

# **CITY OF JOONDALUP**

Notice is hereby given that a Special Meeting of Council will be held in the Council Chamber, Joondalup Civic Centre, Boas Avenue, Joondalup on **FRIDAY 10 SEPTEMBER 2004** commencing at **2.00 pm**.

CLAYTON HIGHAM  
Acting Chief Executive Officer  
7 September 2004

Joondalup  
Western Australia

## **AGENDA**

### **PUBLIC QUESTION TIME**

(Please Note: Section 7(4)(b) of the Local Government (Administration) Regulations 1996 states that a Council at a special meeting is not required to answer a question that does not relate to the purpose of the meeting. It is requested that only questions that relate to items on the agenda be asked).

### **APOLOGIES AND LEAVE OF ABSENCE**

### **DECLARATIONS OF FINANCIAL INTEREST/INTEREST THAT MAY AFFECT IMPARTIALITY**

### **ITEM OF BUSINESS**

#### **ITEM 1      LEGAL REPRESENTATION BEFORE THE INQUIRY INTO                  THE CITY OF JOONDALUP**

### **CLOSURE**

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## **ITEM 1    LEGAL REPRESENTATION BEFORE THE INQUIRY           INTO THE CITY OF JOONDALUP – [72559]**

**WARD - All**

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### **PURPOSE**

The purpose of the report is for Commissioners to determine whether or not they consider that the City has an interest in the Inquiry, and if so, whether this interest requires separate representation before the Inquiry. Should the Joint Commissioners take this view, they will need to instruct McLeod's to make a formal application to Mr McIntyre to determine the issue of leave to appear before the Inquiry.

### **EXECUTIVE SUMMARY**

The Report examines the issue of 'interest' and representation before the Inquiry on behalf of the City. It follows the position taken by Administration from the date the terms of reference were announced, through the issue of conflict of interest and Panel Firms, to the position taken by McLeod's at recent meetings with the Commissioners. The report also canvasses the response from the Inquiry Panel at the Procedural Hearing to the most recent opinion of Mr Staude, Counsel Assisting the Inquiry.

The Acting Chief Executive Officer and the Manager Audit and Executive Services have declared an interest in this matter due to the possibility of being called to give evidence before the Inquiry.

### **BACKGROUND**

The Commissioners were briefed on 24 August and 31 August 2004 by Mr Denis McLeod who has been engaged pursuant to s. 5.41 of the *Local Government Act 1995* and with the full knowledge of the Commissioners to act on behalf of the City in relation to the Inquiry. As a result of these meetings, a Special Meeting has been called for 10 September 2004 at 2.00pm.

### **DETAILS**

#### ***1.    Terms of Reference and Background to the Issue***

On 26 May 2004 the Minister for Local Government and Regional Development appointed the Inquiry Panel and set out the terms of reference for the Inquiry. The terms of reference were as follows –

*The Inquiry Panel is to inquire into all matters considered relevant to the activities of the Council and its CEO during the period 13 March 2001 to 4 December 2003, including events predating this period that would be relevant to the Inquiry, to determine whether there had been a failure to provide good government at the City of Joondalup.*

*The Inquiry may inquire into –*

- *The processes associated with the selection and appointment of Mr Smith as CEO;*
- *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 CEO;*
- *Advice provided by any parties in relation to the selection, appointment and retention of Mr Smith as CEO;*
- *The terms of the contract of the CEO and in particular the performance assessment provisions and their application;*
- *Adherence to the provisions of the contract of employment by the CEO and the Council; and*
- *The provision, cost and use of legal advice associated with all aspects of the appointment and on-going employment of the CEO; and*
- *With specific reference to the period 5 May 2003 to 4 December 2003, address the effect on the government provided by the Council of the conduct of Mr Smith, the Mayor and Councillors, and the operations of the Council; and*
- *Inquire into any other matters coming to the Panel's attention during the course of the Inquiry but only to the extent to which the Panel regards it necessary for the purpose of reporting on whether there has been failure to provide good government in the City of Joondalup.*

The Inquiry Panel pursuant to section 8.22(1) and (2) of the LGA 1995, is to inquire, report and make any recommendations that it considers appropriate, including that the Council be dismissed or reinstated.

On 30 April 2004, shortly after the announcement and release of the terms of reference, the Acting CEO wrote to the Inquiry introducing himself and advising the Inquiry that he would provide every possible assistance to the Inquiry to ensure that the investigation could be conducted as expeditiously as possible. It was suggested that a meeting take place with the Inquiry to discuss the issues. On 5 May 2004, Mr Staude contacted the Acting CEO agreeing to meet when details of the Inquiry's office address and contact details would be known.

On 2 June 2004, Mr Peyton contacted the Chairman of Commissioners advising him that a subpoena to produce documents would be served on the Acting CEO to produce documents. The Chairman was advised that the Inquiry would investigate the instructions given to, and the legal advice received from, solicitors on behalf of the City in relation to various issues arising out of Mr Smith's appointment, including, but not limited to, his contract of employment, the submission made on behalf of the City to the Public Administration and Finance Committee of the Legislative Council in 2003, and the termination of his contract. Mr Peyton requested the Commissioners of the City to formally waive legal privilege in respect of the legal instructions and advice and to disclose the information. The City subsequently undertook this in regard to all legal advice.

On 3 June 2004, Administration Staff, Mr Neil Douglas, and representatives from Fiocco's Lawyers attended a meeting with members of the Inquiry.

On 16 June 2004, Inquiry Staff met with the Joint Commissioners. (A copy of the Agenda is attached to this report and marked Attachment 1.) The issue of the City's interest and representation before the Inquiry was first raised by Mr Staude at this meeting. Mr Staude was of the view that the City did not require separate representation before the Inquiry.

It was at this stage, that the City realised that there might be a problem in engaging Minter Ellison Lawyers to provide continuing legal support before the Inquiry. The City of Joondalup in exercising its requirements of due diligence to its employees and residents had made enquiries early on in determining the possibility of the City obtaining legal representation to protect the interests of the City in relation to the Inquiry.

Indeed, the City had initially looked to Mr Neil Douglas from Minter Ellison Lawyers to provide on-going support to the City during the Inquiry, and because of his familiarity with the details of the case, to represent the City's interest at the Inquiry Hearing. Mr Douglas was willing to act in this capacity and was of the view that the City did have an interest. It became apparent from the Opinion of Mr Harry Dixon SC that there would be a conflict of interest with regard to the City of Joondalup being represented by Minter Ellison Lawyers.

As a result discussions with the Commissioners and pursuant to s. 5.41 of the Act the services of McLeod's Solicitors were engaged to provide on-going legal support in the Inquiry and to make submissions on its behalf for leave to appear before the Inquiry.

**2. *Letter by McLeod's to Inquiry CEO requesting leave to appear for the City at Inquiry Hearings and identifying the City's interest***

Mr McLeod was requested on behalf of the City to write to the Inquiry requesting leave for legal representation at the Inquiry Hearings and explaining the interest that would be represented. Foremost of the arguments put forth in the letter, was the City having an interest in the Inquiry due to the operation of s. 8.27 of the Act which relates to local governments possibly having to meet the costs of the Inquiry. (A copy of this submission is attached to this report and marked Attachment 2.)

At the Procedures Hearing dated 22 July 2004, Mr McIntyre considered Mr McLeod's submission. Mr McIntyre drew attention to certain matters contained in the submission. He raised a number of questions in relation to the submission, and required Mr McLeod to provide further evidence in relation to each of these.

Rather than summarise the opinion of Mr McIntyre, a copy of the transcript of proceedings has been attached to this report and marked Attachment 3.

At the hearing, Mr McIntyre granted leave to McLeod's Solicitors to provide further submissions in relation to their application for leave to represent the City. No deadline for submissions was provided. An initial draft response has been prepared and sent to the Inquiry Office. The City has advised Mr Staude that no determination will be made on this issue until after the meeting on 10 September 2004. The document is an initial draft only and may be expanded to incorporate other points touched upon in the letter to the Inquiry and commented on by Mr McIntyre.

**3. *Interview 23 August 2004***

On 23 August 2004, Mr McLeod attended at the Inquiry offices for a proposed interview with a City employee. At the interview, Mr McLeod made it clear that he attended as the City's legal representative and was present at the interview in this capacity. Counsel assisting the Inquiry expressed the opinion that officers of the City had individual interests that were not capable of being jointly represented. The issue of the City's representation was a separate issue that was briefly touched upon. The interview did not proceed.

#### **4. *Briefing to Commissioners August 2004***

As a result of the issues discussed between Mr McLeod and Mr Staude at the interview, Administration asked Mr McLeod to brief the Commissioners. Mr McLeod addressed the Commissioners firstly on matters that had been raised in the discussion with Mr Staude, and outlined what in his view was the City's position and interest in relation to the Inquiry.

On 25 August 2004, concerns were expressed by some of the Commissioners.

Mr McLeod addressing the Commissioners on 31 August 2004 responded to these concerns. (A copy of his submission is attached to this report and marked Attachment 4.)

Mr McLeod dealt with the following matters –

*(a) Circumvention of the Policy. What has been done to date.*

Mr McLeod stated that all that had been done to date was that the solicitors had examined the events that had occurred and the performance by the employees in their functions as officers of the City. It was his view that there was no apparent basis at the time to separate the City from its Administration.

*(b) Role of the Council, Mayor, Councillors and Administration Employees in Connection with Legal Representation*

Mr McLeod discussed the various roles of each of these identities in some depth in his submission.

*(c) Role of the Lawyers*

McLeod's advised the Commissioners that the role of the lawyer was to act within the scope of their instructions and on the facts provided to them to consider how the representation can best be provided in the interest of the client. The lawyers have an overriding duty to act properly in the interest of their client and in the interest of justice and due process of the law. Lawyers would be obliged to stop acting for a client 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.

*(d) Allowing others to Circumvent the Policy*

All facts or information should be obtained. Information being clearly an area which is open to a finding of improper conduct, would be declined to be dealt with. A basic policy of McLeod's representation of a local government, is that McLeod's will not continue a contact with any past or present member or employee without confirmation through the CEO that they should do so, and provided even then that they do not consider that contact would compromise their duty to their client. McLeod's would not seek such a contact, nor continue if it were made with them, without instruction to do so. Former and suspended members not having a current role with the City, would not in Mr McLeod's opinion have any entitlement to legal advice without express authorisation being given.

*(e) Instructions to Denis McLeod may not reflect the Council's position*

Mr McLeod did not believe that any instructions had been given which were inconsistent with the position of the Commissioners as explained by them on 24 August 2004. Mr McLeod suggested that if taking a neutral position meant that no attempt was to be made to present a position as favourable as the facts allow in the interest of the City, then this did not accord with what he thought he should be doing to represent the interest of the City. Mr McLeod discussed the position of neutrality in some depth in his submission. If taking a neutral position meant simply facilitating the collation of all facts and materials for presentation to the Inquiry then this was not necessarily consistent with representing the City in the City's best interest.

*(f) Instructions from the council are essential*

Mr McLeod was adamant that the Commissioners would need to agree to the role that McLeod's should take before they could properly continue in that role. If the role should be different to that expressed, then they should explain what they require and the lawyers must consider their position against that requirement.

As a result of the meeting, it was decided to deal with the matter of representation at a Special Meeting on 10 September 2004 at 2.00pm. Administration was requested to compile a report on the issue of representation before the Inquiry to be considered by the Joint Commissioners at this meeting.

**5. Letter to McLeod's Solicitors from Inquiry Panel dated 30 August 2004**

On 30 August 2004, Mr Staude wrote to McLeod's Solicitors identifying the main issues relating to representation. (A copy of this letter is attached to this report and marked Attachment 5.) The first was the issue of 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 other was whether Mr McLeod as a solicitor appointed by the City, may properly advise and represent the City's employees specifically those likely to give evidence before the Inquiry.

Mr Staude reiterated his view that the City had no corporate interest in the findings and recommendations of the Inquiry which are capable of being represented by legal counsel. The basis for this, is that the City is constituted by the ratepayers and residents, its interest coincides with the public interest which is the duty of counsel assisting the inquiry to represent. The public interest lying in the proper administration of the *Local Government Act 1995*, which in s. 1.3(1)(d) provides for a framework for the administration and financial management of local government and for the scrutiny of their affairs. The Act is intended to result in greater accountability of local governments to their communities.

The Commissioners were considered to have no interest as the terms of reference do not extend beyond the date of their appointment. It was commented that they are only concerned 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 of the act it was submitted, did not give rise to any duty on the part of the Commissioners to resist any adverse findings which the Inquiry might make. If it was correct, the Inquiry would become an adversarial contest and its statutory function would be obstructed.

Mr Staude was also of the view that the officers of the City have individual interests, not capable of being jointly represented. Mr Staude informed McLeod's Solicitors that he would not be agreeable to Mr McLeod attending any further interviews with potential witnesses. While Mr Staude had no objection to McLeod's Solicitors advising the City's administration with respect to their obligations to comply with any summons or request for information, he did not see any basis at that stage, upon which leave should be granted to Mr McLeod to represent the City at the public hearings.

Mr Staude requested information as to –

- Whether Mr McLeod was instructed by the Commissioners or the Acting CEO; and
- What role, if any, had he been instructed to take with respect to the Inquiry.

**6. *Meeting with representatives of the Inquiry Panel, City Administration and McLeod's Solicitors dated 1 September 2004***

A meeting was held with Mr John Staude regarding matters pertaining to the Inquiry. It was clarified that Mr Staude had received a copy of the notification advising that the Joint Commissioners would be holding a special meeting on Friday 10 September to discuss the issue of the City's legal representation.

Mr Staude was advised that the administration would be preparing a report for the Joint Commissioners consideration on the issue of legal representation and that the report would be available from Tuesday 7 September 2004. It was also requested that Mr McLeod's draft submission not be considered as representing the City's position until the Joint Commissioners had decided upon the issue. This was acknowledged by Mr Staude and it was agreed that no action would be taken to finalise any entitlements to representation by the City until after the Joint Commissioners decision.

***Conclusion***

From an examination of the events that have transpired over the past months and the documents passing between the Inquiry and the City's Solicitors, it is the maintained view that the City does have an interest in the Inquiry. The primacy of this position is based on s. 8.27 of the *Local Government Act 1995*. This section states –

**s. 8.27 Local government may have to meet inquiry costs**

If –

- (a) an Inquiry Panel makes findings adverse to a local government, or to its council or any member, or to any of its employees; or
- (b) 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.

It is important to note that s. 8.27(a) recognizes the possibility of adverse findings against the local government itself (i.e. the City), in addition to any adverse finding against the Council, any member or any employee.

This section states that a local government may be ordered to pay all or part of the costs of the Inquiry if the Inquiry Panel makes findings adverse to the City, or its Council, or any member, or to any of its employees. The Panel Inquiry 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.

The burden of a costs order would fall on the ratepayers of the City indirectly and on the inhabitants generally. The costs, if this should occur, would either have to be derived from reserves or from operating budgets thereby diverting monies from City projects. The level of costs would also, in the absence of Counsel representing the interest of the City, be without mitigation should an order be made. It is realised that submissions concerning costs orders may be made to the Minister after the completion of the Inquiry, yet the interest of the City during the hearing will not be represented. The City therefore has no influence on the collation or arrangement of facts through the evidence process, and no means of mitigating the number of adverse findings or the severity of the findings against itself.

The Inquiry Panel will not be interested in acting in the interest of the City or considering actions based on the facts in a more favourable light. Counsel representing the City may be able to present the position of the City in the light most favourable to it in terms of the possible outcomes of the Inquiry.

It is the opinion of the City's Solicitors that the City as an entity has a recognisable and real interest in the Inquiry that should be represented. Should a Ministerial Order pursuant to s. 8.27 of the Act be made at the end of the Inquiry Hearing, it is the City and not the individuals against whom adverse findings have been made, who will be required to pay the costs of the Inquiry. To hold the view that no interest exists in this instance is to deny to the City and to its ratepayers the ability to participate actively and constructively in an Inquiry that directly affects them.

It should be noted that should the Commissioners be of the view that the City does have an interest in the Inquiry proceedings, and if the application for leave to appear is denied, there is recourse to the Supreme Court for the matter to be determined.

As a final note, the Commissioners need to address the matter of employees' legal representation before the Inquiry. It is the opinion of the City's Solicitors that there is presently no apparent basis to separate the City from its Administration. 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. It is only when an employee appears to have acted improperly then to that extent the employee may have acted otherwise than in performance of his/her function. If that were to occur, the City's lawyer would then be obliged not to provide legal assistance to that employee and advise them to seek separate legal representation.

It is considered an interesting position that employees who to date have not had allegations of wrongful acts made against them be required to fund their own representation before the Inquiry. In any other proceeding whether a planning matter or an appeal against a decision of the Council or pursuant to delegated authority, the City would provide support to the individual employee. The City has a fiduciary duty as an employer to its employees to ensure a safe working environment and to provide support to employees in defence of their proper discharge of their legislative functions.



Based on the City's legal advice, it is strongly recommended that the Joint Commissioners resolve that the City does have an interest at the Inquiry and instruct McLeod's to make further submissions to the Inquiry on behalf of the City.

**Statutory Provision:**

Part 8 of the *Local Government Act 1995*.

**Financial Implications:**

While it is difficult to estimate the cost of the Inquiry it is likely to be significant, with some indication provided by the Minister for Local Government and Regional Development in Parliamentary Question Time in the Legislative Council on 14 April 2004 in response to Question No. 360. The Hon. Minister stated that the Government had approved a budget of \$700,000 for the Panel Inquiry.

**ATTACHMENTS**

Attachment 1 - Agenda for Meeting with the Joint Commissioners prepared by the Inquiry Panel dated 16 June 2004.

Attachment 2 – Letter to the Executive Officer from McLeod's Solicitors dated 13 July 2004.

Attachment 3 – Transcript of City of Joondalup Inquiry heard on the 22<sup>nd</sup> day of July 2004.

Attachment 4 – Comment by McLeod's on Issues Raised by Commissioner Smith in her Fax of 25<sup>th</sup> August Legal Assistance to Officers.

Attachment 5 - Letter from Mr Staude to McLeod's Solicitors dated 30 August 2004.

**VOTING REQUIREMENTS**

Simple Majority required.

**RECOMMENDATION**

**That the Joint Commissioners RESOLVE that the City does have an interest at the Inquiry capable of being represented by legal Counsel at the Inquiry Hearing and instruct McLeod's solicitors to make further submissions to the Inquiry for leave to appear on behalf of the City at the Inquiry Hearings.**

*Appendix 1 refers*

*To access this attachment on electronic document, click here:*

[Attach1agn100904.pdf](#)