



INQUIRY INTO THE CITY OF JOONDALUP

City of Joondalup DOCUMENT REGISTRATION
Reference # : 72559
Letter # : 418721

ATTACHMENT 1

APPENDIX 1

AGENDA

Meeting of the Chairman and Commissioners of the City of Joondalup with representative of the Inquiry at 7.00pm, 16 June 2004, Council Chambers.

Inquiry representatives.

Brendan Peyton, Executive Officer
John Staude, Counsel Assisting

Purpose of meeting.

To provide an opportunity for the Commissioners to meet the Executive Officer and Counsel Assisting and be informed at an early stage of various matters relating to the Inquiry and its expected course.

Points for discussion.

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|----|---|------|
| 1. | The nature and functions of the Inquiry | (BP) |
| 2. | Administration aspects: the stages of the Inquiry | (BP) |
| 3. | The role of the Commissioners/City | (JS) |
| 4. | Representation of interests | (JS) |

McL/W1 17230

13 July 2004

Mr Brendan Peyton
Executive Officer
Inquiry into the City of Joondalup
PO Box 1137
WEST PERTH WA 6872

BY FACSIMILE: 9481 2285

Dear Mr Peyton

CITY OF JOONDALUP INQUIRY

We are responding to your letter of 2 July concerning representation of the City of Joondalup at the City of Joondalup Inquiry.

We note that you were instructed to request that we provide a written submission by close of business (5 pm) 12 July 2004 in support of our application for leave to appear on behalf of the City. You have indicated that our submission should clearly identify what "interest" the City has in the Inquiry that warrants it seeking to be represented by Counsel and to cross-examine witnesses. In that regard we mention the following points:

1. Under s.8.27 of the *Local Government Act 1995* ("LG Act"), the Minister may order the City to pay all or part of the costs of the Inquiry. That may occur if the Inquiry Panel makes findings adverse to the City, or its Council, or any member, or to any of its employees.

The Panel and Counsel Assisting have a completely unrelated interest, and cannot be expected to act in the interest of the City to avoid the possibility of such an outcome.

It would be a significant part of the role of counsel for the City to ensure, so far as is consistent with fairness and truth, that the outcome of the Inquiry does not predicate that result. The burden of a costs order would fall on the ratepayers of the City and indirectly on the inhabitants generally. The level of costs of the Inquiry presently anticipated is, we understand, in the vicinity of \$700,000, but as in the case of the Inquiry into the City of Cockburn and other inquiries, the originally anticipated costs may well be exceeded. This is a very significant interest of the City which, in itself we submit, would justify the City being represented by Counsel and through Counsel having the opportunity to participate in the examination of witnesses.

2. There are significant issues that time to time need to be decided on the basis of legal advice such as issues of legal professional privilege attaching to documents requested by the Inquiry; property in documents in the possession of the City and the protection

(or lack of it) that the legislation gives to persons providing documents (in this regard note the difference between the protection from civil or criminal action provided by s.8.5 of the LG Act for Authorised Person inquiries compared with the lesser provisions of the *Royal Commissions Act 1968*).

3. Adverse findings do have an impact on the City as an entity. It would not be unreasonable to say that the City is still suffering from the stigma of the Wanneroo Royal Commission in the mid 1990s. Both in attracting quality staff and elected representatives, this can be a very significant factor. The City has an interest in its good reputation and good standing, and any avoidable damage to that reputation may affect the ability of the City to attract quality staff and business associates of good standing. Not least the reputation of the City could affect the standard of persons who might offer themselves for election to Council at a later time. The City has a distinct and special interest in the preservation of its reputation for these and related reasons.
4. A lawyer representing the City is able to give at all times an independent lawyer's evaluation of issues from the City's point of view which often the Inquiry lawyers might not have appreciated. This is fundamental to the adversary system of legal process which is ordinarily the predominant legal process in WA, even though a Part 8 Inquiry might not adopt an adversary process. It is assumed that there are potentially two sides at least to each issue. Legal representation for the City will enable the City's point of view on issues which arise, to be identified and presented to the Inquiry at all stages including the stage of examination of witnesses.

There are many parts of the Local Government Act which lack precision and specificity such as for instance the definition of the functions of the Council, the Mayor, Council members, committee members, the CEO and other employees, and perhaps even in certain circumstances consultants providing advice to the City. Because key provisions lack specificity, there is room for interpretation, and inevitably room for different opinions in the interpretation of provisions. The City ought to have legal representation to ensure that where an issue of interpretation is capable of affecting the City's interest, the interpretation most favourable to the City is offered for consideration.

It is necessary only to consider sections 2.7 as to the role of the Council; 2.8 as to the role of Mayor; 2.10 as to the role of councillors and 5.41 as to the functions of the CEO, to be aware that there is a distinct uncertainty as to the definition and overlap of the roles and functions of the different entities involved in the provision of local government. Furthermore it seems clear from the Terms of Reference and the circumstances lying behind the setting up of the Inquiry, that the identification and the working out of the roles and functions of the Council and its different entities is likely to be a matter of some significance in the Inquiry. The City ought to have legal representation to present interpretation of these provisions and the effect of them in combination from a point of view which respects the City's interest in the outcome. In the long run the Inquiry's perception of the proper role of the Council, the Mayor from time to time, the majority of the members of the Council at meetings, and individual Council members, and also the role and function of the CEO and other employees, is likely to have a significant impact on the Inquiry's findings and recommendations, and consequently a significant impact on the interests of the City. It would be highly unlikely that only one interpretation of the relevant provisions is open, and it would be unreasonable to expect that Counsel Assisting would inevitably be able to canvass all

possible interpretations with appropriate weight and emphasis. Furthermore, other Counsel representing other interests at the Inquiry could not be expected necessarily to argue for an interpretation which ultimately would be in the best interest of the City.

5. There are many legal issues to be dealt with by the Inquiry, including issues surrounding draft protocols, documents, and some of the issues discussed above including waiver of legal professional privilege in certain circumstances. In many instances it would be inappropriate for any particular employee giving evidence of matters done in the performance of his/her function with the City, to be left with the responsibility to make decisions without having legal advice readily available, as well as the watchful assistance of legal counsel during the Inquiry process.
6. The issues involved in the terms of reference for the Inquiry are complex and detailed. Legal representation of the City will help to ensure a complete and accurate account is presented to the Inquiry, and presented in a timely efficient and expeditious way. If the City is represented by legal Counsel a greater level of organisation can be imposed on the oral and other evidence adduced through witnesses from the local government, and on other material presented by the City.

A short, more efficient and properly focused Inquiry will not only serve the general interest of the local government, but will enable the City to return at the earliest convenient time to normal operation under an elected Council, with all of its employees freed of the disturbance which an Inquiry inevitably involves, and able to devote the whole of their time to the government of the City. The City has a distinct interest in that regard.

7. Officers of the City performing their functions in accordance with the law should not be prejudiced by the Inquiry. However no officer can be certain that his/her actions will not be called into question at some point in the Inquiry, and will not potentially be the subject of an unfavourable finding or recommendation.

Legal representation for the City will give a re-assurance to officers that at least one of the lawyers will be present with the primary brief of identifying the best interest of the City, to confirm where appropriate that officer actions are consistent with that interest, and to promptly identify if and when the interest of any officer may diverge from the interest of the City, so as to be able to advise the officer then to obtain separate legal representation.

The City has a distinct interest which coincides in this regard with the interest of officers who have acted appropriately.

8. Appearance at an Inquiry can be very stressful for officers, even if ultimately no unfavourable finding is made affecting them. Examples can be given of officers who did not attract unfavourable findings, but who suffered stress or stress-related illness as a result of the Inquiry process.

The City has an interest in protecting its innocent officers from avoidable stress, and the availability of informed legal advice for those officers, and the presence of legal Counsel at Inquiry sessions protecting the interest the City has in its innocent officers, will provide the minimum necessary protection against occupational stress which could seriously interfere with the performance by officers of their duties.

CITY OF JOONDALUP INQUIRY

HEARD ON THE 22ND DAY OF JULY 2004

MR MCINTYRE: Pursuant to section 8.16 of the Local Government Act 1995, the Minister for Local Government appointed me as an inquiry panel to conduct an inquiry into aspects of the City of Joondalup and its operations and affairs. The inquiry panel is to inquire into all matters considered relevant to the activities of the council and its chief executive officer during the period 13 March 2001 to 4 December 2003, including events pre-dating this period that are relevant to determine whether there has been a failure to provide good government at the City of Joondalup.

Without limiting the generality of the inquiry, the terms of reference ask me to inquire into:

- (a) the processes associated with the selection of the appointment of Mr Smith as chief executive officer;
- (b) decisions made by the council or purported to have been made by the council in relation to the selection, employment and retention of Mr Smith as chief executive officer;
- (c) advice provided by any parties in relation to the selection, appointment and retention of Mr Smith as chief executive officer;
- (d) the terms of the contract of the chief executive officer and, in particular, the performance assessment provisions and their application;
- (e) adherence to the provisions of the contract of employment by the chief executive officer and the council; and
- (f) the provision, costs and use of legal advice associated with all aspects of the appointment and ongoing employment of the chief executive officer.

I am also asked by the terms of reference to conduct the inquiry with specific reference to the period 5 May 2003 to 4 December 2003, addressing the effect on the government provided by the council of the conduct of Mr Smith, the mayor and the councillors and the operations with the council. And finally, to inquire into any other matters coming to my attention during the course of the inquiry, but only to the extent to which I regard it as necessary for the purposes of reporting on whether there has been a failure to provide good government in the City of Joondalup.

An inquiry of this kind, pursuant to these terms of reference, has particular functions. Those functions are set out in section 8.22(1) and (2) of the Local Government Act 1995 which empower the inquiry panel to inquire, report and make any recommendations that it considers appropriate, including, without limiting its discretion, that the council be dismissed or that the council be reinstated.

Under section 8.20 of the Local Government Act I have the powers of a royal commission, including the powers of the chairman of a royal commission, and the provisions of the Royal Commissions Act 1968 apply to this inquiry with such modifications as are required.

The instrument of appointment has not set out any limit to the duration of the inquiry. Section 18.17 paragraph (c) suggests that:

"Any limit imposed on the duration of the inquiry is to be set out in the notice of appointment."

Since no such limit has been imposed by that instrument, I am not bound to complete the inquiry within any specific period.

I should say though that, whilst today is the opening of the inquiry, there will then be a period of some months when there will be no public hearings, followed by further public hearings anticipated between now and the end of this year and, if all things go according to our current understandings, I would anticipate that the public hearings ought to be completed before the end of this calendar year.

The views I am about to express are preliminary views which I wish to expose to interested parties in order to enable them to consider them and make any submissions that they may wish to make, at any time during the course of the inquiry, in order to persuade me that I should proceed with this inquiry on any different basis from that which I will now outline.

This is an administrative inquiry to which the rules of natural justice or procedural fairness apply. In general terms, procedural fairness requires that the inquiry be free of bias or pre-judgment, and those against whom there might be adverse findings or comments have an opportunity to be heard in relation to such findings or comments, and to know what is being taken into account in arriving at any such conclusion.

I will be guided in the conduct of this inquiry by the words of Brennan J in *Annetts and McCann*, which is reported at (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."

I will proceed on the basis which is common to administrative inquiries of this kind - see for example the Douglas Report into the City of Cockburn - that the standard of proof which should be applied is proof on the balance of probabilities. I will also conduct the 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. I refer to Neat Holdings Pty Ltd and Karajan Holdings Pty Ltd, which is reported at (1992) 110 ALR 449 at page 450. I am mindful of the words of Dixon J in Briginshaw and Briginshaw, which is reported at (1938) 60 CLR 366 at page 362 when he 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."

I note that this inquiry was not established for the particular purpose of identifying criminal conduct or unprofessional conduct, to the extent that any evidence may emerge which is suggestive of criminal or unprofessional conduct, the Local Government Act 1995, section 8.12 gives power to refer any matter arising out of an inquiry to an authority that has power to investigate or take action in relation to that matter. That section is suggestive of how any evidence of that kind should be dealt with.

The Local Government Act 1995, section 8.21 provides that:

"An inquiry panel's report is to contain any recommendations that the inquiry panel considers appropriate, and without limiting subsection (1) the inquiry panel may recommend that a council be dismissed or that a council that has been suspended be reinstated."

In the present circumstances where the minister has suspended the council of the City of Joondalup, pursuant to the power to do so set under section 8.19 of the Act:

"The minister must, by order, reinstate the council if the inquiry has not recommended its dismissal."

And that provision is set out at section 8.24(4)(a) of the Local Government Act.

The appropriateness of making a recommendation that the council be dismissed will flow from the conclusion I reach as to the extent to which, if any, there has been a failure to provide good government in the City of Joondalup as a result of acts or failure to act on the part of the council as a body, or any member of the council. Whether or not a recommendation is to be made as to the dismissal of the council, the other recommendations which may be appropriate will also generally be focused upon the provision of good government in the City of Joondalup.

A principal issue, therefore, in this inquiry is whether good government has been provided to the City by the council. The concept of good government is a legal concept. The Local Government Act section 3.1 provides that:

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

The statute does not directly define the term. The ordinary rules of statutory construction would thus suggest that it is to be given an ordinary dictionary meaning appropriate to the context in which it is being used. "Good" is defined in the New Shorter Oxford Dictionary variously, and relevantly to mean:

"Beneficial, having enough of the appropriate qualities, adequate, satisfactory, effective, competent, skilful, efficient, reliable, safe, sure, financially sound."

The same dictionary suggests that "good" is occasionally used as being synonymous with "excellent". An alternative definition is:

"Morally excellent or commendable, virtuous."

My view is that when "good" is used in the Local Government Act 1995, the context would suggest it is used in a manner which imports the definitions of "good" which do not include a notion of excellence or a moral element. For the purposes of this inquiry I regard it inadequate as an antonym for "good" and an appropriate concept to apply when assessing whether or not there has been a failure to provide good government.

"Government" is defined in the New Shorter Oxford Dictionary to mean:

"The action of governing, continuous exercise of authority over subjects, authoritative direction or regulation, control."

The Macquarie Dictionary similarly defines "government" as:

"The authoritative direction and restraint exercised over the actions of people in communities, societies and states, political rule and administration."

In volume 8 of Halsbury's Laws, fourth edition, at paragraph 804 it is said that:

"From the legal point of view, 'government' may be described as the exercise of certain powers and the performance of certain duties by public officers, together with certain private persons or corporations exercising public functions, the structure of the machinery of government and the regulation of the powers and duties which belong to the different parts of the structure defined by the law, which also prescribes to some extent the mode in which those powers are to be exercised or those duties are to be performed."

A local government authority is one aspect of the notion of government which Halsbury describes. It is more particularly defined in the statute which authorises it. The Local Government Act 1995 recites in its long title that it is:

"An Act to provide for a system of local government in Western Australia and to amend the Local Government Act 1960 and for related purposes."

In section 1.3 it is recited that:

"This Act provides for a system of local government by providing for the constitution of elected local governments in the state, describing the functions of local governments, providing for the conduct of elections and other polls, and providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs."

At subsection (2) it 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."

It can be inferred from section 1.3(2) that the legislature intended that local government would be improved by the provisions of the 1995 Act which replaced those of the 1960 Act. It can also be inferred from that subsection that the legislature intended that the good government of the local government might be measured by the quality of, (a) its decision making; (b) community participation in its decisions and affairs; (c) its accountability to its community, and (d) its efficiency and effectiveness.

The Local Government Act 1995 pursues the intention of Parliament as expressed in section 1.3(2) by firstly defining the role of the council and the role of the mayor. Section 2.7 defines the role of the council as follows:

"(a) the council directs and controls the local government's affairs and is responsible for the performance of the local government's functions."

Without limiting subsection (1) the council is to oversee the allocation of the local government's finances and resources and determine the local government's policies. Subsection 5.36(1) and (2) place a duty on the local government in relation to the employment of the CEO as follows. Subsection (1) provides that:

"The local government is to employ a person to be the CEO of the local government."

Subsection (2) provides that:

"A person is not to be employed in the position of CEO unless the council believes that the person is suitably qualified for the position and is satisfied with the provision of the local employment contract."

The functions of the chief executive officer are set out in section 5.41 as follows:

"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;

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

The above provisions 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. A failure to comply with these procedures is indicative of the possibility of something less than good government.

The view I have taken of the interpretation and application of the Local Government Act is reinforced by the following extracts from the second reading speech of the minister in the Legislative Assembly, reported in Hansard on Thursday the 31st of August 1995 at pages 7547 to 7551, when the Local Government Bill was introduced into the Parliament. The minister said this:

"This new legislation will take local government in Western Australia into a new era as the current prescriptive legislation gives way to legislation which will provide a broad framework for the operations of local governments. This will bring about significant benefits for the efficiency and

effectiveness of local governments and will improve management structures. However, there will be many checks and balances. In particular, the public will be given much more information about the operation of the local government, and have many opportunities to participate in and influence the decision-making process.

"The government will also have power to ensure that local governments operate appropriately in all key areas. Local governments will also have increased function autonomy. In contrast with the specific powers in the current Act, local governments will have general powers to make laws and provide services and facilities for the good government of people in their district. These are commonly referred to as general competency powers. However, this will be balanced with strict accountability requirements; a key reform.

"The actions of local governments will be reported in annual reports and there will be sanctions where standards of practice are not maintained. While recent investigations have found some irregularities in the practices of some local governments, they have particularly highlighted the need for improved administration, management and decision-making processes within local governments. The Bill provides the legislative basis for this to take place.

"The town or shire clerk will now be known as the CEO. A specified qualification will no longer exist for someone to hold the office. This provision will deregulate the labour market for CEO positions and provide councils with the autonomy to appoint the most suitable candidate. Similar to public sector management reforms elsewhere, the Bill provides for CEOs and designated senior staff to be employed under a performance based contract which can be for a short term of not more than 5 years."

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

"Good government can refer either to the process by which decisions are made and implemented, or to the nature of the policy and decisions made by a public body. Even when the process of decision making is open, accountable and responsive to the wishes of the relevant community, bad decisions could be made in

terms of their effect on the economic or social wellbeing of the community. Conversely, poor procedures may lead to decisions which are widely supported.

"Nonetheless, in a liberal democracy such as ours, the procedural requirement is dominant, so that any exercise of power or use of public resources can be effectively scrutinised. The process of government of public bodies must be open and accountable and free from improper and corrupt conduct."

That view, though not providing a clearly definitive statement of the concept, provides some help in considering the issue of what might amount to good government. Dr Harry Phillips and Dr Quentin Beresford, lecturers in politics and government at Edith Cowan University, in a joint statement to the South Perth Inquiry, drew attention to the similar view expressed in less modern terms in a quote from John Stuart Mill in 1966, "Considerations on representative government" in - - on Liberty 1859, which is published in London by the Oxford University Press.

"There may be conduct or failure to act which may result in a failure to provide good government which would not constitute either improper or corrupt conduct."

There was some discussion in the course of the inquiry into the City of Cockburn about the relationship between the concept of failure to provide good government and the concept of impropriety. Owen J in the case of Edwards and Kyle reported in (1995) WAR 302, particularly at pages 313 to 4, described the words "improper conduct" as "chameleon-like", their meaning varying with the circumstances.

The concept of impropriety is not an antonym for good government. I do not regard it as necessary to explore the meaning of or apply a concept of impropriety in the context of this inquiry.

I note that Professor Campbell Sharman referred to "corrupt conduct" suggesting that it might be the antithesis of good government. Again, it is not an antonym for good government.

It is not necessary to form a view on the content of the concept of corrupt conduct for the purposes of this inquiry.

I am conscious of the fact that it might be said that both positive and negative aspects of the council's performance could be taken into account in determining whether the council has provided good government to the City. However, the matter I am appointed to inquire into - that is, whether there has

been a failure to provide good government - is not to be determined by assessing and balancing evidence of good government against evidence of failure to provide good government. As Thomas Jefferson said to John Norvell in 1807, recorded in the memorial edition of his Jefferson quotations:

"History in general only informs us what bad government is."

This is an inquiry into the recent history of events at the City of Joondalup. As such, it is more apt, as the terms of reference require me to do, to report on what can be judged to be a failure to provide good government. The place which any assertions of the positive contribution to the council will play will be in providing examples reflecting the character of matters which might constitute the provision of good government of the council. Providing some flesh to the concept of good government is part of the process of judging whether there has been a failure to provide good government.

However, it is worth noting that if one is considering examples of good government in the nature of positive results in terms of service to the residents and ratepayers of the City, that may merely reflect a soundness of the administration of the City. It will generally not be possible to attribute credit to the elected council of the City for positive achievements without acknowledging that little can be achieved in a City without administrators willing and able to implement the policies of the council.

There is no help to be gained in defining or applying the concept of good government by reference to the body of case law which has considered the meaning and extent of application to be imputed to the words "peace, order and good government" used in the context of the power to make laws. That phrase, or variations on that phrase may be found in constitutional provisions and statutes relating to state governments and local governments in other jurisdictions.

The general view expressed about such a phrase is that it bestows a very broad power to legislate and does not create a limitation upon the power to legislate. See the cases of Union Steamship Company of Australia Pty Ltd and King, reported at (1988-89) 166 CLR; Lynch and the Brisbane City Council reported at (1961) 104 CLR 353; Waken and Another against the Northern Territory of Australia and Others at (1996) 109 NTR 1; Goya and Moore and Others in (1999) NTSR 145. Those cases do not assist in determining what constitutes good government.

Whether or not there has been a failure to provide good government can only be assessed objectively, and by this process of inquiry is to be assessed from hindsight. If I find the result is bad, that is sufficient to reach a conclusion as to a failure to provide good government. If, however, the procedure by which the result is obtained is adequate, then the result may not justify a recommendation of dismissal.

Subjective intent is relevant to the question of what recommendations should be made. In considering the appropriate recommendation to make, it may prove to be appropriate to adopt the following four-pronged test in relation to council decisions.

- 1) Was the decision made in good faith? That is, for the benefit of the residents.
- 2) Did the decision have a rational basis?
- 3) Was the decision made with the honest and reasonable belief that it was lawful?
- 4) Was the process by which the decision was made appropriate under the circumstances?

A number of those criteria may merge in the circumstances of a particular decision. For example, a rational basis for a decision may be dependent upon an appropriate process. When applying the test, all four elements of the test must be considered. In assessing the appropriateness of the process under the fourth limb of the test, the consequence which would be recommended would ordinarily depend upon the degree or quantity of irregularity or departure from the standard of appropriateness.

An inquiry panel pursuant to section 8.22(2) may recommend that a council be dismissed or reinstated. The Act does not give an inquiry panel the power to recommend the dismissal or reinstatement of an individual mayor or individual councillors. The council effectively stands or falls as a whole. It is therefore likely to be fair to indicate in the report the degree to which individuals did or did not contribute to any recommendation I may make in relation to the council as a whole.

In the Cockburn report, Mr Douglas said:

"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."

I agree with Mr Douglas that specific instances of failure to provide good government may not, by themselves, necessarily warrant a dismissal recommendation. What must be analysed is the nature and the extent of the wrongdoing.

I note that subsection 3.1(3) of the Local Government Act 1995 provides that:

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

That provision is intended to suggest an approach to take in determining whether a local government has exceeded the breadth of its functions. It does not provide any direct assistance to the decisions I am obliged to make. A liberal approach to the decision as to dismissal is, however, suggested in the propositions coming from the Cockburn inquiry, which are recited above. This inquiry will adopt the approach of determining any failure to comply with the relevant legislation with some precision. It may, however, be appropriate to apply a liberal approach as to the recommendations which such findings may suggest.

This inquiry will be conducted as a public inquiry. It's generally desirable that as part of the administration of justice an inquiry of this kind be open, and I refer to *The King and Sussex Justices, Ex Parte McCarthy*, reported at (1924) 1 KB 256 at 259, and *Gleeson CJ in Independent Commission Against Corruption and Chaffey*, which is recorded at (1993) 30 NSW 21 at 28 to 29.

Any findings made in this inquiry will be made solely on evidence which is publicly presented to this inquiry. The only exception to that general statement may be where it is demonstrated that there are exceptional circumstances which, in the public interest and the interests of justice, require the suppression of publication of particular evidence. And I refer to *Re: Bromfield Ex Parte WA Newspapers Ltd* reported at (1991) 6 WAR 155. If such circumstances should arise, then any suppression order will be carefully constructed to balance the particular public interests in question, recognising that there is a public interest in this inquiry being conducted publicly.

Notice was published in *The West Australian* newspaper on the 12th of June 2004 and in *The Weekend Australian* newspaper on the 12th to the 13th of June 2004, giving notice of my appointment and inviting persons to give notice of an intention to seek leave to be heard and examine witnesses at public hearings. No person has a right to appear before an inquiry of this kind except by leave. I refer to *Commissioner Lowe* in the *Communist Royal Commission* (1949) reported by M.V.

McInerney at 24 ALJ 386 at 388, and Sir Gregory Gowans QC in the Land Deals Board of Inquiry of 1977, which is referred to in Hallett on Royal Commissions and Boards of Inquiry, second edition, published by Law Book Company in 1982. I refer in particular to page 195.

The power to impose conditions on a grant of leave to appear was considered by Commissioner Cole in the Royal Commission into the Building and Construction Industry. In this instance it flows from the inherent and entirely unfettered power which an inquirer has to control the proceedings. See Stephens J in *The Crown against Collins Ex Parte ACTU Solo Enterprises Pty Ltd* reported at 8 ALR 691 at 699.

It is consistent with the long history of royal commissions imposing such conditions. See Commissioner Cole at paragraph 22 referring to Sir Murray McInerney in 'Procedural Aspects of a Royal Commission' (1951) 24 ALJ 386, in particular at page 392.

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

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

Summonses have been issued and applications for leave to appear have been received in relation to a large number of people. I will now indicate what the result of those so far has been in relation to those matters. Councillor Chris Baker received a summons, has indicated that at present he will be self-represented. He has responded to the summons indicating that he has no documents at present to provide but that he is preparing a submission and that submission will be awaited.

Councillor Tim Brewer again has not indicated that he is represented by a legal practitioner, so may or may not be legally represented. He has not yet responded to the summons and has written to the executive officer of the inquiry seeking an extension of time until the 6th of August to

respond to the summons, and I grant that extension of time till the 6th of August.

Councillor Michael Caiacob has responded to the summons and has provided documents and has indicated through council that he wishes to be represented by Mr Heaver-Wren of Phillips Fox, solicitors. Leave will be granted to Mr Heaver-Wren to represent Councillor Caiacob, to make submissions in relation to the issue of whether the council has provided good government in the City of Joondalup, and to cross-examine witnesses subject to the condition that the leave granted to cross-examine witnesses is limited to such cross-examination as would challenge or test the foundation for any adverse or unfavourable comments in relation to Councillor Caiacob.

Mayor Don Carlos has not yet responded to the summons to produce documents, and has sought an extension of time, I understand, in relation to medical matters. He has, however, given notice that he will be represented by Mr Tony Heaver-Wren, Phillips Fox, solicitors, and I grant leave to Mr Tony Heaver-Wren to make submissions in relation to the issue of whether the council has provided good government in the City of Joondalup, and to cross-examine witnesses subject to the condition that the leave granted to cross-examine witnesses is limited to such cross-examination as would challenge or test the foundation for any adverse or unfavourable comments in relation to Mayor Don Carlos.

Ms Janine Gollant has not been served with a summons as a consequence of her presently residing in Bahrain. She has made some contact with the inquiry staff and may be in a position to provide some documents. In the circumstances at the present time, it's not proposed to further require her to appear before the inquiry.

Councillor Sue Hart, who is a former councillor, having resigned, has not responded directly to the summons other than - - but has provided a submission and has indicated that she wishes to be represented by Mr Tony Heaver-Wren of Phillips Fox, and I grant leave for Mr Heaver-Wren to appear for her on the same conditions which I have previously indicated, that Mr Heaver-Wren should appear for councillors in relation to Councillor Sue Hart.

Councillor John Hollywood JP, likewise has not responded to - - well, actually, perhaps - - he has responded to the summons. Is that right, Mr Payton? I think there's a note that he has responded to the summons? Yes. And I think Councillor Sue Hart also has responded this morning that Councillor Sue Hart and Councillor Hollywood have both responded this morning to the summons and Councillor Hollywood has also indicated that he wishes to be represented by Mr Tony

Heaver-Wren of Phillips Fox, solicitors, and I grant leave for Mr Heaver-Wren to appear on the same terms and conditions as previously granted in relation to other councillors.

Councillor Gerry Kenworthy has responded to the summons by indicating that there are no relevant documents. Mr Payton, my executive officer, has understood that I may - - that what he has told me in the note about Councillor John Hollywood may not be correct. Mr Heaver-Wren, can you inform me - - enlighten me on the position?

MR HEAVER-WREN: Yes ...(indistinct)... I have got instructions from John Hollywood although I actually haven't spoken to him. Look, initially ...(indistinct)... given the very recent consideration of legal costs, it is quite possible that it could be approached and obtained ...(indistinct)...

MR MCINTYRE: Yes. Very well. I should indicate that whilst I am accepting applications for leave at the present time that have come to me, there will be another - - there will be other opportunities for applications for leave to represent persons. Indeed, this list of those who've been issued with summonses may not be the final list of persons who may be issued with summonses, so those matters remain open.

Councillor Gerry Kenworthy has responded to the summons, indicating that Councillor Kenworthy has no relevant documents to provide, and has not indicated whether or not Councillor Kenworthy wishes to be represented or to appear at the inquiry.

Councillor Paul Kimber has responded to the summons by seeking an extension of time, and an extension of time will be granted to the 6th of August to respond to the summons.

Councillor Carol Mackintosh has responded to the summons by providing documents. There is some suggestion that she may be represented by Mr Neil Douglas of Minter Ellison, solicitors.

I'll come to Mr Douglas in a little while, but I should indicate that if it becomes the fact that Mr Douglas seeks leave to appear for Ms Mackintosh - Councillor Mackintosh - I would be seeking specific submissions from Mr Douglas as to on what basis he was appearing and whether it was appropriate for me to grant him leave to appear because, as I will announce in a little while, Mr Douglas has also been issued with a written summons, and the ordinary legal practitioners' professional conduct rules indicate that if a person is likely to be a witness it is generally inappropriate for that same person to represent another person in the course of the same proceedings. My views will be passed on to Mr Douglas as I express them publicly now, and I'll be seeking submissions from him as to how he regards that matter as affecting him, if

indeed he makes the application which as been suggested to me he may make.

In relation to Councillor Andrew Nixon, he has responded to the summons by indicating that he has no documents to produce and has not indicated that he intends to be represented in this hearing.

Resigned Councillor Mike O'Brien has responded to the summons by providing documents, but also appears to be seeking an extension. Is that - - there seems to be some inconsistency there. Oh, I see. All right. Yes. Sorry. The list which Mr Payton has sent me required some interpretation. The resigned councillor is Councillor Andrew Nixon, not Councillor Mike O'Brien. Councillor Mike O'Brien, who has not resigned, has provided some documents and requires an extension, presumably to provide some further documents, and that extension will be granted till the 6th of August.

Councillor Louis Prospero has not responded to the summons and has not otherwise communicated with the inquiry.

In relation to persons who have not responded to the summons, summonses are issued pursuant to the powers under the Royal Commissions Act. If a person fails to respond to a summons under the Royal Commissions Act, it's open for such persons to be dealt with by way of contempt to the inquiry. An assessment will be made as to whether such matters ought to be referred to the Attorney General for persons to be dealt with in that way. It may be that in relation to some of the persons inquired into that a judgment is made that the quantity of evidence which that person might be able to provide to the inquiry is not sufficient to justify responding to their failure to respond to the summons by having them dealt with for contempt. But that's a matter which will have to be assessed as the matter progresses.

Councillor Peter Rowlands similarly has not responded to the summons, and the comments I've just made would apply to him.

Councillor Allison Walker has not yet responded to the summons but has sought an extension until the 6th of August to respond to the summons, and that extension is granted. She has indicated that she wishes to be represented by Mr Heaven-Wren and leave is granted to Mr Heaven-Wren to represent her on the same terms upon which leave was granted in relation to other councillors.

In relation to a collection of former councillors, summonses have been issued. A summons has been issued to Mr John Bombak JP, who has responded by informing the inquiry that he has no relevant documents to produce, and has not indicated whether he wishes to be represented at this stage.

Mr Paul Kadak has not been served with a summons due to his current residence being in Sydney, and that matter will be kept under review as to whether it is necessary or appropriate to serve Mr Kadak with a summons, given his status as a former councillor.

Ms Tanya Barnett has responded to the summons and has indicated that she has no relevant documents and has not indicated whether or not she wishes to be represented before the inquiry.

Mr Andrew Patterson has responded to the summons, indicating that he has no relevant documents to produce and that he is represented by Mr Marco Tedeschi of Taylor Smart, solicitors, who have requested that matters relating to his summons be dealt with by way of correspondence, and I will direct the executive officer of the inquiry to correspond with Mr Tedeschi indicating the circumstances following today.

Ms Judith Hurst has responded to the summons and provided documents and not otherwise indicated an interest in participating in the matter.

Under the category "City employees", Mr Mark Loader has been issued with a summons and has provided documents. I have a letter of submission from McLeods Solicitors which may indicate that they intend to represent him. I'll deal towards the end of this matter in some more detail with Mr McLeod's submissions.

Mr Denis Smith, a former City employee, has responded to the summons and provided documents and has indicated that he intends to be represented by Blake Dawson Waldron, solicitors. Blake Dawson Waldron, solicitors are granted leave to make submissions in relation to the issue of whether the council has provided good government to the City of Joondalup and to cross-examine witnesses subject to the condition that leave granted to cross-examine witnesses is limited to such cross-examination as would challenge or test the foundation for any adverse or unfavourable comments in relation to Denis Smith.

Mr Neil Douglas of Minter Ellison, solicitors, has been summoned and has sought an extension to the 16th of August and has sought leave not to appear today. I grant him that leave and I grant him the extension to the 16th of August to provide documents. He has indicated in his letter to me the reasons for the application for an extension, which broadly deal with questions of the quantity of documentary material which his firm has accumulated in their role as solicitors for the City, and his concerns about dealing with matters of legal professional privilege and the necessity which he perceives to

refer such matters to the City. He should do those things between now and the 16th of August, and we can deal with those matters beyond that date.

A witness summons has been issued to Mr Warren Reynolds, who is a human resources consultant of Crestline Pty Ltd. He has responded to the summons and has indicated that leave is sought for Mr Steven Pynt of McDonald Pynt, solicitors, to represent him. Leave is granted to Mr Pynt to represent Mr Reynolds, to cross-examine witnesses subject to the condition that the leave granted to cross-examine witnesses is limited to such cross-examination as would challenge or test the foundation for any adverse or unfavourable comments in relation to Mr Reynolds.

You will note that I don't give leave at this stage for Mr Pynt to make submissions in relation to the issue of good government. It would appear to me that Mr Reynolds doesn't have any obvious interest in that topic.

The City of Joondalup, it would appear from Mr McLeod's letter, to be seeking leave to be represented, and I'll deal with that in some detail in a little while.

Other summonses have been issued to government agencies. A summons was issued to the Crime and Corruption Commission, and that commission has responded to the summons and doesn't seek to be represented before this inquiry and has not made any submission.

The WA Police Service likewise has responded to the summons but doesn't otherwise seek to participate in the proceedings, and the Department of Local Government and Regional Development has responded to the summons to produce documents and doesn't otherwise seek to participate in the proceedings.

Mr John Staude has been appointed by the minister to assist me in this inquiry. I grant him leave to appear before me to call witnesses and examine and cross-examine whenever in his discretion he regards it as necessary or appropriate in order to elicit evidence which is germane to this inquiry. I also give him leave to make such submissions to me on the law and the facts as he regards may assist me in forming a view as to whether there has been and, if so, to what extent there has been a failure to provide good government in the City of Joondalup, and what recommendations I should make to the minister.

It is part of the function of counsel assisting me to assemble and present evidence which he regards as relevant to the terms of the inquiry. That evidence will be presented in this public hearing. In assembling evidence he will have the

assistance of inquiry officers. It is, however, ultimately my function to determine what is relevant evidence to the determinations and what recommendations - - and what is relevant to, or necessary to make the recommendations which I consider, in accordance with section 8.22 of the Local Government Act, to be appropriate to make.

Any other interested party will have an opportunity to draw to my attention any evidence or matter which is additional to or might qualify in any way the matters which counsel assisting may present.

As I indicated when dealing with particular witness summonses, further summonses may be issued to such persons as it may emerge may be able to provide evidence to assist the inquiry. Persons involved with the matters under consideration will be examined to ascertain their observation and recollection of relevant events, and respond to versions of events which may be the subject of other evidence or information provided to the inquiry.

Witnesses will be afforded an opportunity to agree or disagree with, or put a contrary account or view about and provide an explanation which may bear upon any conclusion which might otherwise follow from that evidence or information. If it emerges that there are any witnesses who are not legally represented in this inquiry and it appears ought to have an opportunity to cross-examine witnesses or to make submissions to me, then the procedure which I propose to adopt in relation to the cross-examination of witnesses is that I will not, except in exceptional circumstances which will have to be demonstrated to me, allow one witness in these proceedings to cross-examine any other witness in these proceedings.

I do that for two reasons; one is that those not legally represented wouldn't ordinarily understand the art of cross-examination, and might not helpfully engage in that process. Secondly, it would not ordinarily be appropriate for particular persons whose credibility is or may be in issue to be testing one another by way of cross-examination as to their credibility.

The process which I would propose to adopt as an alternative to that happening is that such persons would be permitted to provide questions to counsel assisting, Mr Staude, in a written form if possible. At an appropriate time after Mr Staude has asked the questions which he thinks are appropriate to the witness, and Mr Staude would then put those questions to the witness. Before doing that he would have an obligation as counsel to make some judgment as to whether it was appropriate to put those questions to the witnesses, either from a - - on the basis of questions of the ordinary rules of

evidence or questions of propriety. If he had any issues concerning such matters then he should address them to me, and if any person wished to take issue with the views that he put then I would allow that person to address me on that topic as well, and I would rule as to whether the question should be put and, if necessary, in what form they should be put.

That procedure was one which was adopted in the South Perth inquiry in relation to one or two quite important witnesses who ended up not being legally represented, including the mayor. It worked reasonably effectively and I think, in large part, reasonably fairly. Certainly if any time or adjournments were required in order for that process to be employed at any particular time, I would look favourably upon that.

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.

They 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. Those 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 or in taking any action, 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.

Following that process, and after considering and ruling upon any objection which may be made to the use which may be made of such documents, I will determine which of those documents will be admitted into evidence to be considered in arriving at any decision in this inquiry. At the conclusion of the evidence I will direct counsel assisting to prepare and deliver a written submission setting out the adverse conclusions which might be drawn from the evidence. I will consider those submissions before they are delivered to the affected parties and will ensure that they comprise the outer limits of any adverse conclusions or comments which might be included in my report.

I will invite submissions from any parties to whom I have given leave to respond to those submissions. They will be entitled to make a closing submission in writing and I will allow each an opportunity to address me orally following any oral submissions of counsel assisting before I prepare my report to the minister pursuant to section 8.22 of the Local Government Act 1995.

In addition to such submissions as I have mentioned having been made by various persons who have been issued with witness summonses, I have received a number of submissions in response to the public notice seeking submissions. Those submissions will be taken to account in the conduct of the inquiry insofar as they provide any assistance in arriving at conclusions in relation to the matters which I've indicated are the subject of this inquiry.

Having looked briefly at most of those submissions it may be worth me making one or two comments about what this inquiry is not doing, because some of the submissions from various persons have suggested to me that there may be some misapprehensions as to what the inquiry's function is. I should say at the outset that this inquiry is not administering the City of Joondalup. When the minister made the decision to suspend the council, as many of you may know this, he appointed a set of commissioners. Those persons are now sitting in the place of the council and making the decisions which the council would otherwise make, and they are providing the same function to the City and to the chief executive officer and staff and officers of the City which the council made until its suspension.

I have no role in that function and, as you may recall when I set out the terms of the inquiry, my role is related to specific periods of time, which are now in the past, which relate to the period before the council - the elected council - was suspended. I am not inquiring into the activities of the current commissioners. I say that because one submission, for example, from the Ocean Reef Coastal Stakeholders suggested in their email message that they would like to make a submission in regard to the lack of democratic representation since the suspension of council. And they say:

"We are concerned that the decisions made by the council in November 2003 have been overturned by commissioners and without due process."

That is not a matter which I am inquiring into, which the minister has given me any authority to inquire into. It can be accepted that the way in which the commissioners are operating is a different process from the democratic process which the councillors were carrying out. The councillors were clearly elected representatives and therefore carrying out a democratic process. The commissioners are appointed by the minister and are so in a different category from the councillors. That's a matter which goes without saying, and it's certainly not a matter which I will be - - which I am charged with inquiring into or will be inquiring into.

In a similar fashion, another submission complains about a decision made by the council in relation to a town planning matter and complains that further discussions or further representations to the chairman of commissioners have not produced any better result. Now, firstly, I will not be inquiring into whether the chairman of commissioners or the commissioners as a whole are or are not producing results, better or otherwise, in any direct sense, and I will not be replacing any of their decisions. I have no power to replace any decisions of any appointed commissioners or indeed of any of the elected councillors.

It may, however, be of some relevance to make some comparison between what is happening in the City under the guidance of the commissioners as against what happened under the guidance of the elected councillors to the extent that that may assist me in reaching any conclusions as to whether the City's elected councillors failed to provide good government.

Now, it may well be that if the commissioners are not doing things which the resident or ratepayer wanted to do, which in the same way that the councillors were not doing it as alleged by the resident or ratepayer, that may be an indication that there was actually nothing wrong with what the City or councillors were doing, and that the cause for the resident or ratepayer not achieving satisfaction - what that person regards as a satisfactory result - is to be found somewhere else than in the elected councillors. Now, that may or may not be a process of reasoning which assists me, and that submission may or may not assist in that sort of process.

It should be made clear that this inquiry will not be sitting to reverse town planning decisions or to act as an alternative form of Town Planning Appeals Tribunal, and so one or two of the submissions which tell us in great detail about what are regarded as unsatisfactory particular planning decisions are not matters which we will be solving on a case by case basis or at all. They may, however, be some of the ingredients of evidence from which the broader conclusion as to whether or not there's been a failure to provide good government is to be sustained or not sustained. It will not be individual - - it is unlikely to be individual decisions about individual planning issues which will lead to any particular conclusions, but it may be that an accumulation of such decisions may be indicative of the way in which good government is provided.

Again, it will become a matter of judgment as to whether what has or has not happened is as a consequence of what the elected arm of the council has done as against the administration, and there will often be issues of the interaction between those two elements of the local authority as to why or why not things have happened.

I will now turn to the submission made by McLeods Solicitors in relation to leave to represent the City of Joondalup. The submission raises more questions than it answers, and therefore I for the moment grant leave to the solicitors for the City of Joondalup to provide further submissions in relation to their application for leave to represent the City and apparently various other people. And I give that leave, at the same time drawing attention to certain matters within the submission which has been made, so as to allow Mr McLeod to further elaborate on some of these matters.

The submission by McLeods Solicitors on behalf of the City firstly suggests that leave ought to be granted because of the impact of section 8.27 of the Local Government Act. Section 8.27 of the Local Government Act provides that:

"If an inquiry panel makes findings adverse to a local government or to its council or to any member or to any of its employees, or an inquiry by an inquiry panel was instituted at the request of a local government, the minister may order the local government to pay all or part of the costs of the inquiry and the local government is to comply with that order."

Now, it's contended for the City that leave ought to be granted as a consequence of that provision. The first matter upon which I would seek submissions in relation to that is to be told why it is that that is a matter which gives rise to reasons for appearing before the inquiry during the course of the conduct of the inquiry when it would appear that any decision in relation to the payment of costs of the inquiry by the minister is a discretionary decision which he will make only after the inquiry is completed and he has reached whatever conclusions he may or may not have reached in relation to that recommendation. It is then a further discretionary decision for him to make.

I can understand why submissions would be made to the minister at the time when he was about to make that decision, but it's not entirely clear to me why that is a matter which provides justification for representation before the inquiry.

Secondly, if that does provide a justification, then what is it which it justifies the representative of the City to do? How is it that the representative of the City is to represent the City's interests in relation to that section? Does it mean that the representative of the City must oppose any adverse finding in relation to the local government, its council, any member of the council or any of its employees, because it appears to me that in order for that section not to have a potential application at a later stage, that would have

to be the result; that there be no adverse finding against any of those categories of person mentioned in section 8.27A.

Secondly, the question then is, if that is a legitimate basis for representation, how does the representative of the City carry out that function? Does counsel for the City therefore stand up and oppose everything which might lead to any adverse conclusion which might be suggested by counsel assisting, or any evidence which might come before the inquiry?

The submission in Mr McLeod's letter suggests that one of the reasons for the City's solicitors being represented in the inquiry is to avoid the outcome of the inquiry predicating the result, by which I understand to mean affirming the result, and I'm just not quite sure what that sentence means. The sentence says:

"It would be a significant part of the role of counsel for the City to ensure, as far as is consistent with fairness and truth, that the outcome of the inquiry does not predicate that result."

I suppose it means the result of the City being obliged to pay the costs order if the minister makes that discretionary decision. I don't for the moment understand how the result of the inquiry could predicate that result. It seems to suggest that the only course open to the City's representative is to oppose any kind of adverse conclusion in relation to any of the relevant people in section 8.27. If that's the case, I'd be interested to know whether the City regards that as an appropriate approach for it to be taking.

It is commented that:

"The City is concerned at the level of costs of the inquiry, presently anticipated, we understand, to be \$700,000."

And then makes the comment that:

"In the case of the Inquiry into the City of Cockburn and other inquiries, the original anticipated costs may be exceeded."

Now, the only thing I would ask is that those sorts of comments, if they're to be matters to be relied on, be supported by some kind of evidence, and as far as I know at the present time - I read about that figure in the newspaper, as no doubt others may have - I think, from recollection, it's a figure which came - - which was also mentioned in relation to the City of South Perth inquiry. Now, it's in the realm, I would suggest, of journalists' rumour and it's not something

which I think ought to be without some supporting evidence, a factor which is relied upon in relation to any decision that I ought to make. If there is some evidence which is of some significance then it ought to be provided to me in some sort of appropriate form.

It's suggested in relation to the interests based on section 8.27 that that would result in an entitlement for council for the City to participate in the examination of witnesses, and that to deny that would be to deny natural justice. Now, you'll recall that I rely on Annetts and McCann to indicate the kinds of interests which would ordinarily indicate a right to cross-examine. I'd need to be convinced with some more cogent submissions as to what interest it is which the City has which would require cross-examination.

In that regard, it's said at paragraph 3 of the submission that:

"Adverse findings do have an impact on the City as an entity."

And then it's said:

"It would not be unreasonable to say that the City is still suffering from the stigma of the Wanneroo Royal Commission in the mid-1990s."

Now, again, that's an assertion of fact. Before I was prepared to take that sort of assertion into account I would need some evidence to support that assertion. Now, I'm not at all sure that one can just presume that that's the case. I understand - I've been told, and again I'd put it into the melting pot for consideration - that where we're sitting now was previously the central headquarters of the City of Wanneroo. Now, that may cause some people to identify the City of Joondalup with the City of Wanneroo. I would have thought that equally the fact that the government following the inquiry into the City of Wanneroo decided to split the local authority into two areas, and this City became rebadged, if you like, might dissipate any suggestion that it is still suffering under any reputation which might have arisen from that inquiry. Those are matters which I'd want some evidence on if they're to be asserted as matters I should be taking into account in making any decision.

The submission then goes on to say that that stigma or reputation has an impact upon the recruitment of staff because of the impact upon the reputation of the City and then an effect upon the City's ability to recruit staff. Again, these are matters of assertion which would need to be supported by some evidence. Again, for the same sort of reasons which I've

indicated, I would suspect that there might be equal suggestions to the contrary; that the renaming and the reconstitution of the City may well have ameliorated those sorts of impacts.

It's said at paragraph 4 of the submission that:

"A lawyer representing the City is able to give at all times an independent lawyer's evaluation of issues from the City's point of view, which often the inquiry lawyers may not have appreciated or which may not otherwise emerge from the generality of their concerns."

As far as that goes, that may justify a grant of leave to occasionally provide some information or submissions, perhaps by providing information to counsel assisting, perhaps by observing the proceedings, not necessarily by making submissions publicly within the inquiry.

The submission then goes on to say that:

"It is fundamental to the adversarial system of the legal process, which is ordinarily the predominant legal process in WA, that such leave be granted."

And it says:

"It is said that it is assumed there are potentially two sides at least to each issue."

Well, there may be two sides to each issue but I need to be convinced that the City is always going to be sitting on the opposite side of the issue to counsel assisting. Now, it may be occasionally that that will be the case, but I wouldn't have thought that generally that would be the case. This is a process of inquiry. There may often be no adverse position. The primary function of the inquiry is to find and accumulate information rather than to reach conclusions about disagreements. This is not a - - its primary function is not a dispute resolution process but an inquiry process, and so the adversarial model of the dispute resolution process which is ordinary to legal proceedings is not necessarily the one which applies to these proceedings.

It's next said that the role of the representative of the City may often be to provide - - well, to deal with the fact that there is a lack of precision and specificity in the definition of the functions of the council in the Local Government Acts and the various other persons such as the mayor, the council members, the committee members, the CEO and other employees, and that the role of the representative of the City may be to

provide specific submissions in relation to those key provisions. Now, that may well be the case, but I would have thought that that would apply at the time when final submissions have arrived rather than at any earlier time. So I'd want to have some submissions as to why it might be necessary to do that at any earlier time.

Now, it may well be that from time to time it will become apparent that such a submission is required, and it may be that a submission could be put to me that that leave ought to be provided on an ad hoc, case by case basis when such issues arise, rather than a general right of leave.

It's said that the question of interpretation of the various provisions of the Act will give rise to, or is related to a significant impact on the interests of the City. That's in paragraph 4. I'd need to have it demonstrated to me as to what the particular interests are which the significant impact would - - well, what the significant impact would be upon what interests.

Now, it may be that that's not able to be said at the present time, and it may be able to be said as such issues emerge, and it may be that in the course of the inquiry it becomes clear to Mr McLeod that something has emerged in the inquiry which will have a significant impact on the interests of the City, but at the moment those matters are somewhat in a vacuum. They're in the same category as some letters which I understand have been received by the executive officer asking that he or I indicate what adverse conclusions are to be reached in relation to persons who've been summonsed or are participating in the inquiry.

The answer to that question is that no adverse conclusions are or can be foreshadowed today. It may be that as the course of the evidence emerges, the evidence may suggest the possibility of some adverse conclusions. None can be specified today and none is sought to be specified, and so the leave which has been granted to various counsel to act to represent various interests should take that into account. They don't have carte blanche to start in boots and all with the first witness. It will have to emerge that there's some adverse interest to the witness whom that counsel is representing in order for them to be exercising their right of leave to cross-examine.

It's next said in the submission by the solicitor for the City that it may be appropriate to represent particular employees when matters come up relating to documents and issues of legal professional privilege, and perhaps to employees giving evidence in relation to the performance of their functions. Now, that may be so, although it may be that those matters

can be dealt with as they, I understand, may be being dealt with at the present time by the City's solicitors, giving advice to the City within the usual walls of the City where the City's solicitors give their advice, and a result coming out of that as to issues of legal professional privilege, for example.

Where a City employee or officer is in the witness-box and those issues may arise, there's another issue which then emerges which I'd like some submissions upon; that is, what is to be the position of the City's solicitor in representing the City and employees or officers of the City where the interests of the City and the interests of the employee or officer may not be the same, or may not always be the same?

Now, I suspect that the position would be that the solicitor for the City would have a primary loyalty to the City, and I suspect and wish to be told from whom the solicitor will be obtaining instructions. Now, I suspect it will be or ought to be from the commissioners, and so therefore that's the commissioners representing the decision-making arm of the City. I'd like to be told what is the process if what the commissioners instruct and the interests of the commissioners diverges from the interests of any individual employee of the City.

In that regard, at paragraphs 8 and 9, it's said that the City has an interest in protecting its innocent officers. Is there a deliberate distinction being drawn between innocent officers and officers who are not innocent? And what happens if a person who starts out in the City's estimation as an innocent officer ceases to be an innocent officer? So essentially that's the same question, I suppose.

It's put that the representation is a minimum protection the City should offer for its officers who are innocently caught up in the inquiry. Well, I can understand that while there is no question as to any difference of interest between the officer and the City, but what if that is not always the case?

It's also said that if the City is represented by legal counsel, a greater level of organisation can be imposed on the oral and other evidence adduced through witnesses from the local government. Well, I'm not sure that that's the case. I would have thought that the organisation of the inquiry is largely in the hands of myself and counsel assisting me. If the solicitor for the City is suggesting that he is able to place a greater level of organisation on the calling of evidence, then I'd like to have it explained to me how that's to occur and how that's to integrate with the role of counsel assisting. At the moment I'd take some convincing that that was the case.

It's said in that context that a more efficient, properly focused inquiry would serve the general interests of the local government. Again, how is it that counsel for the City is going to focus the inquiry rather than counsel assisting?

Finally, it's said at paragraph 11 that it may not be in the best interests of the City to lose by dismissal all the previous council members, as could be the recommendation of the inquiry. And it then goes on to say:

"Many years of valuable experience may be lost to the City if that occurs. The City ought to have legal representation to continuously monitor this inquiry and to ensure that, if no dismissal of the council seems appropriate, that occurs."

Now, the difficulty I have with that is I would have thought that if the City is there to represent a particular interest, then that particular interest has to remain the same, and that there's no point in me giving leave to somebody to come along and, if you like, play the role of counsel assisting or second-guess what decision ought to be made, rather than to represent a particular interest. Now, it may be that you can convince me otherwise on that topic, but at the moment I would want to know if there's to be a representative of the City, why isn't it the case that that representative ought to have a particular position at the time when that representation occurs, and that would be a position which would not alter.

If that is the case, then is that position to be that the City opposes any recommendation for dismissal, or is it the position that it opposes it in certain circumstances? Or is it a position that it supports reinstatement, which is the other side of the coin? So I want to know what the City's position, if it has one on that, is on that, and it seems to me that if it doesn't have one then the justification for it being represented falls away.

Now, it may be that it will be said to me that it may have a position which it may be adopt at some time in the future. Well, if that's the case then that can be said, and if and when such a position is adopted, council can come along and make the submission that leave ought to be granted to present that position.

Now, finally, when I contemplated the application by the City to be represented, I tried to envisage what it was that the City's interests might be, and I, of course, thought of section 18 - - sorry, section 8.27, and I've dealt with that issue. It had occurred to me that the City might be saying something else to me, and I'd like to have a submission on this. It's not something that is in the submission by Mr McLeod, but it's something which perhaps, as a matter of

general submission I ought to have a submission upon and be in a position to form a view.

There's a question of whether the terms of reference or the statutory provisions under which this inquiry has been instituted empower the panel of inquiry, while inquiring into and reporting on any aspect of a local government or its operations or affairs, as is set out in section 8.16 of the Local Government Act. Given the breadth of the power of a recommendation in section 8.22(1) of the Act, whether the panel of inquiry has power to recommend that the minister recommend to the Governor that he abolish the district in which the local government comprising the City of Joondalup is now established. There is power to do that under the Local Government Act 1995, section 2.1 and section 2.5.

If a conclusion were to be reached that such power is possible, then a subsidiary question ought to be addressed in the submissions as to whether there's a threshold which must or ought to be reached before any such recommendation would be in contemplation, and whether the City's participation in protecting that kind of interest ought to be preceded by notice from the panel of inquiry that such a recommendation was in contemplation by the panel of inquiry. And upon receiving that notice, it might be appropriate for leave to be given for the solicitor for the City to make submissions.

Now, I hope, in addition to the notes that have been made, that you'll be able to follow that by adverting to the transcript, as I accept that there are a number of complicated issues there, for you to address, Mr McLeod, and I will be asking Mr Staude to also address me upon those issues, to put any points of view which he might have upon those matters which might assist me.

Those are all the matters which I wish to address. Are there any submissions which any represented party would wish to make to me this morning?

MR STAUDE: There are two matters arising, Mr Inquirer. The first is in relation to the summary you gave of the witness summonses which have been served. Reference was made to Ms Janine Gollant, now living in Bahrain - -

MR MCINTYRE: Yes.

MR STAUDE: - - ahead of reference to Councillor Sue Hart.

MR MCINTYRE: Yes.

MR STAUDE: I think it's Ms Gollant who has resigned, not Councillor Hart.

MR MCINTYRE: Oh, yes. I think I was - -

MR STAUDE: It's a matter of correction.

MR MCINTYRE: Yes. I was - -

MR STAUDE: A correction which you made in relation subsequently to Councillor Nixon, who's also resigned.

MR MCINTYRE: Yes. Yes, I was misled by the form in which the document has been presented to me. The word "resigned" appears under the name of the councillor, in the same box as it's now been pointed out to me, but when I was looking at it first I was looking at "resigned" as being the heading for the next person.

MR STAUDE: I make that observation just to allay any anxiety on Councillor Hart's part.

MR MCINTYRE: Yes.

MR STAUDE: Another matter that's brought to my attention, sir - -

MR MCINTYRE: I should say by way of explanation that most of the people whose names I have mentioned I have no prior knowledge of them, so I don't know who they are or what status they have, and at this present stage I am reliant to a large extent upon what I've seen in some documents and have been told to me. These things will no doubt become much clearer to me as the inquiry proceeds as to who all these people are, and if I've offended anybody in the way in which I've referred to them so far, I apologise for that, and I'll get to know who's who in due course.

MR STAUDE: Thank you, sir. The other matter was that it is the case, I understand, that there is at least one witness who hasn't made a response in Councillor Prospero. He intended to do so this morning, and there may be others. You might wish to inquire whether anyone in the gallery intended to respond to the summons today.

MR MCINTYRE: Yes. Is there anybody who has received a summons who wishes to come forward to the central microphone and tell me anything about how they propose to respond to that summons? Yes. The gentleman in the blue shirt can come first. Is there a microphone there?

MR HOLLYWOOD: What's your title? Mr McIntyre?

MR MCINTYRE: You can call me Mr McIntyre, or as counsel assisting has suggested, Mr Inquirer.

MR HOLLYWOOD: Mr Inquirer, my name is John Hollywood, deputy mayor or stood-down deputy mayor. At this stage, Mr Inquirer, I will not be seeking legal advice and I will not be submitting any documentation to the inquiry.

MR MCINTYRE: Thank you. Yes.

MR HOLLYWOOD: It doesn't mean - - I may seek legal advice later on.

MR MCINTYRE: Yes. Well, as I indicated, that will be open to you, and the purpose of legal advice really is if something comes up which suggests that your reputation might be affected in some way, and that would be the opportune time. Thank you.

MR HOLLYWOOD: Thank you.

MR MCINTYRE: Is there - - there was another person. Yes. Would you like to come forward?

MR PROSPERO: Councillor Louis Prospero, suspended, your Worship. I have submitted the documents this morning. My understanding from the summons was I was to present it today.

MR MCINTYRE: Yes.

MR PROSPERO: And I have done so.

MR MCINTYRE: Yes. Thank you for that.

MR PROSPERO: Okay. Thank you.

MR MCINTYRE: Just as a matter of generality, the summonses went out, as I understand, with a covering letter to various persons telling them that they could either present their materials today or present them earlier than that. Some chose to do it earlier, some have done it today, and as you may have noticed as I was going through the list, some have not yet done it but have made an approach for an extension of time, and I, in the course of this hearing today, have granted those extensions of time.

I should indicate that this inquiry will proceed over a period of time. Today was the occasion to formally open the inquiry.

I don't anticipate that there will be any public hearings in this inquiry now for some weeks, if not months, and further public notices will be published in the local media as to when the next inquiry is to proceed.

In the interim, there will be an opportunity for Mr Staude, counsel assisting, to interview those persons who've been issued with summonses who wish to volunteer to be interviewed by him to indicate what evidence they might be able to

provide to me in the public hearings. Some may not wish to be interviewed and just come along and present themselves at the public hearings to be examined under oath. Obviously as a matter of preparation for Mr Staude, it will be easier for him if he has some prior knowledge of what it is that people are going to say so as to direct more efficiently the way in which he presents that evidence to me.

Mr McLeod, did you have something?

MR MCLEOD: Mr Inquirer, I wish to ask a few questions arising out of your comments earlier. Shall I go to the podium?

MR MCINTYRE: No. I think you're being recorded from that position, if you're happy.

MR MCLEOD: I'd like to know how and when you'll take further submissions on the issues that you raised for consideration, and how you take evidence of the kind that you mentioned you might need in order to take certain of the matters referred to in the submissions into consideration. And finally, I'd seek your indication of how we receive copies of the transcript, at least of today's proceedings.

MR MCINTYRE: In relation to the last point, my understanding is that the transcript will go up on the Joondalup inquiry website, so I think that would probably be the way in which all people will be expected to access the transcript.

MR MCLEOD: Yes. Thank you.

MR MCINTYRE: In relation to the other questions, I haven't formed a definite view as to when I should deal with these matters. I think - - well, at present it's really anticipated that we may not commence the next tranche of public hearings until September or perhaps later than that. Now, one option is that we wait until then. Another is that we deal with this as an interlocutory matter, if you like, some time between now and then.

I think what I will do is not fix a date at this time but suggest that you and Mr Staude confer and we arrive at an agreed time which is convenient to the two of you and to me, I suppose. And it may be that we should, if it's a matter which is going to take some little time, and that would be part of the discussions that we might have with Mr Staude, then we can allocate both the necessary time to do the preparation for it and the time which it might take to consider the matter in a public hearing. So perhaps if those matters are all taken into account we can arrive at an agreed time.

MR MCLEOD: Yes. That seems satisfactory, thank you.

MR MCINTYRE: And in relation to the question of the form of the evidence, I would think that probably - - I mean, obviously the rules of evidence don't strictly apply to these proceedings, but I think that I will for the moment proceed on the basis that they do, and that you should perhaps consider presenting material by way of affidavit - in affidavit form or in statutory declaration form. That's probably more appropriate to a non-judicial hearing. And if it can be presented in documentary form in some way, then that would be the preferable course. If it can't be and it's necessary for there to be oral evidence, then perhaps you should give notice of that. And perhaps, again, there should be an agreed timetable in relation to that. Perhaps you can consider the matter, make some suggestion as to such timetable as you might think would be convenient to you, assuming that it will happen some time between now and the commencement of the next public hearings, and we can devise a process by you consulting with Mr Staude as to that.

I would adopt the process which is usually adopted in interlocutory proceedings, where you start by evidence on affidavit or statutory declaration, and if somebody wishes to cross-examine someone or the evidence can't be presented in documentary form, then we have a witness come before the hearing and give evidence on oath.

MR MCLEOD: Thank you.

MR MCINTYRE: If there are no other matters I would adjourn the hearing to a date to be fixed.

HEARING ADJOURNED SINE DIE

CITY OF JOONDALUP
INQUIRY INTO THE CITY OF JOONDALUP
COMMENT BY McLEODS ON ISSUES RAISED BY COMMISSIONER SMITH
IN HER FAX OF 25 AUGUST
LEGAL ASSISTANCE TO OFFICERS

1. CIRCUMVENTION OF THE POLICY

1A What has been done to date

- 1A.1 Nothing has been done as between McLeods and the employees which goes beyond an examination of the events that occurred, and the performance by the employees of their functions as officers of the City.

It is impossible to divide the City from its Administration. The CEO (Acting) and the employees responsible to him have the function of managing the day to day operations of the local government (s.5.41(d)), and liaising with the Mayor on the City's affairs and the performance of the local government's functions (s. 5.41(e)).

- 1A.2 It is impossible for lawyers representing the City to give any advice or provide any representation until they are fully apprised of the facts that must come from the Administration.
- 1A.3 The Administration officers are part of the City, and representation of the City necessarily involves incidentally representation of the employees to the extent that they are acting within and have acted within the scope of their function and performance of their duties.
- 1A.4 If an employee appears to have:
- (a) acted illegally;
 - (b) acted dishonestly;
 - (c) acted otherwise than in good faith; or
 - (d) otherwise been guilty of improper conduct,

then to that extent the employee may have acted otherwise than in performance of his/her function.

1A.5 If that became apparent, the City's lawyers should not give the employee advice or legal assistance other than advice to seek separate legal representation.

1A.6 The lawyers must however be entitled to receive, even from that employee, facts and information which do not touch upon and are not tainted by the impropriety.

1A.7 I regard it as totally inappropriate and untenable, for me not to be able to liaise freely with the Acting CEO and employees designated by him, within the scope of the above parameters and subject to instructions from the Council (Commissioners).

1A.8 I do not consider that at this time I have seen anything which could be considered improper conduct on the part of any employee (leaving aside the former CEO), and certainly not on the part of any employee with whom I have had contact in receiving instructions.

1B Role of the Council, Mayor, Councillors and Administration Employees in Connection with Legal Representation.

1B.1 The Council (Commissioners) has a distinct function which I have not in any way ignored. I derive my understanding of the function from the following:

- (a) Under s. 2.33(1), the function of a Commissioner is to exercise the powers and discharge the duties of the Council and its Mayor. Under s. 2.33(2) a Commissioner is to be regarded as the Council.
- (b) Under s. 2.40(2), if 5 Commissioners are appointed,
 - (i) they are to exercise the powers and discharge the duties of the council of the local government jointly; (i.e. the Commissioners have the same role as Council); and
 - (ii) the chairperson is to exercise the powers and discharge the duties of the Mayor.

It is necessary then to consider the functions of the Council, the Mayor and individual Council members under the LG Act.

1B.2 The LG Act does not include in the role of the Council (Commissioners) or the Mayor (Chairperson) the burden of management of the day to day operations of the local government or the implementation of Council decisions. That is part of the function of the CEO (s.5.41).

1B.3 The role of the Council is set out in s. 2.7 -

“2.7(1) The council —

- (a) directs and controls the local government's affairs; and
- (b) is responsible for the performance of the local government's functions.

(2) Without limiting subsection (1), the council is to —

- (a) oversee the allocation of the local government's finances and resources; and
- (b) determine the local government's policies.”

1B.4 The role of the Mayor is set out in s. 2.8 -

“2.8(1) The mayor or president —

- (a) presides at meetings in accordance with this Act;
- (b) provides leadership and guidance to the community in the district;
- (c) carries out civic and ceremonial duties on behalf of the local government;
- (d) speaks on behalf of the local government;
- (e) performs such other functions as are given to the mayor or president by this Act or any other written law; and
- (f) liaises with the CEO on the local government's affairs and the performance of its functions.

(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.”

Para. (f) of s. 2.8(1) is significant, as it highlights the fact that the Mayor is the conduit between the Council and the Administration as to the conduct of the affairs of the local government and the performance of its functions. This provision gains significance from provisions such as s. 5.41 paras. (d) and (e) which confirms that it is the function of the CEO to manage the day to day operations of the local government, and to liaise with the Mayor on the local government's affairs and performance of its functions.

1B.5 The role of Councillors is set out in s. 2.10 -

“2.10 A councillor —

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

1B.6 The LG Act does not include in the role of the Council (Commissioners) or the Mayor (Chairperson) the burden of management of the day to day operations of the local government or the implementation of Council decisions. That is part of the function of the CEO (s. 5.41) and the other employees under the CEO.

1B.7 It is open to the Council and is part of its role, to decide whether or not legal representation for the City will be retained generally or on any specific issue.

1B.8 It is proper for the Council to impose limits on the representation.

1B.9 It is the function of the CEO and employees under him to carry on the day to day liaison with the lawyers, and to ensure that they are properly briefed and instructed to enable them to provide the authorized legal representation.

1B.10 All parts of the organisation, Council and employees must necessarily receive advice in the course of the legal representation.

1C Role of the Lawyers

1C.1 Once instructed, it is the role of the lawyers, within the scope of their instructions and on the facts provided to them, to consider how the representation can best be provided in the best interest of the client (the City).

1C.2 In doing this, the lawyers may consider many options before advising a final course of action.

- 1C.3 The lawyers have an overriding duty at all times to act properly in the interest not only of their client (the City), but also in the interest of justice and due process of the law.

The lawyers would be obliged to decline to act or continue acting if their instructions seem to them either to inhibit their proper role, or to compromise their overriding duty to their client, and to the interest of justice and due process.

2. ALLOWING OTHERS TO CIRCUMVENT THE POLICY

- 2.1 If a suspended or former Council member has facts or information to offer relevant to the representation of the City, the facts and information should be obtained.
- 2.2 If the suspended or former Council member wishes to explore in discussion issues which touch upon the proper performance by the member's role in a matter expressly within the terms of reference, being clearly an area which is open to a finding of improper conduct, then the lawyers should decline to deal with that.
- 2.3 In any event, I and my firm take it as a basic policy that in our representation of a local government, we do not continue a contact with any past and present member or employee without confirmation through the CEO that we should do so, and provided even then we do not consider that contact would compromise our duty to our client.

Thus we would not seek such a contact, nor continue it if it is made with us, without instruction to do so.

- 2.4 The former and suspended members are in a different position from employees when it comes to advice. Not being currently within the administration of the City, or having any current role in the City's affairs, they would have no entitlement to legal advice without express authorization being given. Presumably such authorization would only be given under and consistently with the Policy on legal representation.

3. INSTRUCTIONS TO DENIS McLEOD MAY NOT REFLECT THE COUNCIL'S POSITION

- 3.1 It is not apparent to me that any instructions have been given which are inconsistent with the position of the Commissioners as explained by them to me on the evening of 24 August.
- 3.2 As to taking a neutral position, if that means no attempt is to be made to present a position as favourable as the facts allow in the interest of the City, then that does not accord with what I think I should be doing to represent the interest of the City.
- 3.3 If taking a neutral position means, attempting to ensure that the Inquiry has all relevant facts not concealing relevant facts, and not presenting a false or exaggerated position to the Inquiry, then the lawyers can do that consistently with their proper role and their duties. But at the same time, the lawyers in performing their duty to their client (the City), must have the normal freedom of considering all options, and adopting all proper measures, to present the position of the City in the light most favourable to it in terms of the possible outcomes of the Inquiry. At all times the position to be adopted would be explained to the instructors and would be subject to instructions given.
- 3.4 If however the taking of a neutral position means simply facilitating the collation of all facts and materials for presentation to the Inquiry then the lawyers should honestly advise that this task can be adequately performed by the City's employees and the Inquiry's investigators, and they should not seek any role in representation before the Inquiry. Their only role then would be to provide occasional advices on issues such as legal professional privilege claimed by others. The City in taking a neutral role of this kind would presumably not even consider a claim of legal professional privilege on its own behalf. To me that is not necessarily consistent with representing the City in the City's best interest.

4. INSTRUCTIONS FROM THE COUNCIL ARE ESSENTIAL

- 4.1 There is no doubt in my mind that the Council (Commissioners), must agree to the role we believe we should take, as explained above before we can properly continue in that role.
- 4.2 If they think the role should be different, they should explain what they require and the lawyers must consider their position against that requirement.
- 4.3 I must make it clear however that I do not consider the proper representation of the City's interest can be achieved if a neutral role of the kind referred to in 3.4 above is adopted.



ATTACHMENT 5

INQUIRY INTO THE CITY OF JOONDALUP

Our ref: corout 106

Mr Denis McLeod
McLeods Barristers & Solicitors
220-222 Stirling Highway
CLAREMONT WA 6010

Dear Mr McLeod

REPRESENTATION OF THE CITY OF JOONDALUP

I refer to our meeting at the offices of the Inquiry on 23 August 2004. Subsequently, on 26 August 2004, Mr Robinson from the City rang the Inquiry to request a meeting to discuss the issue of the City's representation. I saw fit to speak with Mr Robinson and agreed to a meeting being convened at the Inquiry's offices on Wednesday 1 September 2004 at 10 AM.

There are two issues. The first, which is ultimately a matter for the presiding member to determine, is whether, and if so, on what terms, the City should have leave to be represented by counsel at the public hearings of the Inquiry. The second is whether you, as a solicitor appointed by the City, may properly advise and represent the City's employees, specifically the acting CEO, the human resources manager, and the audit and executive services manager, each of whom is likely to give evidence.

As I have previously indicated, my view is that the City has no corporate interest in the findings and recommendations of the Inquiry which is capable of being represented by legal counsel. In as much as the City is constituted by its ratepayers and residents, its interest coincides with the public interest which is the duty of counsel assisting the Inquiry to represent. The public interest lies in the proper administration of the Local Government Act 1995 which, by section 1.3(1)(d), provides for "a framework for the administration and financial management of local governments and for the scrutiny of their affairs". Amongst other things the Act is intended to result in "greater accountability of local governments to their communities".

The Commissioners clearly have no interest as the terms of reference do not extend beyond the date of their appointment. They are only concerned, it is respectfully submitted, to discharge their statutory role under the Act, a role that does not require them to take any position in respect of the matters, which are the subject of the Inquiry, or to engage legal representation of the City. Section 8.27 does not, in my submission, give rise to any duty on the part of the Commissioners to resist any adverse findings which the Inquiry may make. If that were the case,

the Inquiry would become an adversarial contest and its statutory function would be obstructed.

Of course, the Commissioners may well have acquired knowledge of the City which has given them insight into its past workings, and which may be of assistance to the Inquiry, in which case they would be at liberty to make a submission. Such a submission would be made on their behalf, not behalf of the City.

The suspended mayor and councillors (and former mayor and councillors) may have individual interests as they may be subject to adverse findings, as may the former CEO, and indeed the City's consultants and advisors.

Similarly, the officers of the City have individual interests. In my respectful opinion these are not capable of being jointly represented.

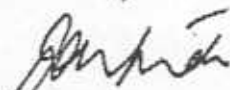
When you attended with Mr Loader at his interview with the Inquiry's investigators last week you made it clear that you did so not as Mr Loader's representative, but as the City's. I explained at that time that it would not be in interests of a fair inquiry for the City's personnel, if they desired legal assistance, to be advised by a legal practitioner who owed them no fiduciary duty. It would be unduly inhibiting and inappropriate. For that reason the interview was terminated.

As presently informed I would not be agreeable to your attending any further interviews with potential witnesses. Clearly I could have no objection to your advising the City's administration with respect to their obligations to comply with any summons or request for information. Nor at this stage do I see any basis upon which leave should be granted for you to represent the City at the public hearings.

In the circumstances I would be grateful if you would let me know:

- (a) whether you are instructed by the Commissioners or the Acting CEO, and
- (b) what role, if any, you have been instructed to take with respect to the Inquiry.

Yours faithfully



Counsel Assisting the Inquiry.

30 August 2004