also advises that following an audit of the City’s procurement and tendering arrangements it was ascertained that there was room for improvement. The City indicated that it is currently in the process of adopting the recommendations of the Audit Report to bring these arrangements into compliance.

16.23 Another area of concern throughout both the public hearings and the documents obtained by the Inquiry related to the records management system in place at the City. The system previously in place was deficient and not in accordance with the relevant legislation applicable to such records. The City introduced a new HP TRIM documents and record management system in 2012 that is compliant with relevant legislation and provides comprehensive version management and search capabilities.

16.24 During 2013 the City completed a review of its asset management policies resulting in a new set of procedures. These new procedures ought to reduce the likelihood of a repetition of expired leases going unnoticed as was identified by evidence presented to the Inquiry.

16.25 All of the above are clear positives and reflect the considerable amount of work being done to improve the level of service provided to local residents. I note, however, that these governance improvements have taken place in an environment very much removed from that in existence prior to the suspension of the Council. Significantly, there is now a single Commissioner, a new CEO and the City has created a dedicated Governance unit. Commendable as these improvements are, it must be recognised that many of the changes have been designed on the basis that the Administration is working with a single Commissioner, rather than a group of individual Elected Members with their various personalities and opinions. Whether they translate readily to a returned Council will have to be seen.

Report of the Panel of Inquiry into the City of Canning
CHAPTER SEVENTEEN

FINDINGS AND RECOMMENDATIONS
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FINDINGS

The Authorised Inquiry Report

Finding One

I find that the sheer size of the Authorised Inquiry Report, the detailed analysis provided in it and the significant number of findings made throughout it point to what was undoubtedly a considerable investigative undertaking, drafting exercise and factual analysis on the part of those charged with investigating and writing the Report. These persons are to be commended for their efforts in that regard and the results of those efforts.

Finding Two

I find that, given the issues and concerns analysed and the conclusions ultimately made after extensive investigation and research, the authors of Authorised Inquiry Report were correct to recommend to the then Minister for Local Government, the Hon John Castrilli MLA, that the City of Canning Council be suspended pending further investigation by a government appointed Inquiry Panel.

Minister’s Decision to Suspend the Council

Finding Three

I find that, given the length and content of the Authorised Inquiry Report, the serious allegations contained in it and the extensive arguments and numerous conclusions contained in the Report, the Minister for Local Government, the Hon John Castrilli MLA, was justified in suspending the City of Canning Council and calling for the appointment of an Inquiry Panel to determine whether good government had been and could be provided in the City of Canning during the period 1 February 2009 to 27 November 2012. To have
done otherwise would have been inappropriate and a disservice to both the Council and residents in the City of Canning.

Natural Justice

Finding Four

I find that this Inquiry has satisfied its obligations of procedural fairness and natural justice. All evidence relied upon by Counsel Assisting and ultimately me as the Inquirer, including evidence and argument cited in the Authorised Inquiry Report, then referenced in the Written Closing Submissions of Counsel Assisting, was made available to all witnesses and/or their legal counsel. Importantly, all who appeared before this Inquiry were given a right of reply.

The Council’s Relationship with CEO Mark Dacombe

Finding Five

Councillor Mason sent an email to the Mayor, Councillor Barry and Councillor Olsen advising of his intention to bring a motion calling for the cancellation of Refocus. Councillor Mason did not send this email to any other Councillor; nor did the Mayor, Councillor Barry or Councillor Olsen.

In the circumstances, I find that the deliberate or short sighted exclusion of other Councillors in relation to this email was inappropriate and demonstrated poor judgement on the part of Councillor Mason, the Mayor, Councillor Barry and Councillor Olsen – particularly given the significance attached to Councillor Mason’s proposal to cancel Refocus.

Finding Six

On 7 December 2011, Councillor Mason sent an email to Mark Dacombe, Andrew Sharpe and Mayor Delle Donne notifying them of two motions that he intended to move at the 13
December 2011 Ordinary Council Meeting. The first motion related to the cancellation of Refocus. The second motion was for the CEO to advertise for the position of Executive of Town Planning Services and appoint Councillor Mason and the Mayor to the selection panel.

Mark Dacombe was overseas on leave at the time he received this email from Councillor Mason. Councillor Mason did not request advice on the possible ramifications of his motions from Mr Dacombe. At no time, did Councillor Mason consult Mr Dacombe in relation to these issues. The email simply informed Mr Dacombe of his intention to move the motions. Nor did Councillor Mason consult other members of the Executive team or other Councillors who were not parties to the email.

In relation to City of Canning CEO Mark Dacombe’s email dated 9 December 2011 to Councillor Mason, the Mayor and Mr Andrew Sharpe advising that Councillor Mason’s proposed motions would have consequences that would contravene the \textit{Local Government Act 1995}, and Councillor Mason’s subsequent email to the Mayor and Councillor Barry and Councillor Olsen only, I find that that Councillor Mason, Mayor Delle Donne and Councillor Barry acted inappropriately at the 13 December 2011 Ordinary Council Meeting when they failed to ensure fellow Elected Members received the same advice they had received from the CEO about the problems created by Councillor Mason’s motion to appoint the Mayor and Deputy Mayor to an employee selection panel and the motion to cancel Refocus.

\textbf{Finding Seven}

I also find that it was not appropriate for Councillor Mason to move and vote in favour of a motion that he and Mayor Delle Donne be placed on the selection panel given the concerns raised by Mr Dacombe to him.

\textbf{Finding Eight}

I find further that Councillor Barry and Mayor Delle Donne acted inappropriately when they voted for the motion at the Ordinary Council Meeting 13 December 2011 to place the Mayor and Deputy Mayor on the selection panel, after becoming aware that Mr Dacombe had advised that the motion was contrary to the \textit{Local Government Act 1995}. The decision
to ignore that advice was an error of judgment by all three Elected Members and demonstrated poor decision-making.

**Finding Nine**

I also find that it was inappropriate for the Council to resolve in favour of this motion. Such a decision demonstrates poor judgment, little or no regard for the separation of powers between the Administration and the Executive and an unnecessary interference in the administrative functions of the City.

As a matter of prudence and good government, the Council should not have considered the motion to cancel Refocus without having given due regard to the consequences, intended and unintended that would follow from such a decision. The Council failed to do so here and demonstrated a lack of foresight and good judgment in relation to this issue.

**Finding Ten**

In relation to those Councillors who had not been privy to the email exchange, I find that their behaviour in this regard is to some degree explained by Mr Dacombe’s failure to advise them of the legal issues central to the motions they were being asked to decide on. I find that Mr Dacombe’s failure to act in this regard was an error.

**Finding Eleven**

In relation to Refocus generally, I find that the evidence shows a serious failure on the part of the Council and the Administration to work together in a cooperative fashion.

**Finding Twelve**

Given the almost symbiotic relationship between Refocus and Mr Dacombe’s performance, it is concerning that the Council did not have a clear picture of how to assess the implementation of Refocus and measure its success or failure. The evidence demonstrates that many Councillors did not understand what Refocus was or how it could be measured. This no doubt led to the Council being unable to properly determine an appropriate
mechanism to monitor Mr Dacombe’s performance. I find that the lack of clear performance indicators undoubtedly led many Councillors to feel that Mr Dacombe had failed to deliver what was expected and subsequently to a lack of mutual trust and respect.

Finding Thirteen

In relation to the employment by Mr Dacombe of Mr Mike Richardson, I find that the process of engagement lacked elements of accountability. I find no improper conduct per se on the part of Mr Dacombe. Nonetheless, it is clear that this situation could have been much better handled and made much more transparent to those who later queried Mr Dacombe’s actions, however well intentioned. It is probable that the Council would have been less concerned about Mr Richardson’s role if there had, again, been a greater degree of discussion and information sharing between the Council and Mr Dacombe.

Finding Fourteen

I find that in relation to Mr Dacombe’s Performance Reviews, there was a lack of any real formality or structure in relation to when Performance Reviews would be carried out during the time of Mr Dacombe’s appointment as CEO. Both Mr Dacombe and the Mayor need to shoulder the responsibility for the delays in conducting the reviews as each was a material participant and to that extent. I reject submissions made which assert that blame should be laid solely at Mr Dacombe’s feet.

Finding Fifteen

I also find that both the Mayor and Mr Dacombe would have been assisted if the City had had in place a more structured system within its Human Resources department that could monitor Performance Reviews generally and advise relevant parties as and when they fell due.

Finding Sixteen

In relation to Mr Dacombe’s second Performance Review, I find that the Mayor’s process for review was discourteous towards Mr Dacombe and likely to cause further tensions. It
did not foster cooperation and on the face of it seems most unfair. It also set a poor precedent of the sort that is not conducive to a good working relationship between the CEO and the Council he is expected to work with in a cooperative and open manner.

Finding Seventeen

I also find that the Mayor used the wrong performance criteria when assessing Mr Dacombe. It was clear from the second Performance Review document that the Mayor had used the performance criteria that had applied at the time he had conducted the first Performance Review, and not the revised criteria that he and Mr Dacombe had agreed they would decide upon and apply. The failure by the Mayor to correctly and fairly assess Mr Dacombe displayed poor judgment and poor leadership.

Finding Eighteen

In relation to the Mayor’s decision to direct that the audio recording of 23 January 2012 meeting be switched off, I find the Mayor’s decision to do so was inappropriate as it meant that the City’s records would be incomplete and an objective record of the meeting would not exist.

Finding Nineteen

In relation to the Mayor’s failure to advise all Councillors of the circumstances and results of Mr Dacombe’s second Performance Review, in the interests of accountability and transparency, the Mayor should have disclosed these facts prior to the Special Council Meeting of 23 January 2012. By failing to so inform the Council, the Mayor failed to bring relevant and important information to the Council’s attention, potentially misleading the Council as to the true factual background attending to Mr Dacombe’s proposal.

Finding Twenty

In relation to Mr Dacombe’s eventual departure from the City of Canning the Council had no authority to allow the Mayor to seek legal advice in relation to this matter. Nor,
however, do I read Council’s Resolution as suggesting that the Mayor should seek legal advice. In any event, there is no reasonable basis to interpret the Council’s resolution of 23 January 2012 as authorising the Mayor to direct Mr Dacombe in accordance with the contents of the letter of 30 January 2012. Specifically, he had no right to send Mr Dacombe on 'gardening leave' effectively suspending him from further duties as such a course cannot reasonably flow from the terms of the resolution authorising the Mayor to: “… finalise as soon as possible, the contractual arrangements between the City and the Chief Executive Officer and in accordance with section 6.8 of the Local Government Act 1995 to finance the cost of settlement.” The Mayor should have brought any legal advice obtained by him to the Council for consideration and that he should have sought a further resolution authorising him to act in accordance with that advice. The Mayor did not discuss his intended course of action with any other Elected Member. In the circumstances, I find that Mayor Delle Donne’s unilateral conduct exceeded the authority placed in him by the Council’s resolution and demonstrated poor judgment.

Finding Twenty One

I find that the Mayor, having clearly had concerns of misconduct on the part of Mark Dacombe, did not raise these concerns with Mr Dacombe when he handed him his Performance Review on 12 January 2012. Furthermore, the Mayor did not raise these concerns during the Special Council Meeting on 23 January 2012 when Council finalised the CEO’s contract. The failure on the part of Mayor Delle Donne to raise this matter with either the Council or to a lesser extent, Mr Dacombe, represents poor judgement and poor leadership.

Finding Twenty Two

All of the above paints a picture of a strained and dysfunctional relationship between the Council and Mr Dacombe. I find that overall in relation to the Council’s relationship with CEO Mark Dacombe, the end result was poor decision making, poor leadership and the failure to provide good government to the residents of the City of Canning.
The Nicholson and Bannister Road Project

Finding Twenty Three

In relation to the Nicholson and Bannister Road project as a whole, I find that the Council had essentially been left in the dark throughout the early stages of the Black Spot Funding process, such that when Councillors were eventually asked to make decisions about the Nicholson and Bannister Road Project, most had insufficient information upon which to base any decisions that needed to be made. It would have been far preferable if there had been ongoing consultation between the Council and the Administration prior to the submission of all Black Spot Funding applications.

Finding Twenty Four

In the circumstances, I find that one explanation for the Council’s delay in progressing the Nicholson and Bannister Road project can be attributed to the failure of the City’s Administration to provide the Council with a more comprehensive background to the project.

Finding Twenty Five

I also find that while more information and cooperation from the Administration would clearly have assisted in avoiding the delays outlined in this chapter, some Councillors also failed to ask the types of (sometimes quite basic) questions one would reasonably expect of them. In hearings some Councillors professed to know nothing about relevant information that had been presented to them and, in some cases, exercised poor judgement.

Finding Twenty Six

In relation to the Mayor’s wish to delay the City of Canning and the City of Gosnells projects until they could be conducted together, notwithstanding that this was contrary to advice he had received from various sources, and notwithstanding that the City of Gosnells repeatedly indicated it was some years off commencing work on its works with any
resultant delay only adding to traffic delays and safety concerns, I find that the Mayor’s actions demonstrate either a very poor understanding of the issues or a failure to listen to and accept sound advice.

Finding Twenty Seven

I also find that the Council’s decision at its Ordinary Council Meeting of 13 March 2012 to amend the Officer’s Recommendation by including authority for the CEO to call for tenders for the road construction works at the Nicholson and Bannister Road intersection failed to properly consider the state of available work for the City’s internal workforce. The Council should have sought clarification from the City’s Officers about the level of work available for the City’s construction workforce before moving a motion that would see construction work outsourced.

Finding Twenty Eight

Overall, I find that the decisions by the Council concerning the Nicholson and Bannister Road project demonstrate scant regard for the considerable work carried out by the Administration as well as a fundamental failure to ensure that the benefits that such works would provide to the ratepayers of the district of Canning were delivered. The Council’s decisions were short sighted.

Finding Twenty Nine

In relation to the Council agendas prepared and settled by the Administration, I find that attention should have been drawn by the Administration to the overlap of issues between a potential shortfall of work for the City’s internal work construction crews and the item dealing with the Nicholson and Bannister Road project. Had this been done, the matter might not have been overlooked.

Finding Thirty

The Council should have clarified the need to put the relevant work out to tender and confirmed that the value of that work required a tender. The failure to engage with the
Administration and explore potential consequences of their decision demonstrated a lack of foresight. I find that Councillors either did not read, misunderstood or did not consider Report ET-040-12 and, in the process, failed to demonstrate good judgement.

Finding Thirty One

I find that had the Administration involved the Council much earlier in the Black Spot Funding process and later taken steps to ensure that those Councillors seeking relevant information received it, many of the delays at the centre of this issue may have been avoided.

Finding Thirty Two

Overall, I find that in relation to the Nicholson and Bannister Road project, there was a failure to provide for the good government of the residents of the City of Canning.

Centenary Avenue and Manning Road Project

Finding Thirty Three

The Council was informed that this project was fully funded, by a Black Spot Government grant, at the Special Council Meeting on 11 August 2011. During this meeting a motion moved by Councillor Mason was passed, requesting a detailed report on this item as well as other items outlined in the 2011/2012 budget.

This request was adhered to by the City of Canning Administration who prepared a detailed report regarding the Centenary Avenue project. Report ET-115-11 was presented to Council at the Ordinary Council Meeting on 13 December 2011. This report detailed not only the fact that the project was fully funded but also that the City had sought approval from Main Roads to ensure that the cost of the project would stay within the budget of $600,000 as provided by Government funding.
I find that to suggest that Councillors were not aware that the project was fully funded or that they feared that the project would run over budget demonstrates that Councillors did not adequately read or comprehend the information before them.

**Finding Thirty Four**

Furthermore, the Council’s reason for not adopting the Officer Recommendation on 13 December 2011 to proceed with the project (ie because the works were in the City of South Perth and they had not contributed anything to the project) was inappropriate. I find that in order for Council to have drawn this conclusion the Council had to have done so by disregarding the facts outlined in Report ET-115-11. The Report clearly stated that the project had two stages and that the second stage, which was dependant on the first being completely, was entirely within the City of Canning. Also, the project was fully funded and therefore very likely to be cost neutral for both the City of Canning and the City of South Perth assuming it was commenced and completed within the proposed timeframe. I find that to ignore this information caused further delay and demonstrated poor judgement and a failure on the part of the Council to understand relevant information.

**Finding Thirty Five**

I find further that in relation to the Council’s decision to rely on Clause 3.14 of the Standing Orders, the Council’s failure to appreciate the substance and import of the relevant Recommendation again reflects an inadequate analysis of the matter and demonstrates poor judgment. The decision to treat the motion to accept the Officer’s Recommendation as being contrary to Clause 3.14 of the Standing Orders was an error and one that reflects poorly on the Council.

**Finding Thirty Six**

The Mayor’s decision to make this ruling, preventing the works from proceeding, adversely affected both the City of Canning rate payers and the rate payers of the City of South Perth. I find that the decision was ill considered and showed a lack of respect for the City of Canning Administration staff who had prepared the report and the City of South Perth,
which was willing to assume responsibility of the project to benefit ratepayers and the residents of both districts.

Finding Thirty Seven

I find further that this error might not have occurred had there been a greater exchange of information between the Administration and the Council. The Administration’s stated policy of “saying nothing until asked” is most unhelpful and counter-productive when dealing with issues of considerable concern to ratepayers.

Finding Thirty Eight

Overall, I find in relation to Centenary Avenue and Manning Road project that there was a failure to provide for the good government of the residents of the City of Canning.

Refuse Truck Purchase

Finding Thirty Nine

Despite the Iveco truck being the preferred choice by Administration staff, the Council determined that a greater warranty was of more value and voted instead to purchase the Hino truck.

Although this motion went against the Officer’s Recommendation, consideration was given before the alternative motion was passed. Hence, I find that Finding 24 in the Authorised Inquiry Report, suggesting that proper consideration was not given, has not been established.

Finding Forty

Councillor Barry moved the motion to purchase the Hino truck based primarily on the greater warranty that it offered. In doing so he was expressing a personal opinion. He was not purporting to be an expert on the purchase of specialist equipment. Hence, I find that
Finding 25 in the Authorised Inquiry Report, which suggests that Councillor Barry was offering professional expertise on the purchase, has not been established.

Finding Forty One

In the circumstances, I find that, although the Officer Recommendation was not followed in relation to this issue, there is no evidence to suggest that the Council was not acting in the best interests of the City of Canning residents or that the Council failed to provide for the good government of the persons in the City of Canning district in deciding as they did.

The Southern Metropolitan Regional Council

Finding Forty Two

I find that it was inappropriate for the Council to give Mayor Delle Donne authority to personally obtain a second legal opinion from Hardy Bowen Lawyers in relation to withdrawal from the SMRC.

Finding Forty Three

I further find that in seeking this legal opinion, the Mayor interfered with a role designated for Administrative officers.

Finding Forty Four

I find that Councillors acted with undue haste by immediately voting on whether to withdraw from the SMRC once the second legal opinion in relation to this matter had been received. Councillors had had less than a day to review the legal advice in question. I note that the Special Council Meeting was adjourned for 15 minutes at the request of Councillor Clarke to enable Councillors to read the advice. This suggests that some Councillors had not had any opportunity to read the advice. The Administration had certainly not been given time to review it and could not, in the circumstances comment on it.
Finding Forty Five

I find that by voting when they did, when there was no urgency to do so and without any contingency plan, Councillors acted without the benefit of thorough advice from the City of Canning Administration about the legal advice, the full consequences of withdrawal and the contingency plans necessary and contemplated to move the City forward.

Finding Forty Six

In the circumstances, the Council failed to allow sufficient integration between the Council and the Administration, making decisions that would have benefited from the expertise of City Officers. In doing so, I find that the Council failed to provide good government to the residents of the City of Canning. Good governance requires cooperation and mutual respect for the roles allocated to those charged with providing good government. In relation to the SMRC, the Council stepped outside of the role allocated to it and acted without the benefit of expertise from those most able to assist Councillors with their decision making processes.

The Legal Services Tender

Finding Forty Seven

I find that it was inappropriate for the Mayor to use his City of Canning email address and his Mayoral office title in conducting private business with Civic Legal. This conduct breached Rule 5.1(c) of the City’s Code of Conduct.

Finding Forty Eight

I find, however, that the breach in question by the Mayor was of a minor nature.

Finding Forty Nine

I also find that Councillor Mason failed to declare gifts in an inconsistent manner. While no illegal conduct is suggested here, inconsistency of this sort fails to instil public confidence in Elected Members. Transparency is a core feature of good governance.
Finding Fifty

I also find that the Mayor’s failure to declare his relationship with Civic Legal in accordance with Reg.11 represents a minor breach for the purposes of section 5.105(1) of the Local Government Act. I would also add that, even if it could be found that the Mayor’s actions did not constitute a minor breach of the Act, in the interests of transparency, the Mayor ought to have disclosed that fact prior to or during the Ordinary Council Meeting of 13 December 2011. To not do so is quite simply a very bad look and one that risks undermining the credibility of Councillors in the eyes of local residents – residents who very much deserve to know that elected Councillors are being completely transparent. Councillors need to be aware of the risks to good governance attached to public perceptions of improper conduct, even if no improper conduct per se has occurred.

Finding Fifty One

I do not agree with the majority of findings made in the Authorised Inquiry Report in relation to this issue. I do not find that Mayor Delle Donne and Councillor Mason breached Regulation 11 of the Local Government (Rules of Conduct) Regulations 2007 in failing to disclose their luncheon with Civic Legal representatives before the motion inviting Civic Legal to brief the Council, by mid February 2012, on their legal services, with a view to the Council appointing one or more legal services for a three year term.

Finding Fifty Two

There is insufficient evidence before the Inquiry to demonstrate that Mayor Delle Donne or Civil Legal had a relevant financial interest within the meaning of section 5.60 of the Local Government Act 1995. Nonetheless, having been a recent client of Civic Legal, this was an ‘interest’ for the purposes of Reg. 11 of the Local Government (Rules of Conduct) Regulations 2007, in that it could reasonably be perceived to adversely affect the Mayor’s impartiality. In the circumstances, I find that the Mayor’s failure to make a declaration in accordance with Reg.11 represents a minor breach for the purposes of section 5.105(1) of the Local Government Act 1995.
Finding Fifty Three

Overall, in relation to the Legal Services Tender while mistakes were clearly made by the Mayor and Councillor Mason, there was no ulterior or improper motive in relation to their actions. In the circumstances, contrary to the conclusions drawn in the Authorised Inquiry Report, I do not find that there was a failure to provide for the good government of residents in the City of Canning in relation to this issue.

Willetton Childcare Centre

Finding Fifty Four

In the concluding comments of his Written Closing Submissions, Counsel Assisting writes that there was a level of dysfunctionality between the Council and the Administration that existed in both directions that adversely impacted on the delivery of good government to the residents of the City of Canning’s district when dealing with the WCCC. I agree.

I cannot envisage a situation more evident of an overall level of systemic dysfunctionality than the failure by both the Council and the Administration, collectively and individually, to meet the very clear, and thoroughly justified, needs of the Willetton Child Care Centre. I find the errors made, the attitudes displayed towards local residents and the ultimate unjustified delays in settling a simple leasing document are indicative of a failure to provide good government at all levels. Residents with an interest in this issue deserved much, much better.

Finding Fifty Five

Finding 16 of the Authorised Inquiry Report provides:

There was no rational reason for Council to have not recognised the significant interest the WCCC had in the outcome of any assessment of its lease. Council should have openly and honestly stated its position to plan for its future and provide information to its community members on whether it could continue to deliver services. The WCCC had a right to receive this information and Council acted unreasonably by denying them access.
I agree in part with this Finding. Contrary to this Finding, I do not believe that Councillors failed to recognise the significant interest the WCCC had in the outcome of any assessment of its lease. Rather, I find that the Council was aware of the WCCC’s concerns but that the Council failed to address these concerns in a way that was timely and accountable to the needs of local residents. Common sense did not prevail here.

Finding Fifty Six

The Council should have openly and honestly stated its position to plan for its future and provide information to its community members on whether it could continue to deliver services. It did not. This is unacceptable. The WCCC had a right to receive this information. I find that the Council acted unreasonably by denying the WCCC access to this information.

Finding Fifty Seven

The Administration waited until August 2010 to provide Council with a new lease for the WCCC, even though the original lease had expired in 2007. I find that the failure to alert Councillors to what was obviously a significant local issue prior to this date is also unacceptable.

Finding Fifty Eight

I find that it is indicative of poor administrative structures that the City’s record keeping systems were insufficient to keep a proper check on the status of leases.

Finding Fifty Nine

I also find, in relation to the failure to articulate a preferred option in Report CS-041-11, that Mark Dacombe failed in his duties as CEO for facilitating a Report of one of his officers going to Council without any Officer Recommendation being made. The failure to identify a preferred option did result in further delay in attending to this matter. Mark Dacombe, as CEO, did have a duty to ensure that officers presenting reports to Council provided the best information to the Council in order to make a decision. The Administration should have
ensured that the content of Reports to Council addressed all relevant matters in sufficient detail.

Finding Sixty

I find that that there was a troubling failure on the part of both the Administration and the Council to communicate in relation to the meaning and effect of confidentiality in relation to the WCCC lease and relevant legislative provisions that are designed to assist the Council with its decision making processes.

Finding Sixty One

I also find it concerning that the Council felt at liberty to ignore Officer’s Recommendations without any consultation or discussion with the Administration about any alternative course of action. This lack of cooperation and communication led to unnecessary delays and considerable confusion.

Finding Sixty Two

I find that the Mayor’s conduct in relation to Mr Lindsay Holland was unjustified and inappropriate. The Mayor’s behaviour represents a failure to provide good government. It jeopardises the need for very clear lines of communication between the public and Elected Members.

Finding Sixty Three

I also find that the Council failed to effectively engage with the community on this issue. There was a lack of leadership throughout and no real accountability to the community to ensure effective and appropriate service delivery. The importance of effective community engagement cannot be underestimated in the delivery of good government. It promotes transparency in decision-making and promotes community confidence in those decisions.
Finding Sixty Four

Overall, in relation to the renewal of the WCCC lease, the City of Canning Council failed to provide for the good government of residents in the City of Canning.

Engineering, Consultancy Services Tender and Executive Engineering and Technical Services

Finding Sixty Five

Contrary to the Findings in the Authorised Inquiry Report, I do not find that Mayor Delle Donne acted contrary to clause 2.1(d) of the City’s Code of Conduct by failing to immediately exclude himself from the recruitment process when he became aware that Mr Blanchard, his daughter’s father-in-law, was an applicant for the Executive Engineering and Technical Services position.

On a strict literal interpretation of clause 2.1(d), there was no obligation on the part of the Mayor to disqualify himself from dealing with this matter.

Finding Sixty Six

I do, however, find that from the point of view of open and accountable governance, the Mayor ought to have brought the nature of his connection to Mr Blanchard to the Council’s attention.

Finding Sixty Seven

I further find that Mayor Delle Donne, Councillor Mason and Councillor Barry did not make improper use of their office as Elected Members with the intent and purpose of gaining directly or indirectly an advantage for the Mayor’s daughter’s father-in-law.
Finding Sixty Eight

In relation to the Engineering Consultancy Services Tender, I do not find that Councillor Barry had any ulterior motive when he moved a motion during the Ordinary Council Meeting of 9 November 2010 to reject the Officer’s Recommendation in Report ET-152-10.

Finding Sixty Nine

I find that had the tender evaluation report been provided as part of the Officer’s Recommendation, many of Councillor Barry’s concerns might have been alleviated. There was no reason the Council should have been left in the dark on this issue. More information from the Administration would arguably have addressed many of Councillor Barry’s concerns.

Finding Seventy

Notwithstanding my finding as to the lack of any ulterior motive on the part of Councillor Barry, I cannot, however, accede to the request made in submissions on his behalf not to make an adverse finding. Councillor Barry did interfere in an administrative process. I accept, however, that better information from the Administration might have avoided interference in the first place. Without this information and without more support from the Administration the Council was effectively left to decide on an issue without really knowing whether they could actually do, legally or logistically, what was being proposed. Good government requires this level of cooperation and communication.

Finding Seventy One

I also find that by directly nominating its own selection of City engineering consultants the Council interfered in the day to day administration of the City. Interference by Elected Members of the sort evident here fails fail to provide good government as it blurs the line between those duties assigned to the Administration and those assigned to the Council. When this occurs, delays are inevitable, tensions rise and necessary decisions required by
residents are not made. This was a decision that should have been left to the Administration, with the Council having no role in the creation of the panel in question.

Finding Seventy Two

In relation to the legalities of this decision, and the decision by the City’s Design Engineer, Mr Colin Gomes, to seek legal advice from McLeods pertaining to the Council’s resolution on this matter I find that it was a serious error for Mr Dacombe not to have brought the resulting legal advice to the Council’s attention. The failure by Mr Dacombe to bring the advice to the attention of the Council deprived the Council of the opportunity to consider and reflect upon it. The situation created could well have given rise to a potential breach of Reg.12 of the Local Government (Functions and General) Regulations 1996.

Finding Seventy Three

I also find that, given the potentially serious consequences of any decisions made by the Council in relation to this issue, the Council should have followed up its own resolution authorising Mr Dacombe to investigate the matter.

Finding Seventy Four

I find that overall there was a lack of clear communication between the Council and the Administration in terms of the best way forward for the Engineering Consultancy Services Tender. Conducted in the manner in which it was, the process was wasteful and unnecessarily prolonged. This resulted in a failure to provide good government to the residents of the City of Canning.

Finding Seventy Five

In relation to the recruitment of Executive Engineering and Technical Services, I find that Mr Dacombe correctly advised that the Council had no authority to direct that any elected member be appointed to a selection panel. That invitation occurred on 5 January 2012. In such circumstances, I find that between 13 December 2011 (the date of the resolution) and
5 January 2012 the Mayor and Councillor Mason should have disqualified themselves on the basis of Mr Dacombe’s advice.

**Finding Seventy Six**

In relation to the second attempt at recruiting the Executive Engineering and Technical Services, while I find no ill will on the part of any Councillor, the evidence again reveals that by this stage the relationship between the Council and the Administration was such that no one trusted anyone. The Council, in these circumstances, took it upon itself to question extensively and ultimately intrude into subject areas that are best managed by the Administration. Good government cannot be, and was not, provided in circumstances such as these.

**Finding Seventy Seven**

I do not find Councillor Mason’s absence from this debate to hold the same conspiratorial connotations suggested at paragraphs [190]-[191] of the *Authorised Inquiry Report*. While it is true that other Elected Members were unsure of the precise reason for Councillor Mason’s absence in relation to this particular issue, there is insufficient evidence on the balance of probabilities to infer that his absence was an attempt to facilitate the rejection of the Officer’s Recommendation.

**Willetton Sports Club**

**Finding Seventy Eight**

I find that Councillors were entitled to rely upon the prudent advice given to them by Andrew Sharpe in relation to the Willetton Sports Club. That advice simply called for a prudent approach before agreeing to any loans to the Sports Club. The advice was legally sound.
Finding Seventy Nine

I find that as regrettable and disappointing as the Council’s decision may have been to the public and indeed the Council in terms of the consequences that flowed from this decision for the WSC, the Council did nothing other than rely upon advice provided to it by its Officers.

Finding Eighty

In relation to the Willeton Sports Club, I find that there was not a failure to provide good government to the residents of the City of Canning.

Regulatory Services

Finding Eighty One

I find there was an inadequate use of delegations at the City of Canning to allow Officers to avoid the need to burden the Council with matters best dealt with by the Administration.

Finding Eighty Two

I further find that the degree of Council interference with regulatory matters is partly explained by a deteriorating level of trust between the Council and the Administration and a lack of confidence on the part of the Council in relation to some Administrative staff.

Finding Eighty Three

The Council picked up matters otherwise within the purview of the Administration because the Council decided that it was better equipped to resolve them promptly. In so doing, I find that the Council impermissibly interfered in the administration of the City.
Finding Eighty Four

Said interference could, however, have been avoided had the Council and the Administration worked together to better understand the role of and need for delegated authority and the need for open communication and cooperation. By failing to do so, I find that good government was not provided to the residents of the City of Canning.

Governance

Finding Eighty Five

From the perspective of good government, decision-making is enhanced when all decision-makers possess the same information. Councillors can engage and debate more constructively when they have a similar understanding of a matter. This also promotes an opportunity for differing views on a matter to be tested and explored. As a corollary, lacking relevant information can lead to a failure to engage on matter of significance to local residents.

For differing reasons, some Councillors did not attend Council Forums. I find that this situation reflects poorly on the Council on many levels. Those Councillors who chose not to attend risked being unaware of the information presented, particularly in light of the often brief Minutes kept of Council Forums.

Finding Eighty Six

I find that the induction process for Councillors used at the City of Canning prior to and during the relevant period of time being examined by this Inquiry was inadequate and failed to provide a proper foundation for new Councillors to properly understand their roles and how to carry them out.
Finding Eighty Seven

I also find that the provision and use of continuing education programs for Councillors was lacking.

Finding Eighty Eight

I find that Mayor Delle Donne was not consistent in the manner in which he exercised his discretion during public question time. The lack of a consistent approach by the Mayor gave rise to a lack of confidence and in turn, did not assist in the provision of good government. I do not find, however, that this was deliberate or malicious on the Mayor’s part. Inconsistency, however, was the end result.

Finding Eighty Nine

I find that CEO Mark Dacombe failed to comply with the provisions of section 5.41(h) of the Local Government Act and ensure that the Minutes of Council Meetings properly recorded both the decision to close a meeting or part thereof together with the reasons for such closure as set out in section 5.23 of the Local Government Act, Reg 11(d) of the Local Government (Administration) Regulations and cl 2.17.8 of the City’s Standing Orders.

Finding Ninety

I find that the City failed to review its Standing Order Local Law in accordance with section 3.16 of the Local Government Act.

Finding Ninety One

I find that when the evidence is properly considered, there was no use of secret votes by the Council as suggested in the Authorised Inquiry Report.
RECOMMENDATIONS

Dismissal of the City of Canning Council

Pursuant to section 8.22(2) of the Local Government Act 1995, an Inquiry Panel may recommend that a Council be dismissed. The Act does not give an Inquiry Panel the power to recommend the dismissal of an individual Mayor or individual Councillors. As explained by Greg McIntyre SC in his findings relevant to the Inquiry into the City of South Perth (2006), “the Council effectively stands or falls as a whole”.

It is clear from the various Findings that I have made throughout this Report that on numerous occasions the actions of one or more Councillors contributed to a failure to provide good government to the persons of the City of Canning’s district and that on others, the actions of the Council as a whole contributed to such a failure.

Equally clear are my criticisms of Mr Dacombe or the Administration as a whole for failings that either contributed to or caused a failure to provide good government. On some occasions, it was a combination of failings by both the Council and the Administration that led to a failure to provide good government.

The task I am now faced with is determining whether, having made the ninety one Findings outlined above, the failures on the part of Councillors and the Council are sufficiently serious, either in isolation or in combination with each other to warrant a recommendation that the Council be dismissed.

What has emerged with abundant clarity from the evidence outlined in this Report is that each of the Councillors and representatives of the Administration who appeared before me acted at all relevant times in what they considered to be the best interests of the ratepayers of the City of Canning. Without exception I found this to be the case and in no instance did I observe any evidence to suggest that any witness had acted corruptly, deceitfully or deliberately in bad faith. To that extent, any criticisms I have made about the conduct of individual witnesses, serious though they may be, do not attract any additional negative connotation that warrants additional sanction or investigation.
In considering the failures to provide good government identified in this Report it is difficult to see the separate failures attributable to the Council (whether individually or collectively) as anything other than serious, notwithstanding failures on the part of the Administration which may have played a contributory role.

While in some instances, the failures on the part of the Council may be seen as a reactionary response to difficulties caused by the Administration or Mr Dacombe specifically as CEO, in other instances, the failures by Council can be seen as the progenitor of problems giving rise to a failure to provide good government.

In examining the failures outlined in the above ninety one Findings, I have not lost sight of the fact that throughout the relevant period examined by this Inquiry, there had been a gradual deterioration of the relationship between the Council and the Administration that in turn coloured the way in which many individuals acted towards members of the other group.

This raises an important question as to whether it was the circumstances of the relationship that gave rise to the failures identified in this Report or whether it was the failures that gave rise to the nature of the relationship or whether it was a combination of the two. From the evidence before me, I find that it was the latter.

What is clear to me is that neither the Council nor the Administration reached out to the other to find a way forward and resolve the obvious tensions that were developing and impacting upon the ability to provide for the good government of the residents of the district of Canning. Rather, it appears battle lines were drawn and each side retreated into their respective defensive positions, with the result producing negative outcomes.

The often complex interaction behind the dealings of the Council and the Administration in relation to a particular decision reflects the necessary cause and effect relationship between the actions of one upon the actions of the other. This is as it should be in a properly functioning local government where the separation of roles and responsibilities requires collaboration and a common view of the goals and results to be achieved. Those separations are based on clearly defined roles with relevant expertise residing in each
respective party. When there is interference by one in the affairs of the other, or where there is a lack of proper consultation, the result will usually be a failure to deliver good government.

My sense from the evidence is that many of the problems identified concerning the Administration and its processes were intimately connected in one way or another with the subsequent failings identified on the part of the Council. The examples identified in this Report of the Council making decisions without seeking the considered input of the Administration or of making decisions in relation to matters one would ordinarily expect the Administration to be making suggest a real disengagement from the collaborative approach that ought to have existed.

There is little doubt that there was a significant element of distrust or lack of faith shown by the Council as a whole towards the Administration, particularly by the Mayor and certain Councillors identified throughout this Report. In my view, the evidence indicates that the Council was seeking to control the Administration, rather than working together as equals.

I am satisfied that the evidence demonstrates that Mayor Delle Donne failed to lead by example and encourage all Councillors to work together as a cohesive governing body in the interests of the district as a whole. The evidence demonstrated that Mayor Delle Donne on occasion acted with an alienating style. Further, at times he would act in an inconsistent manner towards Councillors giving rise to perceptions of bias or favouritism.

This conduct on the part of the Mayor in turn led to a breakdown in the fabric of Council itself giving rise to a lack of mutual respect and constructive appreciation of the differences of individual Councillors. The evidence shows that from time to time there were elements of disharmony and a sense of isolation that exceeded what might ordinarily be expected during robust debates involving a group of individually Elected Members. These elements consequently acted as a fetter on full and frank debates, with some Councillors resigning themselves to the view that participation in meetings was pointless.

While there is no doubt that there were a number of significant failings on the part of the Administration, and at times Mr Dacombe as CEO, these failings did not justify the Council
effectively taking over certain Administrative functions or decision-making or, importantly, failing to rely on the expertise of the Administration staff. The evidence demonstrates that at times there was a “we know best” attitude by the Council while at others, an unjustified level of dismissiveness.

The decisions by the Council concerning the Nicholson and Bannister Road and the Manning Road projects demonstrate scant regard for the considerable work carried out by the Administration as well as a fundamental failure to appreciate the benefits such works would provide to the ratepayers of the City of Canning’s district. The decisions were short sighted and lacked broader appreciation of the issue. Notwithstanding the failure by the Administration to inform the Council of the Black Spot Funding applications, both the work involved by the City’s officers and the benefits to the community ought to have been clear to the Council.

The obtaining of legal advice in circumstances contrary to the City’s Legal Services Policy demonstrated another example of a failure by the Council to work collaboratively with the Administration. By excluding the Administration from the proper process of obtaining legal advice, Council were depriving the Administration of an opportunity to consider how such advice would impact upon the operations of the City and to then provide such comments to the Council to enable them to make a thoughtful decision. Failure to consider the impact of advice, be it legal or otherwise, upon the City’s operations demonstrates a clear failure to provide good government. Attempting to deal with problems associated with implementing a Council resolution after it had been made, rather than identifying such problems before the decision is made, demonstrates a lack of foresight and does not promote community confidence.

There was also a lack of transparency in many of the decisions taken by the Council apparent from the evidence before me. There were disparities in the information held by individual Councillors when they came to decide a matter. Whether such disparities were due to a failure to attend Forums, a failure to conduct private investigations, a failure to share information (or only share it amongst a privileged few) is not the point. Without ensuring that all Councillors were privy to the same information, Council debates would necessarily lack the level of robust discussions that would arise from a level playing field.
This in turn gives rise to an inability to determine whether decisions were being made from a properly informed basis.

I also consider the Council to have failed to effectively engage with the community on a number of issues, most particularly the WCCC matter. There was a lack of leadership throughout and no real accountability to the community to ensure effective and appropriate service delivery. In this regard, I find the Mayor’s treatment of Lindsay Holland in relation to the WCCC particularly evident of a failure to provide good government. The importance of effective community engagement cannot be underestimated in the delivery of good government. It promotes transparency in decision-making and promotes community confidence in those decisions.

Another area of concern was the Council’s failure to adequately set the CEO’s performance plan and monitor his performance. Given the almost symbiotic relationship between Refocus and Mr Dacombe’s performance, it is concerning that the Council did not have a clear picture of how to assess the implementation of Refocus and measure its success or failure. The evidence demonstrated that many Councillors did not understand what Refocus was or how it could be measured. This no doubt led to the Council being unable to properly determine an appropriate mechanism to monitor Mr Dacombe’s performance. The lack of clear performance indicators undoubtedly led many Councillors to feel that Mr Dacombe had failed to deliver what was expected and subsequently to a lack of mutual trust or respect and ultimately to a failure to provide good government.

The totality of these failures on the part of the Council give rise to a Finding that there has been a failure to provide for the good government of persons in the City of Canning’s district.

I note that since the publication of the Authorised Inquiry Report and following evidence before this Inquiry, the City has undertaken a number of significant reforms in relation to a number of identified deficiencies. They should be commended for those actions.

Having concluded that there was a failure to provide for the good government of persons in the City of Canning’s district, the question now is whether there are prospects of such good
government being provided in the future (including by reference to whether the Council and Administration has the ability to, and is likely to, do so).

Reflecting on the above matters, I am unable to conclude that the Council in its present configuration and Administration are likely to be able to do so. The attitudes of many of the individual Councillors seem entrenched over many years and based on the evidence before me, I cannot see them changing significantly.

**Recommendation One**

I recommend that the Council be dismissed.

**Use of the Term “Panel” in section 8.16 of the Local Government Act 1995**

The use of the term “Panel” in section 8.16(1) of the Local Government Act 1995 to refer to the appointment of one person to chair a local government inquiry is peculiar. It would be more accurate for the legislation to be amended such that when one person is charged with investigating issues in relation to good government (rather than three, as is allowed by the legislation), that one person should be referred to as an “Inquirer”.

**Recommendation Two**

I recommend that section 8.16(1) of the Local Government Act 1995 be amended such that when one person is charged with investigating issues in relation to good government (rather than three, as is allowed by the legislation), that one person is referred to as an “Inquirer”.

**Model Bench Book**

Despite the fact that this was the 7th local government inquiry to be held in Western Australia in the past 14 years, my appointment did not come with a procedural guide or manual. Staff retained by the Inquiry (other than Counsel Assisting) were not, through no fault of their own, well versed on the “ins and outs” of inquiries of this sort. This Inquiry,
like those before it, effectively found itself having to start from scratch when it came to
document management, office and court set up and, importantly, hearing procedures.

A Bench Book modelled on the Bench Book used by the state’s Crime and Corruption
Commission and incorporating practice directions commonly used in Royal Commissions
throughout Australia would greatly assist future inquiries of this sort in Western Australia.

Recommendation Three

I recommend that the Department of Local Government, perhaps with the assistance of the
Department of the Attorney General, investigate the creation of a model Bench Book for
future local government inquiries incorporating, amongst other things, practice directions
commonly used in Royal Commissions throughout Australia.

Rule 5.1(c) of City’s Code of Conduct

In reviewing the evidence before the Inquiry, Counsel Assisting submitted that the use by
the Mayor of his Mayoral email account to conduct personal business was technically a
breach of Rule 5.1(c) of the City's Code of Conduct CM-100 as that provision does not
contain a reasonable personal use provision.

It would assist Elected Members in the future if the City's Code of Conduct were redrafted
to acknowledge reasonable personal use of emails and letterhead by Councillors.

Recommendation Four

I recommend that the City's Code of Conduct were redrafted to acknowledge reasonable
personal use of emails and letterhead by Councillors.

Making Information Available to Councillors absent from Forum Meetings

It is evident that attendance at Council Forums may not always be possible for every
Councillor due to work or personal commitments. It is this necessary that those Councillors
not in attendance are not deprived of the information presented.
Local governments should be required to create practices that ensure all Councillors have the same information available to them prior to any relevant decision-making exercise. Whether this takes the form of more complete minutes from Forums, the requirement that presentations be made in hard copy or the audio/visual recording of Forums, it is essential that Councils be required to ensure that all Councillors have access to the same information.

**Recommendation Five**

I recommend that the City of Canning be required to ensure that detailed minutes are kept of all Forums and that any reports or presentations discussed at Forums be made available to all Councillors who are unable to attend. Forums should be audio recorded to enable absent Councillors to follow any discussions that occurred should they wish.

**Recommendation Six**

I recommend that an opportunity also be extended to any Councillor who did not attend a Forum to meet with the CEO or other appropriate executive to receive a briefing on any Forum they were unable to attend to ensure that any questions arising are addressed prior to Council debating a motion during an Ordinary Council Meeting.

**Induction Training**

The Inquiry received evidence indicating that Councillors received little, if any, constructive induction training when they were elected to their positions. It appears that many were elected, provided with a “bare minimum” induction package and were then expected to “hit the ground running”.

A review of the evidence also indicates that notwithstanding the provisions of clause 4.3(b) of the City’s Code of Conduct, which requires Councillors to be as informed as possible about the functions of Council, there were varying and often disparate levels of understanding of the relevant legislation and procedures applicable to local government in Western Australia.
This provides a compelling inference that the induction process that applied at the City of Canning prior to and during the relevant period of time being examined by this Inquiry was inadequate. Overall, what has been offered does not provide a proper foundation for new Councillors to properly understand their roles or how to carry them out.

**Recommendation Seven**

I recommend that that:

1. Consideration be given to providing newly elected Councillors a period of time after their election (perhaps three months), and prior to officially taking up their role as local government Councillors, to participate as non-voting members in the Council process as remunerated observers.

2. During this period, these newly elected Councillors should be required to complete a formal training program in their new role as per an appropriate, government mandated, local government training program.

3. This training be funded by each local government and be offered to any other Councillor who requests it.

4. The *Local Government Act 1995* should be amended accordingly to accommodate these new educational and learning initiatives.

**Continuing Education**

Councillors appearing before the Inquiry expressed considerable frustration with the volume of reading material placed before them, the complexity of this material, the large number of decisions (often on complex matters) required of them and the relatively short amount of time they were provided in order to “get up to speed” on many of these matters.
It seems logical that in an environment such as this, a greater priority should be made to ensure that Councillors are given every opportunity to learn as much as possible about their roles, the legislation that governs them and the types of issues they are likely to face.

Unfortunately, the evidence shows that little concerted effort had actually gone into ensuring that Councillors were necessarily prepared for what is now a quite sophisticated local government environment.

It is evident that many of the frustrations expressed by Councillors would not have occurred had at least some of those who appeared before this Inquiry had engaged more critically with their roles and the considerable body of written work focused on ensuring that they know what is expected of them.

This Report has outlined educational programs offered in Western Australia by the WA Local Government Association and now proposed in New South Wales. Programs of this sort merit further investigation by the government. Having reviewed the evidence before this Inquiry, it is evident that educational program of the sorts now available would be of considerable value to anyone choosing to be a local councillor.

**Recommendation Eight**

I recommend that the Department of Local Government, in cooperation with the WA Local Government Association and Local Government Managers Australia, investigate the offering of continuing education programs of the sort detailed in this Report and that, in due course, the *Local Government Act 1995* be amended to make continuing education and training mandatory for all Elected Members.

**Remuneration for Elected Officials**

There was some discussion during the course of the Inquiry’s public hearings about the remuneration for the Mayor and Councillors. The evidence shows that the remuneration offered is not generous. This necessarily has an effect on the amount of time Councillors can devote to positions and how much time they can devote to continuing education.
Recommendation Nine

I recommend that any changes of the sort suggested above in relation to induction and continuing education be undertaken simultaneously with an investigation of the current remuneration levels for local government members – remuneration levels which are, in my opinion, inadequate given the considerable time requirements now imposed on Elected Members.

The Cost of the Statutory Inquiry Process

I note that in 2006, in relation to the Inquiry into the City of South Perth, Greg McIntyre SC made the following observation:

*It is trite that an Inquiry Process of this kind is expensive, both economically and in the impacts it can have on individuals and communities.*

*I do not at the moment, on the basis of the expertise of this Inquiry, see that there is a simpler, cheaper way to do it. The content of this report illustrates the complexity of the legal and fact-finding issue which may arise, in what might be regarded as a comparatively less contentious Inquiry than some others.*

*It appears to me that it would be appropriate to conduct a study which focused on the issue of the most appropriate manner to deal with matters of this kind, taking into account the accumulated experiences of investigatory operations under local government legislation in this State and other jurisdictions.*

*I recommend that the Department of Local Government conduct a study into the most appropriate manner of carrying out investigations of this kind in the future.*

It would appear that an inquiry of the sort suggested by Mr McIntyre has not been undertaken.

I share Mr McIntyre’s concerns in relation to the costs of inquiries of this sort and agree that an investigation into whether these costs can be reduced should be undertaken.
Recommendation Ten

I recommend that the Department of Local Government, perhaps with the assistance of the Department of the Attorney General, undertake a study of the statutory inquiry processes that apply to local government inquiries of this sort to determine whether there is a way to reduce the costs associated with these inquiries.

Dr CHRISTOPHER N. KENDALL

May 2014
APPENDICES

APPENDIX A – CITY OF CANNING ADMINISTRATION CHARTS
APPENDIX B – INQUIRY PRACTICE DIRECTIONS
EXECUTIVE/MANAGERIAL CHARTS 2013/2014
(After Appointment of Lyn Russell as CEO)
APPENDIX B
INQUIRY PRACTICE DIRECTIONS

INQUIRY INTO THE
CITY OF CANNING

Local Government Act 1995 (WA)
Royal Commissions Act 1968 (WA)

Practice Direction No. 1
7 August 2013

HEARING ADMINISTRATION

1. The Inquiry proposes to sit from Monday to Thursday each week, except as otherwise advised. Usual hearing hours will be from 10:00am to 1:00pm and from 2:00pm to 4:00pm. The hearing room will be on Level 8 in Perth's Central Law Courts at 501 Hay Street. Hearings will commence on Monday 23 September 2013.

2. The Inquiry’s proceedings will be as orderly as possible. The Inquiry will endeavour to ensure that those whose reputational interests may be adversely affected by the evidence before the Inquiry are treated fairly and in accordance with the principles of natural justice, while protecting confidentiality where that is deemed appropriate.

3. The Inquiry accepts no obligation to notify persons with authorisation to appear or other interested parties of the times and places of its hearings. Details of the public hearings arranged from time to time may be obtained from the Inquiry’s Executive Officer or from the Inquiry’s website at http://www.canninginquiry.wa.gov.au. Nonetheless, a person who, in the opinion of Counsel Assisting, may be substantially and directly interested in evidence to be produced to the Inquiry at a hearing will, if practicable, be notified prior to that hearing of the fact that it is proposed to produce the evidence to the Inquiry.

4. Transcripts of all public hearings will be made available on the Inquiry’s website. They will be posted on a daily basis.

AUTHORISATION TO APPEAR BEFORE THE INQUIRY

5. Section 22 of the Royal Commissions Act provides that a person may be legally represented when appearing at a hearing. The application of that section to an Inquiry provides that the legal representative of that person may, to the extent that the Inquiry Panel thinks proper, examine that person, or any other witness on any matter which the Inquiry Panel deems relevant to the Inquiry.
6. Lawyers do not have an absolute right of appearance before an Inquiry Panel. Nor do they have an unqualified right to examine and cross-examine witnesses as they see fit. An Inquiry Panel can, and often will, limit what legal representatives can say and do. Further, the authorisation to appear may be withdrawn by the Inquiry Panel, or made subject to altered or additional limitations or conditions, at any time.

7. In particular, the Inquiry Panel may:
   - Limit the particular topics or issues upon which the person may examine and cross-examine;
   - Impose time limits upon examination and cross-examination;
   - Require that submissions be presented in writing only.

8. The Inquirer is conscious of avoiding unnecessary representation at these hearings and takes the view that representation, and participation in the investigation that it invites, should serve a real and direct interest of the person concerned in or arising from the subject-matter of the hearing. An interest means some real risk that they may be subject to an adverse finding or that their reputation may be adversely affected. It must be something more than that which a curious or concerned member of the public may have.

9. When in doubt, the Inquirer may require any lawyer seeking authorisation to appear to represent a witness or person at a hearing to support their application by submissions, written or otherwise, which identify with as much precision and particularity as possible:
   - The nature of the interest(s) in the hearing;
   - If an appearance is sought on the basis of the rules of procedural fairness, the particular interest(s) involved;
   - The reasons why the rules are attracted;
   - If authorisation is sought to participate as a legal representative at a hearing other than that where the lawyer’s client is a witness, what circumstances exist to indicate to the Inquiry Panel that it is proper to allow such participation and the extent of any such participation.

**CALLING OF WITNESSES AND PRODUCTION OF EXHIBITS**

10. Subject to the control of the Inquirer, Counsel Assisting will determine what witnesses are called, what documents are tendered to the Inquiry, and in what order the Inquiry will call and examine witnesses.
11. The details of evidence to be produced to the Inquiry will not be published in advance of the hearing at which it is produced.

12. In relation to evidence, a set of relevant documents will be compiled from those which are included in various submissions and those which have been recovered as a result of the summonses which have been issued by the Inquiry.

13. These documents will be converted into electronic form and a copy of the same will be made available on compact disc for any witness, for each counsel given leave to appear and any affected party who wishes to avail himself or herself of that opportunity. It is proposed that an index of all relevant documents will be prepared for each witness. It is hoped this process will be completed by mid to late August.

14. These documents will, in many cases, be put by Counsel Assisting to witnesses for comment, witnesses who have had any connection to their creation or who may have taken them into account in arriving at any decision, and explanations will be sought where appropriate as to the meaning and significance attached to them and to what extent they have affected any decisions made or any action taken.

15. The Indexes are intended to be guides for both witnesses and their counsel. They should not be construed as binding on Counsel Assisting, as the nature of the Inquiry is likely to be fluid. Similarly, it should not be assumed that each and every document will necessarily be put to a witness by Counsel Assisting.

16. After considering and ruling upon any objection which may be made to the use of such documents, the Inquirer will determine which of those documents will be received by him to be considered in arriving at his decisions.

17. Any person wishing to have evidence of any other witness or witnesses not called by Counsel Assisting placed before the Inquiry must notify Counsel Assisting of the names of all such witnesses and provide a signed statement of their expected evidence, if possible in the form of a statutory declaration.

18. Should this occur, Counsel Assisting or Inquiry staff may interview such witnesses and take further statements from such witnesses if it considers necessary. It is not necessary that any such interviews or the obtaining of such additional statements occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Inquiry. The orderly conduct of the Inquiry will be greatly facilitated if this evidence is made available without delay.

19. Counsel assisting has control over what evidence, whether documentary or physical in nature, will be produced at a hearing. ‘Exhibits’ will not be ‘tendered’ as in a court, but will be ‘produced’ by reference to a unique Inquiry reference system.
20. Persons wishing to produce additional evidence to the Inquirer must provide a statement of the evidence or a copy of the document or thing to Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the Inquiry, becomes known.

21. Counsel Assisting will then be in a position to determine whether the evidence should be introduced as part of this Inquiry and, if so, when and how that should happen. Except where otherwise allowed, the evidence, if deemed relevant, will be introduced by Counsel Assisting at a time of the Inquirer’s choosing.

22. Application may be made directly to the Inquirer (rather than through Counsel Assisting) to call witnesses or place documentary material before the Inquiry only in the following circumstances:

   a. application has been made to Counsel Assisting to call such witness or tender such documents which application has been refused;

   b. thereafter, the applicant has given to Counsel Assisting written notice of the reasons why such witnesses’ evidence or documentary material should be placed before the Inquiry;

   c. either:

      i. Counsel Assisting has reaffirmed his decision not to place the evidence before the Inquiry; or

      ii. two working days have passed since the notice referred to in (b) has been received by the Inquiry without response from Counsel Assisting.

23. As stated, generally, Counsel Assisting will determine what witnesses to call and when. An indicative schedule of witnesses will be made available to each witness. It will be made available by mid-August.

24. That witness schedule should not be regarded as set in stone. If the evidence of a particular witness does not extend for the length of time which the schedule suggests then there will be adjustments to the schedule. Inquiry staff will contact witnesses to advise them of any adjustments to the schedule which impact on the date when a particular witness will be required.

25. All witnesses will initially be summoned to appear on the first day of hearings. Witnesses may thereafter be excused subject to the provision of suitable contact details and an undertaking to appear when required.
EXAMINATION AND CROSS EXAMINATION OF WITNESSES

26. All witnesses will first be called and examined by Counsel Assisting. The procedures to be followed thereafter will depend on whether or not the witness called by Counsel Assisting is represented by a legal representative who has been granted Leave to Appear before the Inquiry.

Witnesses who are Legally Represented

27. Generally, after Counsel Assisting has examined a witness who is legally represented, that witness may next be examined by his own legal representative and then cross examined by the legal representative of any person considered by the Inquiry to have sufficient interest in doing so. That witness’s own legal representative and finally Counsel Assisting may re-examine.

28. Certain limitations do, however, apply.

29. When Counsel Assisting concludes his examination of a witness, the Inquirer will ask counsel for that witness whether they wish to make an application to examine the witness/their client.

30. Should counsel make an application to examine the witness/their client, the following procedure will apply:

- The Inquirer will ask counsel to identify the topics that he or she proposes to examine and how an examination of those topics will advance the Inquiry. The proposed questions should bear directly on the factual issues in, or provide necessary clarification of, the evidence adduced in the Inquiry’s examination of the witness.

- Following the identification of the questions, the Inquirer will invite Counsel Assisting to make submissions.

- Following Counsel Assisting’s submissions, and any discussions that arise, the Inquirer will then determine whether those questions can be asked.

- Should counsel stray from the agreed topics, Counsel Assisting should rise and make a submission for the Inquirer’s determination.

31. In relation to the cross examination of witnesses, procedural fairness does not require an Inquiry Panel to permit cross-examination in all cases. At all times, duplication and repetition is to be avoided. To assist in that regard, in relation to cross examination, counsel representing any person mentioned in evidence in a way they consider is adverse to them may apply to the Inquirer for a witness to be recalled for the purpose of cross-examination. Such an application should be supported by a written submission setting the basis upon which it is made and the material contrary to the evidence of the witness it is sought to cross-examine.
32. Acknowledging that affected persons may be unaware of the totality of relevant evidence until the end of the hearings, the Inquirer may defer cross-examination until that time and then afford legal representatives the opportunity to apply for witnesses to be recalled for the purpose of cross examination.

33. The Inquirer will adopt the same process for re-examination.

Witnesses who are Not Legally Represented

34. If it emerges that there are any witnesses who are not legally represented in this Inquiry and it appears that they should be given an opportunity to cross-examine witnesses or to make submissions to the Inquirer in order to ensure natural justice to them, then the procedure in relation to the cross-examination of witnesses by those who are not legally represented will be as follows.

35. Such unrepresented persons will be allowed to provide written questions to Counsel Assisting outlining the questions they would like asked of the relevant witness. At an appropriate time, after Counsel Assisting has asked the questions which he himself thinks are appropriate to the witness, Counsel Assisting will then put the questions given to him by the unrepresented person to the witness. Before doing that Counsel Assisting will exercise his judgment as to whether it is appropriate to put those questions to the witnesses, either on the basis of ordinary rules of evidence or questions of propriety. If Counsel Assisting has any concerns in relation to these matters, he will address them to the Inquirer. If any person then wishes to take issue with the views that Counsel Assisting advances, the Inquirer will allow that person to address the Inquirer on that topic. The Inquirer will then rule on whether the question should be put and, if necessary, in what form it should be put by Counsel Assisting.

OBJECTIONS TO THE TAKING OF EVIDENCE

36. Legal practitioners should be mindful of the nature of the Inquiry Panel’s functions when making and framing objections to the taking of evidence at a hearing. Objections on the basis of the rules of evidence, curial relevance, or the potential inadmissibility of the evidence in court proceedings, will seldom be helpful.

37. Generally speaking, objections will have more pertinence to the nature of the Inquiry Panel’s functions at a hearing where it is reasonably contended that:

- the subject matter of the questioning is manifestly outside the Terms of Reference of the Inquiry (though this is not immutable);
- the witness would be unable to give a rational and helpful response to the question; or
- the line of inquiry will not prove helpful in informing the Inquiry Panel of any matter relating to the Terms of Reference.
FINAL SUBMISSIONS

38. At the conclusion of the evidence, the Inquirer will direct Counsel Assisting to prepare and deliver a written submission setting out any adverse conclusions which might be drawn from the evidence.

39. The Inquirer will consider these closing submissions before they are delivered to all affected parties and will ensure that they comprise the outer limits of any adverse conclusions or comments which might be included in his Final Report to the Minister for Local Government pursuant to section 8.22 of the Local Government Act 1995.

40. The Inquirer will invite written closing submissions from any parties to whom he has given leave to respond to those submissions, as well as any unrepresented witnesses whom he considers it appropriate be provided such an opportunity.

VARIATION OF PRACTICES

41. The Inquiry reserves the right at any time to vary the above practices.
Cross Examination of Witnesses

1. A tentative schedule of witnesses is available on the Inquiry’s web site.

2. In order to accommodate the needs of one of the witnesses appearing before the Inquiry, there will be a four week break between the appearance of Mayor Delle Donne, tentatively scheduled for 10 October 2013, and Councillor Mason, tentatively scheduled for 5 November 2013.

3. Pursuant to clause 32 of Practice Direction No 1, dated 7 August 2013, I direct that the cross examination of witnesses will commence on 6 November 2013 – ie, at the conclusion of the examination of the final witness, Councillor Mason.

4. At the conclusion of the examination of Mayor Delle Donne, tentatively scheduled for 10 October 2013, all lawyers given Authority to Appear before the Inquiry will be invited to make Applications to Cross Examine any witnesses called before the Inquiry. They will be given 5 working days to do so from the completion of the examination of Mayor Delle Donne. This will allow me to consider these Applications and provide a schedule for cross examination, to commence on 6 November 2013.

5. Witnesses and their legal representatives are reminded of the provisions of clause 31 of Practice Direction No 1 and the need for specificity in relation to Applications for the Right to Cross Examine.

6. Witnesses who appear before the Inquiry who are not legally represented should refer to clauses 33 and 34 of Practice Direction 1. Those who seek to rely on Counsel Assisting as per the terms of Practice Direction 1 should provide their written...
questions to Counsel Assisting within 5 working days after the conclusion of the
evidence of Mayor Delle Donne, tentatively scheduled for 10 October 2013.

7. Any Applications for the cross examination of Councillor Mason or any other witness
arising from the examination of Councillor Mason should be made at the conclusion
of Councillor Mason’s evidence, tentatively scheduled for 5 November 2013.

Dr Christopher N Kendall
Presiding Member
30 August 2013
Examination and Cross Examination of Witnesses

1. This Practice Direction replaces Practice Direction No. 2.
2. A tentative schedule of witnesses is available on the Inquiry’s website.
3. The examination of witnesses by Counsel Assisting the Inquiry and by the legal representatives of those witnesses will commence during the week of 21 October 2013.
4. The examination of these witnesses is tentatively scheduled to conclude on 6 November 2013.
5. Pursuant to clause 32 of Practice Direction No 1, dated 7 August 2013, I direct that the cross examination of witnesses will commence on 19 November 2013.
6. At the conclusion of the examination of the final witness, tentatively scheduled for 6 November 2013, all lawyers given Authority to Appear before the Inquiry will be invited to make Applications to Cross Examine any witnesses called before the Inquiry. They will be given 3 working days to do so from the completion of the examination of the final witness. This will allow me time to consider these Applications and provide a schedule for cross examination, tentatively scheduled to commence on 19 November 2013.
7. Legal representatives are reminded of the provisions of clauses 27-30 of Practice Direction No 1 in relation to their examination of their witnesses.
8. Legal representatives are reminded of the provisions of clause 31 of Practice Direction No 1 and the need for specificity in relation to Applications for the Right to Cross Examine.

9. Witnesses who appear before the Inquiry who are not legally represented should refer to clauses 33 and 34 of Practice Direction 1 in relation to their right to cross examine. Those who seek to rely on Counsel Assisting as per the terms of Practice Direction 1 should provide their written questions to Counsel Assisting within 3 working days after the conclusion of the evidence of the final witness, tentatively scheduled for 6 November 2013.

Dr Christopher N Kendall
Presiding Member
4 September 2013
1. Should any person who has been called as a witness be mentioned in evidence in a way that they consider to be adverse to them, that person may apply to the Inquiry, either personally (in the case of non-legally represented witnesses) or through their lawyer (in the case of legally represented witnesses), for the witness (or witnesses) who has (or have) made said adverse comment(s) to be recalled for the purpose of cross-examination. To avoid uncertainty, this provision overrides clause 31 of Practice Direction 1 to the extent that there is any inconsistency.

2. Such an application should be supported by a written submission setting out the basis upon which the application is made and any material that is contrary to the evidence of the person that the witness seeks to cross-examine.

3. All applications for leave to cross-examine must be received by Counsel Assisting no later than 4:00pm on Monday 11 November 2013.

4. This practice will enable the Inquiry to consider the ways in which conflicting evidence has been placed before it, identify possible areas of conflict and rule in advance of a person being recalled for cross-examination on the areas in which cross-examination will be permitted.

5. If it is proposed to cross-examine a witness on a document that is not presently evidence before the Inquiry, a copy of that document (in both hard copy and electronic format) together with submissions as to its relevance must be provided to Counsel Assisting no later than 4:00pm on Monday 11 November 2013. Clauses 20 and 21 of Practice Direction 1 apply with any necessary modification.

6. The principles which will generally guide this Inquiry in relation to the types of questions that will be permitted during cross-examination will be:
a. if there is a disputed issue of fact relevant to a matter which is regarded as material to any issue the Inquiry must determine, the Inquiry will allow cross-examination upon it;
b. if a person gives evidence on oath of an adverse matter, which evidence is not denied, the Inquiry will not allow cross-examination because no issue will have been raised regarding the evidence;
c. if the disputing evidence is a matter of comment, as distinct from raising a factual conflict, the Inquiry will not allow cross-examination;
d. if a person gives evidence of a fact and the contestant states that she or he has no recollection of the alleged fact, the Inquiry will not allow cross-examination unless there are surrounding circumstances casting doubt upon the veracity of the evidence alleged because, in these circumstances, there is no basis upon which a cross-examiner can contest the evidence;
e. over-riding all other considerations, if there are grave allegations against a witness which may be diminished or eliminated by cross examining the witness giving the evidence, the Inquiry may allow cross-examination.

7. Witnesses who are not legally represented should refer to paragraphs 34 to 35 of Practice Direction No 1 in relation to the method to be used by this Inquiry for cross-examination by non-represented witnesses.

8. In the event that Counsel Assisting has any concerns in relation to the scope of any proposed cross-examination, he will contact the relevant legal representative or non-legally represented witness in an attempt to resolve any disagreement in that regard. Should Counsel Assisting not be able to resolve any disagreement, the legal representative or witness concerned may apply to me for resolution of any outstanding issues in relation to the scope and content of cross-examination.

9. Lawyers and witnesses will be advised of the order of witnesses to be cross-examined and the scope of any permitted cross-examination of those witnesses on Thursday 14 November 2013. Counsel Assisting will determine the order of witnesses presented for cross-examination and the order in which counsel will cross-examine those witnesses.

10. To ensure an orderly and timely process, where one counsel seeks to ask questions already asked of a witness by another counsel, I may, in my discretion, prohibit such questions to avoid unnecessary duplication or repetition.

11. The cross-examination of witnesses will commence on Tuesday 19 November 2013.

Dr Christopher N Kendall
Inquirer

6 November 2013
Closing Submissions

1. Public hearings were completed on 29 November 2013.
2. As per my Opening Statement of 17 June 2013 Counsel Assisting must now provide me with written Closing Submissions.
3. Any person or entity against whom there is a possibility of an adverse finding by me arising from Counsel Assisting’s written Closing Submissions must then be given an opportunity to provide me with written Submissions in Reply.
4. I thus direct as follows.
5. By close of business on Tuesday 17 December 2013, Counsel Assisting should provide me, and all persons and entities who might be adversely affected, written Closing Submissions in relation to all relevant evidence before this Inquiry.
6. Such Closing Submissions should specify:
   a. the findings of fact which Counsel Assisting contends are available and ought to be found; and
   b. the conclusions which it is contended should be drawn from such facts.
7. Such Closing Submissions should be appropriately referenced to the evidence.
8. Counsel Assisting’s written Closing Submissions must not be published other than to the affected person or entity (or, where applicable, their legal representatives).
9. By close of business on Monday 13 January 2014, all persons and entities provided with Counsel Assisting’s Closing Submissions should provide me with written Submissions in Reply.
10. Written Submissions in Reply should specify:
   a. Any disputed findings of fact, and the basis for such dispute;
   b. Any additional findings of fact sought; and
   c. Any submissions in reply to Counsel Assisting’s written submissions.
11. Written Submissions in Reply may also address the issue raised by clause 1 (ii) and (iii) of the Terms of Reference, namely the prospect of good government being provided in the future and any steps which may need to be taken to ensure that good government is provided in the future.
12. Written Submissions in Reply are to be appropriately referenced to the evidence, including reference to contrary evidence.
13. Written Submissions in Reply should not be published other than to me and to Inquiry staff.
14. To avoid any doubt, there will be no oral closing submissions.

Dated this 2nd day of December 2013

Dr Christopher N Kendall
Inquirer