



Department of
**Local Government, Sport
and Cultural Industries**

Report of the Inquiry into the City of Cockburn

Authorised Inquiry under Part 8 Division 1
of the Local Government Act 1995 (WA)



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The DLGSC works with partners across government and within its diverse sectors to enliven the Western Australian community and economy through support for and provision of sporting, recreational, cultural and artistic policy, programs and activities for locals and visitors to the State.

The department provides regulation and support to local governments and the racing, gaming and liquor industries to maintain quality and compliance with relevant legislation, for the benefit of all Western Australians. This publication is current at April 2021.

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1. Introduction

1. The City of Cockburn (**City**) is in Perth's south-western suburbs approximately 24 kilometres south of the Perth Central Business District and around eight kilometres south of Fremantle. According to the City's website it is home to approximately 112,000 people.
2. The community is represented by a Mayor and nine Councillors, each elected for four-year terms. The City's elected members (the Councillors and Mayor) represent residents across three wards: the East, West and Central wards.
3. The City covers an area of 167.5 square kilometres and includes the suburbs of Atwell, Aubin Grove, Banjup, Beeliar, Bibra Lake, Cockburn Central, Coogee, Coolbellup, Hamilton Hill, Hammond Park, Henderson, Jandakot, Leeming (part), Munster, North Coogee, North Lake, South Lake, Spearwood, Success, Treeby, Wattleup and Yangebup.
4. Mr Logan Howlett is currently the Mayor of the City. A new permanent Chief Executive Officer (**CEO**), Mr Tony Brun, commenced at the City in early 2021.

Authorisation

5. Section 8.3(1) of the *Local Government Act 1995* (the **Act**) gives the Director General of the Department of Local Government, Sport and Cultural Industries (the **Department**) the authority to inquire into all local governments and their operations and affairs.
6. The Director General may, by written authorisation, authorise a person to inquire into and report on any aspect of a local government or its operations or affairs.

Scope of the Inquiry

7. On 14 April 2020, the Director General of the Department authorised an inquiry into the City (the **Inquiry**) in accordance with section 8.3(2) of the Act. The authorisation directed an Inquiry into the City's governance from 1 January 2019 onwards, in the following areas:
 - i) the employment and management of staff;
 - ii) inappropriate workplace behaviour;
 - iii) systems in place for dealing with workplace behaviours;
 - iv) systems for the reporting of misconduct to the appropriate authorities;
 - v) the City's complaint handling procedures for both internal and external complaints; and
 - vi) the workplace culture at the City.
8. This report seeks to provide an overview of key matters identified through the Inquiry and outlines findings made by the authorised persons in respect to those matters.
9. This report on the outcome of the Department's Inquiry has been compiled in accordance with section 8.13 of the Act by officers of the Department who were authorised to conduct the Inquiry (the **Authorised Persons**).

Directions to produce documents, information or property or attend an interview

10. To perform their functions through the Inquiry, the Authorised Persons issued a total of 28 directions to the City requesting the provision of documents, information, or property (**Direction**). The Directions were issued in line with the provisions of section 8.5 of the Act.
11. Of the 28 Directions issued, five required elected members to participate in formal interviews as per section 8.5(1)(a) and (b) of the Act. All elected members complied with these directions and interviews took place in April and May of 2020.
12. The remaining elected members, including Mayor Logan Howlett undertook interviews with the Authorised Officers on a voluntary basis. These interviews were held between 30 April 2020 and 27 May 2020. Due to Covid-19 restrictions at the time, some of these interviews were held over platforms including Microsoft Teams and Skype.
13. Mr Stephen Cain, former CEO of the City, also undertook a voluntary interview with the Authorised Persons on 7 May 2020.
14. During the period of the Inquiry, the senior executive staff of the City were:
 - Mr Daniel Arndt – Director of Planning and Development. Acting CEO from 27 April 2020.
 - Mr Stuart Downing – Director of Finance and Corporate Services. Acting CEO from 24 October 2019 until 27 April 2020.
 - Mr Don Green – Director Governance and Community Services.
 - Mr Charles Sullivan – Director Engineering and Works.
 - Ms Gail Bowman – Executive Manager, Strategy. Ms Bowman’s position is not considered to formally be a part of the senior executive, however for the purposes of this report Ms Bowman’s position is included here as she was also interviewed as part of the Inquiry.
15. All affected persons including relevant elected members and staff members were given an opportunity to comment on this report in draft form before it was finalised. All submissions were considered by the Authorised Persons and form part of this final report.

2. Background to the Inquiry

16. Prior to the commencement of the Inquiry in April 2020, the Department was made aware of some matters impacting on and involving the City. While these matters themselves are not the specific subject of the Inquiry, it was these events that drew the Department’s attention to the City and as such, are matters relevant to the background of the Inquiry.

Allegations of unsafe workplace

17. The City’s former CEO, Mr Cain took leave commencing at close of business 23 October 2019, citing an unsafe workplace. Mr Cain’s claims related to alleged bullying and harassment by some members of Council.
18. Following Mr Cain’s bullying complaint, the City commenced an investigation into his claims. Subsequently, the City also undertook an investigation into allegations of misconduct by Mr Cain. This misconduct investigation, and

related matters, resulted in Mr Cain's employment being terminated by Council at a Special Council Meeting held 16 April 2020.

19. As the alleged misconduct of Mr Cain was investigated by the City and formed the basis for Mr Cain's termination, the allegations were not a matter for the Inquiry and not examined further in this report.

Legal proceedings involving elected members

20. In October 2019, the Department was made aware of a successful defamation lawsuit by Cr Lee-Anne Smith (as a private citizen) against Ms Lara Kirkwood (as a private citizen) who is now a councillor and Deputy Mayor of the City. As a result of the defamation proceedings, Ms Kirkwood (now Cr Kirkwood) paid damages to Cr Smith and made a public apology. Also, in October 2019, Cr Smith undertook additional legal action against Cr Chontelle Sands (now Stone).
21. On 3 February 2020, Cr Smith was suspended by the State Administrative Tribunal for a period of two months, for failing to comply with an order made by the Local Government Standards Panel.

Media attention

22. The City attracted a range of media attention in the 12 to 18-month period leading to the Inquiry. Various forms of media including radio, newspaper, online news sites and nightly news broadcasts reported on the circumstances at the City during this time.
23. For example, there was media coverage in respect to a range of allegations made against Cr Smith, including but not limited to alleged inappropriate behaviour on social media, allegations of conflict with members of the Cockburn community and the above-mentioned legal proceedings which involved herself as well as her fellow elected members.
24. Likewise, matters surrounding the taking of leave and unsafe workplace allegations made by Mr Cain, as well as his subsequent termination as the City's CEO were also the subject of media coverage and scrutiny.
25. Additionally, following the authorisation of the Inquiry in April 2020 media coverage of events at the City continued. This included coverage relating to the actions of another elected member, Councillor Michael Separovich amid allegations of inappropriate use of social media; specifically, racially motivated posts being made on his Facebook page. It is noted that these allegations have been determined by another jurisdiction, the Local Government Standards Panel and as result, are not the subject of this report.
26. The adverse media coverage involving the City, its elected members and CEO drew the Department's (and wider community's) attention to the City and was one of the factors considered by the Director General when authorising the Inquiry.

3. Statutory framework

27. The Act and associated local government regulations set out the framework for the administration and financial management of local government.

28. Extracts from the Act and associated legislation have been reproduced here, where relevant to the findings of the Inquiry.
29. The Act and various regulations define the roles and responsibilities of the Council, Mayor, Councillors, and the CEO. Relevantly, the Act provides the following in relation to the role of Council and elected councillors:

Section 2.7. Role of council

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

Section 2.8. Role of mayor or president

- (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 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.*
- (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 2.10. 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.*

30. It is important to note that individual elected members have no authority to make independent decisions or participate in the day-to-day operations and administration of the local government. All authority sits with the Council as a whole and that authority is exercised by simple or absolute majority decisions at formal council or committee meetings.
31. As the Mayor and Councillors are not involved in operational or administrative matters, each local government employs a CEO and other staff for the purposes of day-to-day running of the local government.
32. The CEO is directly appointed by Council through an absolute majority decision and is the link between elected members and local government staff. All other local government staff report to the CEO. The Act provides the following as to the role of the CEO:

Section 5.41 Functions of CEO

The CEO's functions are to —

- (a) *advise the council in relation to the functions of a local government under this Act and other written laws; 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(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 function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*
33. Section 5.42 of the Act provides for a Council to delegate, in writing to the CEO, the exercise of some of its powers or the discharge of its duties, subject to some exceptions (e.g. borrowing money, decisions requiring an absolute majority of council members, appointing an auditor).
34. Outside these delegated powers from Council, as provided for by section 5.41 above, it is the CEO's principal role to manage the day-to-day

operations of the local government and its staff. Consequently, the role of individual local government staff members is determined by the CEO.

35. Section 5.44 of the Act allows the CEO to delegate in writing to any employee of the local government the exercise of any of the CEO's powers or the discharge of any of the CEO's duties, other than the power of delegation. With some qualifications, under section 5.44 the CEO is permitted to delegate a power or duty the exercise or discharge of which was delegated to the CEO by the Council under section 5.42 of the Act.
36. The statutory provisions for local government are intended to guide and promote accountability, transparency, and good governance in local government. The Act and the recently gazetted *Local Government (Model Code of Conduct) Regulations 2021* (made under the Act) are the current, predominant source of these requirements as they prescribe not only detailed direction on conduct that is or is not permitted but also a set of principles against which elected members and local government employees conduct can be measured and to which they are to be held accountable.
37. While this is the case, other legislation also exists by which the conduct of local government employees and elected members can be measured. The *Corruption, Crime and Misconduct Act 2003* (CCM Act) is one such piece of legislation that should be referred to by local governments in respect to measuring and determining appropriate conduct. The CCM Act creates an obligation for public agencies (including local governments) to report any information which involves, or may involve, suspected misconduct to relevant agencies.
38. Under the CCM Act, misconduct is classified as either serious or minor in nature, and the obligation of public agencies to notify the Corruption and Crime Commission (CCC) or Public Sector Commission (PSC) respectively of any suspected misconduct is paramount. In the case of local governments, the principal notifying officer is the CEO. Through the CCM Act, CEO's are required to notify the CCC or PSC in writing, of any matter that they suspect, on reasonable grounds, concerns serious or minor misconduct.
39. While this may be the case, in the interests of natural justice, procedural fairness and good governance, upon receipt of a complaint of alleged misconduct or inappropriate behaviour a local government should, in the first instance, refer the matter to either the PSC or CCC, prior to considering initiating their own investigation.

4. Key City Policies and Documents

Codes of Conduct - Staff

40. Section 5.103(1) of the Act requires a local government to prepare a code of conduct to be observed by council members, committee members and employees. At the time of the Inquiry, the City had both a Code of Conduct for Staff and Code of Conduct for Elected Members.
41. Part 3 of the Code of Conduct for Staff identifies the appropriate conduct for an employee of the City. Relevantly it states:

3.1 Staff shall not use confidential information to gain improper advantage for themselves or for any other person or body, in ways which are inconsistent with their obligation to act impartially, or to improperly cause harm or detriment to any person or organisation.

3.3 Staff shall observe the highest standards of honesty and integrity and avoid conduct that might suggest any departure from these standards.

42. At the time of the Inquiry, Regulation 34C of the *Local Government (Administration) Regulations 1996* was in place. Regulation 34C required that a local government's Code of Conduct for employees include a requirement that employees with an interest in a matter that may adversely affect their impartiality, to disclose the nature of the interest. As of February 2021, the *Administration Regulations* were amended. While the requirements for the disclosures of impartiality interest remain the same, as of February 2021 this requirement is provided for by Regulation 19AD.

43. The version of the City's Code of Conduct for Staff provided to Authorised Persons during the Inquiry included the provisions for disclosing an interest in clause 3.6:

(1) In this Code "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 an employee and who has an interest in any matter to be discussed a Council or Committee meeting attended by the person is to 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.

Code of Conduct – Elected Members

44. The version of the City's Code of Conduct for Elected Members that was in place at the time of the Inquiry prescribed the roles and objectives of an elected member of the City. Part 2.4 of the City's Code of Conduct for Elected Members, 'Roles and Objectives' states, in part:

44.4 An elected member shall always act:-

- as a leader on issues of importance to the community;*
- honestly, impartially and with integrity in its dealings with all elements of the community;*
- tolerantly by acknowledging the right of individuals both on Council and in the community, to hold differing opinions and to express those opinions;*
- independently and free of undue influences created by pecuniary interests and other conflicts of interest; and*
- in an ethical and procedurally fair manner in all of its dealings.*

45. Part 3 of the Code of Conduct for Elected Members deals with the Conduct of Elected Members. Relevant to the findings of this report, part 3.1 stated, in part, that:

“Elected Members shall act and be seen to act;

- *Properly and in accordance with the requirements of the law and the terms of this Code;*
- *Co-operatively with Council staff through appropriately defined communication channels;*
- *To communicate and confirm Council decisions and policies in a positive and proactive manner in the community, regardless of the level of personal support for Council’s collective decisions; and*
- *To make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable person unwarranted offence or embarrassment”.*

46. The Code of Conduct for Elected Members also included information about the expected conduct of elected members when using social media, including but not limited to the following:

5.2 (a) *Elected Members are responsible for the content they publish in a personal capacity on any form of social media platform and in this regard must understand their legal obligations...*

As civic leaders, Elected Members must comply with the requirements of the Local Government Act 1995 and the Local Government (Rules of Conduct) Regulations 2007 and such obligations extend to when Elected Members use social media to communicate with the community.

(b) *In view of this, Elected Members when using social media must:*

- *Only disclose and discuss publicly available information;*
- *Ensure that all content published is accurate and not misleading and complies with all relevant City policies and legislative requirements;*
- *Be polite and respectful to all people they interact with;*
- *Avoid making negative comments about the Elected Members or Administration of the City of Cockburn or members of the community;*
- *Avoid making any comment of post any material that might otherwise cause damage to other persons, or bring the City’s reputation into question;*
- *Comply with their record keeping responsibilities when using social media for Elected Members activities and*

Council related matters by providing a copy of the post to the City's Administration;

- (c) *Elected Members when using social media must not:*
- *post material that is offensive, obscene, defamatory, threatening, harassing, bullying, discriminatory, hateful, racist, sexist or otherwise unlawful;*
 - *use or disclose any confidential information obtained in their capacity as an Elected Member of the City, or release information to the public before it has been dealt with by Council or approved for release by the City;*
 - *mention or disclose staff members names or positions publicly or through private means (direct message) via social media.*

Policy: Legal Representation & Costs Indemnification – Elected Members & Employees [sic]

47. The City's Legal Representation & Costs Indemnification Policy was adopted by Council on 13 December 2018. According to the policy reviewed by Authorised Persons, the policy "...is designed to protect the interests of Council members and employees where they become involved in civil legal proceedings because of their official functions".
48. The policy defines legal representation as "...*the provision of legal services, to or on behalf of a Council member or employee, by an approved lawyer, that are in respect of (a) a matter or matters arising from the performance of the function of the Council member or employee; and (b) legal proceedings involving the Council member or employees that have been, or may be, instituted.*"
49. Relevantly, part (3) 'Applications for Financial Assistance' of the policy states the following statements in respect to applications for financial assistance:
- 2. A member or employee requesting financial support for legal services under this policy is to make an application in writing, where possible in advance, to the Council providing full details of the circumstances of the matter and the legal services required.*
- ...
- 5. Where there is need for the provision of urgent legal services before an application can be considered by Council, the CEO may give an authorisation to the value of \$10,000 provided that the power to make such an authorisation has been delegated to the CEO in writing under section 5.42 of the Local Government Act 1995.*
- 6. Where it is the CEO who is seeking urgent financial support for legal services, the Council shall deal with the application...*
50. The delegation of authority from Council to the CEO to approve the provision of financial assistance for legal representation to elected

members and/or employees is made under delegation LGAES13 'Legal Representation – Elected Members and Employees Delegation of Authority'.

51. Relevantly, the delegation provides these various conditions:

“The application cannot wait until a meeting of Council is convened for the application to be considered; approval of up to \$10,000 and approved applications to be informed to all elected members.”

Policy: *Obtaining Legal Advice & Other Expert Advice & Legal Proceedings Between the City of Cockburn & Other Parties* [sic]

52. The City's Obtaining Legal and Other Expert Advice Policy [abbreviated] was also adopted by Council on 13 December 2018. The policy "...provides a mechanism to expedite the acquisition of legal and other expert advice, as required, and also provides a system enabling advice and the ongoing status of legal proceedings of the City to be provided to all elected members on a regular basis".
53. Notably, part (2) of the policy states *“The Chief Executive Officer is authorised to obtain legal and other expert advice as is deemed necessary to maintain the proper administration of Council affairs, subject to the following conditions: -*

in the instances where Council has resolved or requested to seek legal or other expert advice, a copy of that advice and Council's letter of instruction be provided to all Elected Members as soon as practicable within seven(7) days of receipt by the City unless otherwise resolved by Council;”

54. Relevant sections of part (4) of the policy 'Responding to Legal Proceedings' state:
1. *“This section applies to any legal proceedings to which the City is required to formally respond.*
 2. *The Elected Members must be advised that a legal proceeding has been commenced against the City as soon as practicable after the City has been given notice of the proceeding.”*

5. Inquiry findings

5.1 Council culture and cohesion

55. In November 2019, investigators from the Department met with the then Acting Chief Executive Officer Mr Stuart Downing, members of the senior executive team, Mayor Howlett, and other elected members to discuss matters at the City.
56. Through these discussions (and subsequently through interviews conducted as part of the Inquiry during April and May 2020) several concerning issues within the Council group were identified and are summarised, in part, below.

Conflicts between elected members and elected member behaviour

57. In initial conversations with Departmental officers, concerns were raised about conflicts between elected members, and public displays of poor elected member behaviour in settings such as meetings. One elected

member reported that some members acted like children and appeared to show a lack of respect for the meeting process and for their roles as elected officials.

58. Elected members also discussed their concerns about the publicised incidents of legal action between their colleagues. Elected members felt that these incidents had affected the way elected members interacted with each other in the Council chamber; creating an environment where elected members were reluctant to have open and frank discussions with each other, for fear of retribution.
59. Around the same time as officers from the Department met with persons from the City in late 2019, an email was sent by two of the City's elected members to their colleagues, the then Acting CEO and the Director of Governance and Community Services.
60. The email identified concerns about the culture within Council and the behaviours of elected members including statements such as "...behaviours and a culture that is extremely concerning", "The current culture appears to be one of blame and shame. There appears to be a lack of openness and communication..." and "There are divisions and factions...."
61. When the Inquiry was authorised in April 2020, the Authorised Persons interviewed all elected members. Through the interviews, it was noted that while there was some improvement in behaviour from some members, the earlier issues identified around culture and behaviour were still apparent and creating conflict within the elected member group. It was reported that internal conflicts between elected members were still a cause for concern as were incidents of inappropriate behaviours by some elected members in public settings, including in meetings and on social media.
62. One of the elected members interviewed felt that some of their fellow elected members viewed their colleagues as competition and instead of focusing their energies on improving the City, they appeared more focused on competing and creating conflict with each other. A second elected member also identified competition between elected members as a cause for concern, stating it was "...disconcerting and destabilising".
63. Another elected member noted that some colleagues had displayed disruptive behaviour during meetings, appearing reluctant to follow standing orders and frequently speaking out during meetings after the presiding member had asked that they cease. They felt this demonstrated a lack of respect for the meeting process, and for the role they held as an elected member.

Elected members use of social media

64. Elected members posting inappropriate content on social media platforms such as Facebook was also identified as a problem amongst some in the elected member group.
65. For example, Mayor Howlett advised the Authorised Persons that the use of Facebook by some members of Council had "created some grief" between elected members and with members of the community, referring to some social media posts made by elected members as "shocking".

66. He stated that so problematic was the use of social media platforms such as Facebook by some elected members that Council had previously sought to review its Elected Member Code of Conduct to address the inappropriate use of social media and to ensure more clear and concise rules around its use were articulated. He noted however, that despite the review of the Elected Member Code of Conduct, the problems remained.
67. During the Inquiry, Authorised Persons reviewed the Code of Conduct and note that part 5.2 refers specifically to social media use. It states amongst other things, that elected members “must not post material that is offensive, obscene, defamatory, threatening, harassing, bullying, discriminatory, hateful, racist, sexist, or otherwise unlawful”; “must be polite and respectful to all people they interact with”; “must avoid making negative comments about the Elected Members or Administration of the City of Cockburn or members of the community”
68. Based on information provided to the Inquiry - and more recent media coverage about the use of social media by some of the City’s elected members - it is apparent that some members of Council have failed to comply with the requirements of the Code when they have used social media, and through their social media use, have not demonstrated behaviours expected of local government elected officials.
69. Authorised Persons note that the City’s elected members are also required to abide by the Elected Members Communication Policy, which outlines principles by which elected members should communicate with the administration and community. Although this policy mentions the use of email and social media, it does not include any reference to the expectations and requirements of their use by elected members.
70. It is the view of the Authorised Persons that the City’s policy should be strengthened to better articulate best practice requirements for elected members using email and social media, with an added emphasis on the appropriate use of technology for communicating with members of the wider community. The City may also wish to consider the development of a new social media policy.

Role of the Mayor

71. A common theme that emerged through the Authorised Persons interviews with both employees and elected members was the Mayor's leadership of Council, in particular his role in managing poor elected member behaviour.
72. While almost all persons interviewed agreed that Mayor Howlett was an effective community leader, had a good rapport with the community and performed official Mayoral duties well, concerns were raised about his ability to manage elected members behaviour during meetings.
73. The conduct of elected members and the role of the Mayor in managing this conduct was identified as an issue by several persons interviewed. During interview, one elected member said they felt as though the Mayor would be reluctant to point out when poor behaviour was occurring. Another elected member advised that following the Authorisation of the Inquiry they had noticed an improvement in the Mayor’s chairing of Council meetings but noted that in the past meetings “could have been managed better”. This

councillor also made comment as to improved behaviour of council since the commencement of the Inquiry. At interview, a member of the City's executive team stated that they believed the Mayor understood his role as Mayor and presiding member well, and noted that while he controlled meetings well, they could be controlled better.

74. The Mayor's perceived ability (or lack of) to control poor/unacceptable behaviour of elected members was also mentioned by interviewees in relation to the City's agenda briefing sessions. While this was identified as an issue in itself, Authorised Persons interviews with members of Council and staff also identified some broader concerns about the conduct of the briefing sessions (and the behaviours of elected members during those meetings) which should be addressed by the City to ensure good governance into the future (see below).

Conduct of briefing sessions

75. At the time of the Inquiry, in addition to monthly Ordinary Council Meetings (OCM), the City held monthly Agenda Briefing Sessions on a Thursday one week prior to the OCM. Alongside regular monthly briefing sessions, the City also held a range of ad-hoc briefing sessions on other matters of relevance to Council, sometimes with external guests attending to present topics or ideas.
76. During interviews with elected members and staff, Authorised Persons were advised of past incidents of some elected members 'screaming' at the former CEO Mr Cain during briefing sessions, arguing with members of the public who had attended to present information to Council and some elected members being under the apparent influence of alcohol.
77. While these behaviours were noted to be exhibited by a select number of elected members only, not indicative of all elected members behaviour at briefing sessions and were less apparent in more recent times, it is evident there may be some underlying issues with the City's briefing sessions including in respect to the way in which they are conducted more generally. Notably, at the at the time of the Inquiry being held, the briefing sessions were chaired by the CEO, closed to the public and very informal.
78. While it is accepted that briefing sessions are less formalised than meetings of Council, the Department does not support CEO's chairing of briefing sessions, as to do so may obscure the distinct and separate roles of the administration and Council.
79. The Department's 'Operational Guideline 5 - Council forums' also recommends that local governments clearly distinguish between the types of forums they may hold (i.e. Concept forums versus Agenda forums/briefing sessions), that all forums or briefing sessions are governed by comprehensive procedures (like standing orders), and wherever possible be open to the public.
80. During his interview with the Authorised Persons, Mayor Howlett discussed the briefing sessions in relation to the behaviours of elected members, the role of the CEO and how he saw his role as Mayor during the briefing sessions. Comments made in his interview (and in interviews with other elected members and employees about the briefing sessions) support the

Department's position in relation to the holding of briefing sessions as set out above.

81. For example, the Mayor stated he had no authority at the briefing sessions and that because the sessions were chaired by the CEO, he saw himself as "the same as all elected members", unable to exert his authority as Mayor to preside over the briefing sessions and call members to order if they were behaving poorly. This also aligns with comments made by other elected member where they felt the Mayor did not control bad behaviour at briefing sessions.
82. The Mayor noted he had previously raised the matter of behaviour with the City's administration and spoke of occasions when he had to ask the CEO to better control the briefing sessions, and the behaviour of elected members. He suggested that some behavioural issues could have been avoided had he been presiding over the briefing sessions. The Mayor also stated that it was his preference for the briefing sessions to be open to the public and have a more formalised structure, but noted some other elected members were opposed to this idea.
83. The Authorised Persons agree with these sentiments. Specifically, it is the view of the Authorised Persons that as duly elected Mayor, whose role it is to preside over, and keep order in meetings of Council, the Mayor should also preside over and maintain order at briefing sessions. This may avoid any inconsistency in perceived acceptable behaviours in briefing sessions, as well as avoiding the obscuring of the distinct and separate roles of the local government CEO and its Council. Further, having briefing sessions open to the public where possible and with a more formalised structure, would ensure good governance.
84. In summary, the Authorised Persons recommend that the City holistically review its practices in respect to briefing sessions. This should include a move away from the practice of the CEO chairing briefing sessions, a comprehensive review of the structure, organisation and purpose of briefing sessions including a delineation between the types of briefing sessions being held; the development of adequate policies, procedures and protocols to dictate how sessions/forums should be conducted and consideration given to opening agenda briefing sessions to the public.

5.2 Administration acting without the formal authority of Council

85. Following receipt of a letter by Mr Cain on 23 October 2019 whereby he alleged he was being subject to an unsafe workplace and would be taking leave, the Council met informally the following day (24 October 2019).
86. Authorised Persons were advised that the purpose of this informal meeting was to discuss matters raised in Mr Cain's letter. A second informal meeting of Council occurred on 31 October 2019.
87. In the intervening period, a letter dated 28 October 2019 signed by Mayor Howlett was sent to Mr Cain. The letter stated, among other things, that Council would appoint an external consultant to investigate Mr Cain's allegations and that Mr Cain's IT system access, including access to emails, had been temporarily suspended for the duration of his absence from work.

88. However, when the letter was sent on 28 October 2019, Council had not formally met to authorise any course of action in relation to Mr Cain. The first formal meeting of Council to discuss this matter was held 4 November 2019.
89. Through his lawyers, Mr Cain raised the issue of the disconnection of his email account with the City. It was his view that the City did not have the authority to undertake that action, without a formal Council resolution.
90. During interview, Mayor Howlett was asked about this incident and noted that Council was concerned with Mr Cain's health and wellbeing so had determined (and subsequently requested action of the administration) that to ease any mental stressors on Mr Cain, it would be appropriate to immediately disconnect his email account.
91. While it is not the Authorised Person's position to provide further comment on the health or welfare implications behind the Council's decision, from a legislative position it is the Authorised Persons view that the actions of Council in this matter were inconsistent with the requirements of the Act.
92. It is the view of the Authorised Persons that the Act clearly prescribes the role of Council and its decision-making processes. It provides that elected members participate in the decision-making process at council meetings, and that the authority to make decisions is exercised by Council via simple or absolute majority decisions at formal meetings of council, or committees with delegated authority, only. The Authorised Persons recognise that Council's may run informal forums inclusive of briefing session or concept forums, however no binding decisions should be made at these "informal" meetings.
93. As the Council is responsible for appointing the CEO, to demonstrate good governance, any decision made regarding the CEO's employment status and/or conditions should be made by way of a Council resolution, in a formal meeting setting. Regardless of the Council's motivation behind making the decision to suspend Mr Cain's IT access, the decision to alter the employment conditions of their employee (i.e. the CEO) should have been made via a formal resolution of Council. Moreover, without a formal resolution, it is the view of the Authorised Persons that the City's administration lacked appropriate authority to implement the decision.
94. The Inquiry also identified a separate incident whereby the City's administration acted without the formal authority of Council. This occurred following a meeting of Council in December 2019.
95. At a Special Council Meeting held 4 December 2019, Council considered two matters behind closed doors, Confidential Staff Matters 1 and 2.
96. Through 'Confidential Staff Matter 2' Council resolved, among other things, to undertake an investigation into allegations of misconduct being committed by Mr Cain while he was on a leave of absence.
97. The decision of Council included a motion to investigate whether Mr Cain had committed misconduct by, among other things, attending the "NGAA Conference on or about 10 November 2019".
98. Subsequently, at two other Special Meetings of Council (11 March and 16 April 2020) when the investigation into Mr Cain's alleged misconduct was

further considered by Council, part of the misconduct allegations had been changed in staff reports.

99. Specifically, the initial allegation relating to Mr Cain attending an event as per the Council resolution of 4 December 2019 “the NGAA conference on or about the 10 November 2019” was substituted in subsequent reports with “the LG Pro Conference Dinner on 7 November 2019”.
100. As Acting CEO during this time, Mr Downing was asked about this matter in his interview with Authorised Persons. He indicated that when the City found out Mr Cain had not attended the NGAA conference and had in fact been seen at another event, he advised the City’s lawyers to amend the terms of the investigation.
101. When put to him by the Authorised Persons that this change should be reported back to Council as it was the subject of a Council resolution, Mr Downing did not agree this was required.
102. Mr Downing indicated that he was of this view that because the misconduct investigation was about whether Mr Cain attended workplace functions after Council directed him not to, and the event in question was according to Mr Downing, “just a name, one of the named functions” allegedly attended by Mr Cain, that the change to scope was simply part of the investigative process and was something that could be done without authority from Council.
103. It is the Authorised Persons position that Mr Downing’s view is incorrect. Had the Council resolution been to investigate Mr Cain’s attendance at events as a general matter, the change to the investigation terms may have been appropriate. However, as the Council resolution was specific as to the event Council wished to have investigated (being the NGAA conference) Council should have, at minimum, been advised of the proposed change in scope.
104. The Act clearly indicates that the Council are the decision-making body of the local government. In contrast, the role of the of the CEO is, amongst other duties, to advise Council in relation to the Act, to ensure that advice and information is made readily available to Council so that Council may make informed decisions and to implement decisions of Council. While there may not have been intent to mislead Council on behalf of the Acting CEO, it remains that it is not the role of the CEO to make changes or amendments to a Council resolution without the express authority of Council.
105. Notwithstanding the actions of the administration in changing the investigations terms of reference (and in effect, the Council resolution), it was also Council that received and accepted the reports provided by the administration, even when it was presented with information that did not align with its initial resolution of 4 December 2019. By these actions, Authorised Persons are of the view that Council also displayed poor governance and a lack of oversight in respect to matters coming before it.

5.3 Inappropriate involvement in Council’s decision-making

106. At the virtual Special Meeting of Council of 16 April 2020, Council resolved to terminate the contract of Mr Cain as the City’s CEO. After the meeting

proceeded behind closed doors, a motion to terminate the CEO's contract was moved by Cr Smith.

107. As noted by the Authorised Person who was present during the meeting - as well as by elected members and administration staff during their interviews with the Authorised Persons – the process around the moving of Cr Smith's motion was chaotic and lengthy. It was also noted that both the City's lawyers and Acting CEO were attempting to assist Cr Smith through this process.
108. When asked about this matter in his interview with the Authorised Persons, Mayor Howlett stated that he was comfortable with the assistance given to Cr Smith by the lawyers as she was taking some time to get the wording correct.
109. Mayor Howlett was then asked about the Acting CEO's attempts to assist Cr Smith with the wording of her motion as during the meeting he had asked him to cease intervening. In response, he indicated that he was not comfortable with the level of intervention by the Acting CEO, so had asked him to stop.
110. Similarly, when Mr Downing was questioned about this matter, he acknowledged that the Mayor had asked him to stop assisting Cr Smith, stating that he was told to "butt out". He further advised that while he thought it was his role as acting CEO to assist as Cr Smith was struggling with her motion, after being asked by the Mayor to cease, he did.
111. However, material obtained by the Authorised Persons suggest that Mr Downing may have continued to attempt to assist Cr Smith with the wording for her motion unbeknownst to the rest of Council by way of an email he sent to her at 9.30pm titled 'reason' [sic]. The email contained wording in respect to Council exercising a clause of the CEO contract (relating to termination) and reference to relevant parts of the report into Mr Cain's alleged misconduct.
112. Meeting minutes show that when the email was sent at 9.30pm, Council was debating Cr Smith's motion to terminate Mr Cain's contract as CEO. The Acting CEO's seemingly covert attempt to assist Cr Smith with wording for her motion demonstrates at minimum, a lack of respect for the Mayor, elected members and of the meeting process itself by not including other elected members present at the meeting, in his email to Cr Smith. At worst, it could be viewed as an attempt by the Acting CEO to inappropriately involve himself in Council's decision-making processes.
113. While the actions of the Acting CEO in this instance were not fundamental to the ultimate outcome of Council's decision making processes regarding Mr Cain's tenure as CEO, the Authorised Persons consider this incident to demonstrate another example of poor governance and a concerning workplace culture at the City, where the separation of the roles of the administration and Council appears to be obscured and good governance procedures ignored.

5.4 Use of confidential information

Provision of confidential information to an outside third party

114. As part of the Inquiry into the City, Authorised Persons reviewed a range of emails addressed to, and sent from, the authorised email addresses of all elected members and executive staff.
115. The review of emails identified that on 15 November 2019, the Acting CEO sent a confidential email to a third party.
116. The email sent to the third party was a forwarded email from the City's lawyers with an attached document. The attachment was a proposed draft of a letter to be sent from the Mayor to Mr Cain, inviting him to attend an interview with one of the investigators. The email and attached draft letter were both marked confidential.
117. When asked about this email during his interview, Acting CEO Mr Downing said he did not know why he had sent the email to the third party and suggested he may have done so in error. The Authorised Persons review of emails did not identify any follow-up email from either party in relation to the email being sent in error.
118. When further questioned by the Authorised Persons about the appropriateness of sending the confidential email to a third party, Mr Downing agreed that the email was confidential and should not have been sent to another person.
119. By distributing confidential information to a third party, the Acting CEO may have failed to comply with Part 3 of the City's Code of Conduct for Employees. Additionally, section 5.93 of the Act provides that it is an offence for an employee of a local government to improperly use information acquired in the performance of their duties, in order to cause an advantage, or detriment, to the local government, or another person.
120. Whether or not the Acting CEO intentionally provided confidential material to a third party with the intent to cause detriment to another person (in this case, Mr Cain) is a matter for the City to determine if it wishes to pursue further investigation. Notwithstanding, it may also be prudent for the City to remind employees and elected members of the importance of maintaining confidentiality in respect to information received in the course of their duties as representatives of the local government in order to comply with their obligations under the Act.

Provision of confidential information within the administration

121. The provision of confidential and sensitive material to persons that it should not have been provided to, was identified on other occasions throughout the Inquiry.
122. For example, at the Special Council Meeting of 16 April 2020 (where Council ultimately resolved to terminate Mr Cain as the City's CEO) a report was presented to Council, authored by all four City directors. Prior to consideration of the report, a staff motion was considered by Council recommending the meeting be closed to the public due to the confidential nature of business being discussed.

123. As is the standard practice for such decisions, the recommendation for the meeting to go behind closed doors also included a recommendation of who should remain in the Chamber. It was recommended the City's lawyers and members of the City's executive team; Acting CEO Mr Downing, Director of Governance and Community Mr Green, Director of Planning and Development Services Mr Arndt and Director of Engineering and Works Mr Sullivan should remain in the meeting.
124. Authorised Persons reviewed a recording of the meeting (one Authorised Person was also in attendance) and note that there was extensive debate amongst elected members as to why all four directors should remain in the meeting when confidential matters were being discussed about their superior, Mr Cain. Further, elected members questioned why all members of the executive were involved in compiling a confidential report regarding their superior officer, Mr Cain.
125. During the meeting, the Director of Governance and Community advised Council the administration was of the view that the matters surrounding Mr Cain's employment were of importance for the entire executive, so all were involved with drafting the report.
126. He further advised that the executive team had been involved, to some extent or another, in assisting with all reports relating to the matters of Mr Cain, adding that it was normal practice for the executive to assist with formulating Council agendas and reports. Authorised Persons have also viewed emails which confirm that members of the executive provided comment and feedback on multiple reports for Council, relating to Mr Cain.
127. During the Council meeting and in subsequent interviews with the Authorised Persons, some elected members indicated that Council were not aware of this and had not given authority for administrative staff, other than the Acting CEO and Director of Community and Governance, to be privy to confidential information relating to Mr Cain.
128. It is the view of the Authorised Persons that regardless of whether it was the administration's standard process for the executive to assist with Council reports on general matters, in the matter of the employment relating to the City's CEO, this should not have been the case. Further, the Authorised Persons do not believe that it was up to the City's administration to determine who should, or should not be, disclosed confidential information regarding Mr Cain as it is a local government's Council, not its administration, that is directly responsible for making decisions relating to the appointment, contract of employment, and termination of a local government CEO.
129. Authorised Persons acknowledge that Mr Cain did send his initial email regarding an unsafe workplace to all members of the executive, however information discussed by Council following that time should have remained between Mr Cain, Council and persons Council had given authority to (such as the Acting CEO). Accordingly, while the Acting CEO was required to prepare reports to Council as per his obligations under the Act, no other members of the City's administration were required to be involved with these matters. Authorised Persons believe it was poor governance practice for other senior employees to be involved with, and privy to, information

relating to the employment status of a more senior employee, in this case their immediate superior.

130. In addition, the Inquiry identified other examples of inappropriate disclosure of confidential information to administrative staff. Particularly, it was apparent that the City's Human Resources Manager also regularly provided advice and assistance to the Acting CEO when he was preparing reports regarding Mr Cain's employment and related matters.
131. One elected member advised the Authorised Persons that Council was not aware that the Human Resources Manager had been privy to confidential information regarding Mr Cain until they were advised by Mr Downing in April 2020, after some elected members requested information about who had prior knowledge of the Fair Work Commission proceedings.
132. The Authorised Persons viewed a range of emails sent from the Acting CEO to the Human Resources Manager which identify the Human Resources Manager was aware of, and assisting with, matters relating to Mr Cain long before the Fair Work Commission proceedings were underway; including as far back as October 2019 when Mr Cain first made his claims of an unsafe workplace to Council.
133. In reviewing emails, Authorised Persons also identified some other correspondence regarding the Human Resources Manager which was concerning; noting that one specific email referred to accusations of inappropriate material about Mr Cain being circulated by the Human Resources Manager to other staff members.
134. It is the view of the Authorised Persons that this information raises specific questions as to the appropriateness of the decision made to allow the Human Resources Manager to be privy to, and provide advice on, confidential matters regarding Mr Cain, while also reiterating the more general concerns held by Authorised Persons about less senior employees being involved with, and providing advice on, confidential matters in relation to more senior employees, who may be their superiors.
135. Authorised Persons believe a more appropriate approach to be taken in this case, if the City was required to seek HR advice, would have been to seek wholly external expert advice, to ensure that any advice given in relation to Mr Cain and his employment matters was completely impartial and free from the apprehension of bias.

5.5 Compliance with policies regarding provision of legal services

136. During the Inquiry, some of the City's elected member raised concerns with the Authorised Persons about the Fair Work Commission proceedings questioning why the City's lawyers had provided legal services to Mayor Howlett, Cr Allen and Mr Downing in the Fair Work Commission proceedings, when no prior request or indeed approval, in accordance with the City's Legal Representation and Costs Indemnification Policy, had been made to the Council. Moreover, elected members raised concerns as to why the Council had not been informed about the legal proceedings until after they were finalised.
137. Information provided to the Inquiry confirms a law firm represented the City and other parties at the Fair Work Commission. Records indicate that the

City spent approximately \$190,000 (incl. GST) on legal fees for the Fair Work Commission proceedings (noting that most of these initial costs were reimbursed to the City via an insurance claim at a later date).

138. The invoice for the proceedings identifies legal services were charged to the City for the preparation of “witness” statements for Mr Downing, Mayor Howlett and Cr Allen. It also identifies other fees charged for services provided to Mr Downing.
139. The Legal Representation and Costs Indemnification Policy states that the authority to approve the provision of legal services for an elected member or employee is to be authorised by Council, except where there is a need for ‘urgent legal services, before an application can be considered by Council’. In these cases, the policy provides that the CEO may give authorisation, under delegation.
140. The delegation of authority from Council to the CEO is made under the delegation LGAES13. Relevantly, the delegation provides that an application can be approved by delegated authority if it cannot wait until a meeting of Council is convened; that the approval is only up to the value of \$10,000, and all applications approved through delegated authority are subsequently informed to Council.
141. Additionally, the City’s Obtaining Legal and Other Expert Advice Policy states that for any legal proceedings to which the City is required to formally respond elected members must be advised that a legal proceeding has been commenced as soon as practicable. For legal advice requested by Council, this must be reported back within seven days.
142. Authorised Persons requested information from the City to explain the circumstances surrounding the Fair Work Commission hearing, specifically as to why Council authorisation was not sought for the provision of legal services for Mr Downing, Mayor Howlett and Cr Allen, and why some elected members felt they were not provided with timely information in respect to these legal proceedings.
143. The response from the City, in a document provided by its lawyers, advised that legal services were not provided to Mayor Howlett and Cr Allen and that the legal services identified on the lawyer’s invoice reflected the preparation of witness statements only. However, the response also advised that Mr Downing, Mayor Howlett and Cr Allen *‘relied upon the witness statements that we [the law firm] had prepared as their evidence’*.
144. In respect to questions about Mr Downing’s representation and any associated costs to the City, the response was more complex. The information from the lawyers noted that they had formed the view that Mr Downing’s interests aligned with the City’s, and that as they saw no conflict arising from them acting for both the City and Mr Downing in the proceedings, nor any additional work needing to be undertaken leading to increased costs, it was advised to the City that they [the law firm] should *“additionally act for Mr Downing in his personal capacity. That way, if the City was prevented from appearing at the hearing, the City’s position could in effect be put to the Fair Work Commission via us appearing for Mr Downing”*.

145. Following the lawyers taking instructions from the City's Director Governance and Community, and the Human Resources Manager, and subsequent instructions from Mr Downing to act for him personally; they commenced acting for Mr Downing in the proceedings. Applications were also made to the Fair Work Commission for the lawyers to legally represent both the City and Mr Downing in the proceedings. These applications were successful.
146. The information provided by the lawyers also advised that the law firm did not invoice Mr Downing for any associated legal costs and services as it *'did not undertake any legal work for Mr Downing above and beyond the legal work that we had already been engaged and instructed to do by the City in defence of the Application'*.
147. It may be the case that no additional legal costs were borne to the City by the lawyers acting for Mr Downing at the Fair Work Commission; however the information provided clearly identifies that Mr Downing was represented by the City's lawyers in a personal capacity (i.e. provided with legal representation). It may also be the case that the City's lawyers only assisted Mayor Howlett and Cr Allen with the preparation of witness statements, however it is also the case that these statements were relied upon by both parties, as their evidence (i.e. a legal service as per the City's own policy definition).
148. Accordingly, Authorised Persons are of the view that as per City policy, Council approval should have been sought prior to the administration authorising actions in respect to the Fair Work Commission Proceedings.
149. This includes Council giving authorisation for the City's lawyers to act on behalf of the City and Mr Downing at the Commission and for legal services provided to Mayor Howlett and Cr Allen. No information has been provided to the Inquiry that suggests Council's authorisation was requested or granted for these actions.
150. If prior authorisation of Council was not possible, or not seen as appropriate given the circumstances, Council should still at minimum, have been advised by the administration that a legal proceeding was afoot which involved the City and/or its employee and elected members, as soon as it became known to the administration.
151. Based on a review of Council meeting minutes and proceedings, emails, and interviews with relevant persons, there is no information to suggest this advice was forthcoming. It was only after the Fair Work Commission proceedings were finalised and published on the Commission's website (17 April 2020) that all elected members were advised.

5.6 Failure to disclose Impartiality Interests

152. At the time of the Inquiry, Regulation 11 of the *Local Government (Rules of Conduct) Regulations 2007* was in place which prescribed how and when a disclosure of an impartiality interest was to be made by an elected member (as of February 2021, Regulation 11 was replaced by Regulation 22 of the *Local Government (Model Code of Conduct) Regulations 2021*).
153. Regulation 11 - and subsequently Regulation 22 - states that an elected member must disclose an interest that could, or could reasonably be

- perceived to, adversely affect the impartiality of the person having the interest. The regulations further require that a member who has such an interest in any matter to be discussed at a meeting, must disclose the nature of the interest prior to the meeting, or prior to the matter being discussed. The nature of the interest is to be recorded in the minutes of the meeting.
154. Similarly, at the time of the Inquiry, Regulation 34C of the *Local Government (Administration) Regulations* 1996 (following amendments of February 2021, this is now Regulation 19AD) required that a local government's code of conduct contain a requirement for a person who is an employee and has an interest in any matter to be discussed at a meeting attended by that person that could, or could reasonably be seen to adversely affect their impartiality, to disclose the nature of their interest to the meeting. The nature of the interest is to be recorded in the minutes of the meeting.
155. Regulation 34C - and subsequently Regulation 19AD - also prescribes that the code of conduct include a requirement that the same disclosure of interest applies to any employee who has given, or will give advice in respect to the matter being discussed at a meeting, even if they do not attend the meeting. The City's Code of Conduct for Employees includes both these provisions in clause 3.6.
156. Following the Special Meeting on 16 April 2020, an email was sent by Cr Stone to Mr Downing, Mr Green and elected members questioning why none of the parties to Mr Cain's Fair Work Proceedings had declared an impartiality interest at the meeting.
157. In reply, Mr Green sent Cr Stone an email advising:
"As the action taken by Mr Cain in the Fair Work Commission (FWC), as noted in the attachment, was not the matter before Council, there was no need for parties to declare an impartiality interest at last night's SCM"
158. Responding to Messrs Green, Downing and all elected members, Cr Stone sent a further email:
"The draft FWC proceedings was [sic] mentioned in several of the attachment documents in the SCM agenda. Actually it was used by the lawyers to show the breakdown of trust between Mr Cain and the City had occurred [sic]. Lack of trust was the reason given to terminate the CEO's employment contract... Respectfully, I disagree with your decisions that no impartiality submissions were required..."
159. Cr Stone is correct, in that both the agenda and confidential minutes of the Special Meeting refer to the draft proceedings in the Fair Work Commission. However, it was not just in the attachments, but also in the staff report.
160. Notably, the staff report included a reference to Mr Cain providing an apology to the Mayor, Cr Allen and Mr Downing for a 'vexatious' complaint and referred to his actions in taking out a fair work application as 'threatening conduct'.
161. In response to Cr Stone's query, Mr Green again emailed Cr Stone (no other elected members this time) and reiterated his point that as the fair work application was not directly related to the purpose of the meeting it was not

necessary for the relevant elected members to declare an impartiality interest. The email also stated, “in any case, it is worth noting that Cr Allen and Cr Smith both declared an impartiality interest in the matter at the meeting”.

162. The minutes identify this to be true in so much that an impartiality interest was declared by councillors Allen and Smith, with the nature of the interest being that they had previously sent a disparaging email about the extension of Mr Cain’s contract.
163. Records indicate that the administration initially raised the matter of this email and potential impartiality interest with councillors Allen and Smith prior to the Council meeting. An email was sent by the administration to the councillors suggesting they disclose an impartiality interest because of correspondence they had with a former councillor which referred to the extension of Stephen Cain’s contract in August 2019 as a ‘slap in the face’ to Mr Downing.
164. The advice provided to councillors Smith and Allen suggesting they disclose an impartiality interest because of their correspondence about Mr Cain’s previous contract extension appears at odds with response to Cr Stone about what did, or did not, constitute an impartiality interest in the context of a matter before Council.

Impartiality interest should have been disclosed by elected members

165. The Authorised Persons question the argument put forward by the administration that as the Fair Work Commission proceedings were not the matter before Council, they were interests that did not require disclosure.
166. It is the view of the Authorised Persons that regardless of whether the Fair Work Commission proceedings were or were not a matter directly before Council, the proceedings involved Mr Cain alleging that he had been the subject of workplace bullying by the named elected members. Those members were directly required to vote on the employment status of Mr Cain.
167. It is also noted that the Fair Work Commission proceedings, where Mr Cain’s allegations of bullying were ultimately dismissed, took place on the day of the Special Council Meeting, 16 April 2020.
168. These factors, in the view of the Authorised Persons, would likely give rise in the mind of a reasonable person, to a conclusion that the decision maker (in this case the elected members involved in the Fair Work Commission matter) would not bring an impartial mind to the decision before them. It is in this situation that the impartiality interest arises, which elected members are required by law to declare. The fact that the proceedings were confidential, is not in and of itself a reason for not declaring the impartiality interest.
169. It is the view of the Authorised Persons that a person who is a party to a legal proceeding involving an individual, to whom a decision before Council was being debated and resolved, is an interest which could or could reasonably be perceived to adversely affect the impartiality of the decision makers.

170. Accordingly, the failure by councillors Smith and Allen and Mayor Howlett, to disclose, pursuant to the regulations, an impartiality interest in the decision before Council, is a failure to adhere to the principles of good governance with respect to open and transparent decision making.
171. It is also noted that during the Fair Work Commission proceedings, two documents were presented as evidence on behalf of Mr Cain which were City documents relating in the form of emails between elected members. When Mr Cain was examined during the proceedings, he advised that he was provided with the information via Cr Chontelle Stone.
172. In line with the expectations of elected members to disclose an interest that could, or could be seen to, adversely affect the impartiality of the person having the interest, it is the view of the Authorised Persons that a council member who had provided local government information for legal proceedings, to an individual whom a decision before Council is being debated and resolved, is an interest which could, or could reasonably be perceived to adversely affect the impartiality of the decision maker.
173. For these reasons, Authorised Persons are of the view that Cr Stone also failed to disclose, pursuant to the regulations, an impartiality interest in the decision before Council on 16 April 2020.

Impartiality interest should also have been disclosed by Acting CEO Downing

174. Further, Authorised Persons believe that the Acting CEO failed to comply with the City's Code of Conduct part 3.6 (and regulation 34C of the Administration Regulations) as he also held an impartiality interest, that he failed to disclose, at the Special Meeting of Council on 16 April 2020.
175. In the case of Mr Downing as Acting CEO, the nature of his interest/s in the matter to be discussed at the meeting were multiple, including:
- he had been involved in compiling reports for Council relating to Mr Cain's allegations of an unsafe workplace.
 - he had instructed and provided information on Council's behalf to the City's lawyers and the investigator who was engaged to investigate allegations of misconduct by Mr Cain.
 - he had been privy to correspondence between elected members regarding Mr Cain's extension of contract (as noted above) where it has been inferred that he be promoted to the role of CEO, in place of Mr Cain; and
 - he was one of the parties to which, Mr Cain had alleged in the Fair Work Commission proceedings had engaged in repeated unreasonable (bullying) behaviour.
176. In these circumstances, a reasonable person would likely consider that as Acting CEO, Mr Downing may not be able to provide impartial advice to Council, in respect of the matter before Council at the 16 April 2020 meeting. It is the view of the Authorised Persons, that the nature of Mr Downing's interests were interests which could give rise to a reasonable apprehension of bias. Therefore, he should have disclosed the nature of those interests under clause 3.6 of the Code of Conduct for Staff and regulation 34C of the Administration Regulations, before the 16 April 2020 meeting.

5.7 Absolute Majority Decision

177. As previously noted, at the Special Council Meeting of 16 April 2020, a motion was put forward by Cr Smith to terminate the then CEO's contract. The motion, if passed would have had a substantial level of financial impact on the City. The motion was debated and voted on with the result a tied 50:50 vote; five in favour, with five votes against the motion. The Mayor had the casting vote, voting in favour of the motion to terminate Mr Cain's employment.
178. During the meeting, an elected member queried if an absolute majority vote was required due to the decision having a considerable financial impact on the City. However, the query was made after the vote to terminate the CEO's contract had occurred.
179. By way of an email sent after the meeting, the Authorised Persons also queried why only a simple majority vote was taken when the decision would have financial implications for the City and why the expenditure related to the decision was not included in the annual budget. An answer was received from the Acting CEO the next day stating:
- "It would only be necessary to seek Council approval to vary the employee cost budget if the actual costs were unable to be contained within the adopted budget. The 2019/20 annual budget is showing a surplus of \$650 000 at the end of March 2020 for this line item, so I don't believe this separation package requires amendment to the adopted annual budget."*
180. It is acknowledged that a decision to terminate the CEO's contract is a contractual decision of Council. What the Authorised Persons believe wasn't considered is the financial aspect of the decision; and are of the view that the Acting CEO's reply to the Department did not address these concerns.
181. The Statement of Financial Activity as at February 2020 is Year to Date (YTD) actual expenditure for the line item of 'Executive Services' as \$1,674,061 which is near to the expected expenditure. The Statement of Financial Activity as at March 2020 is YTD actual expenditure for the line item of 'Executive Services' as \$1,960,504, which is \$286,443 expenditure for the month of March. This monthly expenditure, if continued, would bring the total expenditure close to the budgeted amount for that line item.
182. The Statement of Financial Activity as at April 2020 is YTD actual expenditure for the line item of Executive Services as \$2,502,373, which is \$541,869 for the month of April.
183. At the Ordinary Council Meeting on 11 June 2020 a variance to the budget was put to Council for \$5.81 million in operating expenditure which included an overspend of \$0.47 million in executive salaries due to CEO termination payment and ongoing higher duty payments for the Acting CEO. There was a \$0.38 million variance to the Employee Costs – Direct to which includes executive salaries.
184. The variance confirms that the expenditure from the municipal fund to pay out the CEO's contract was not included in the annual budget. The variation thus required an absolute majority pursuant to s.6.8(1)(b) of the Act.

185. As of 3 February 2021, the *Local Government (Administration) Amendment Regulations 2021* came into force which provide a set of minimum standards for local government CEO employment, performance management and termination. The regulations require, among other things, that a local government Council endorse a decision to terminate the CEO's employment by way of an absolute majority resolution.
186. Authorised persons acknowledge that at the time of Mr Cain's termination as CEO in April 2020, this legislation was not enacted. However, it has also long been the position of the Department that as a Council is required to appoint a CEO by way of absolute majority decision, good governance principles suggest that any changes to the term of a CEO contract and/or the termination of a CEO should also be decided by way of absolute majority.
187. In line with this and by way of the financial implications noted above, it is the view of the Authorised Persons that the City should have sought advice from the Department as to the best practice governance requirements for the CEO's termination, and accordingly, Council should have made its decision to terminate Mr Cain's contract with an absolute majority resolution.

6. Recommendations

188. It is recommended that:
1. The City undergo an independent governance review (with scope approved by the Director General) within three months of this report becoming final and provide the Director General with a copy of the review's findings and report upon its completion.
 2. All elected members and members of the City's executive team undertake training and mediation as determined appropriate by the Director General, within six months of receipt of the final report, to enable them to work as a cohesive and well-governed group in the best interests of the local government.
 3. Within six months of receipt of this report, the City's CEO is to deliver a report to the Director General of the Department outlining:
 - i. the steps taken in response to the above recommendations;
 - ii. identifying the persons who have attended training as set out in recommendation 2 and any reasons given for non-attendance;
 - iii. any other information considered to be relevant in respect to any further changes the City has made in response to the recommendations and/or information contained within this report.

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