



**SHELLHARBOUR CITY COUNCIL**  
**PUBLIC INQUIRY**

**REPORT**

**4 July 2008**

**Richard Colley**

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## **EXECUTIVE SUMMARY**

On 31 March 2008, the Minister for Local Government, the Hon Paul Lynch MP, appointed me as Commissioner to hold a Public Inquiry into the Shellharbour City Council.

I was to inquire, report and provide recommendations as to whether all civic offices at Shellharbour City Council should be declared vacant. In doing so, I was to have particular regard to the conduct of Councillors, their relationships with staff and whether Councillors have adequately, appropriately and reasonably carried out their roles and responsibilities in the best interest of all ratepayers and residents.

The terms of reference also allowed me to have regard to other matters that warrant mention, particularly when such matters may impact on the effective administration of the area. While I was mindful of this, my primary focus during the course of the Inquiry was the operation and performance of the governing body of Council and the conduct of individual Councillors.

As part of the Inquiry, extensive documentation was obtained from Council and the Department of Local Government, public submissions were received, public hearings were held and persons affected by the Inquiry were offered the opportunity to make oral and written submissions in reply.

The Council was elected to office on 27 March 2004. Only 3 of the 13 councillors were members of the previous Council. The evidence indicates that there were problems from early in the term. The General Manager reported that he considered himself under a “state of siege” after the Councillor induction weekend.

In 2005 the Council was subject to a Promoting Better Practice Review, which was finalised in July 2006. The Department of Local Government made 48 recommendations in the final Review report. A number of these recommendations related to governance matters. It is apparent that the Council

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has not adequately addressed some of the matters that were the subject of recommendations.

Prior to my appointment, both the Minister and the Department of Local Government had written to the Council about the need for it to improve its performance. The Hon Ernie Page OAM, the Chairperson of the Ministerial Advisory Council, attended Council in December 2007, to reiterate the Minister's concerns, and to warn the Council as to what the consequence would be if it failed to heed the warning.

In March 2008, the General Manager of the Council wrote to the Department, reporting on the implementation of the PBP recommendations. He advised that the governance situation at Council continued to deteriorate. It was subsequent to the receipt of this letter that the Department recommended to the Minister that a Public Inquiry be held pursuant to section 740 of the *Local Government Act 1993*.

It is apparent that there have been improper disclosures of confidential Council information during this term of Council. As a consequence the Council instigated unprecedented legal action, in an endeavour to seek a determination from the Land and Environment Court as to the identity of the person or persons who disclosed the information. While the disclosure of confidential information is a serious matter, Council's attempts to identify the sources of the disclosures have been costly and largely ineffectual.

Having now completed the Inquiry, I have found that:

- Relationships amongst Councillors and between Councillors and staff have been irretrievably damaged.
- Councillors have failed to demonstrate, through their statements and actions, a proper understanding of their roles and responsibilities.
- There have been frequent acts of disorder during Council meetings.

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- The manner in which Council meetings have been chaired has contributed to the current circumstances of Council.
  - All of the Councillors share a collective responsibility for the failure of the Council to respond to disorder at Council meetings in an appropriate manner.
  - The manner in which the Council has implemented the Model Code of Conduct for Local Councils in NSW has been flawed.
  - The governing body of Council has failed to fulfil its charter to be a responsible employer in regard to its management of the General Manager.

The findings section of this report details my formal findings in regard to the terms of reference. The analysis section of the report discusses the relevant evidence.

I have recommended that all civic offices at Shellharbour City Council be declared vacant and that an Administrator be appointed until the Council elections in 2012.

In making this recommendation, I have been mindful of the depth and extent of the problems that need to be addressed by Council's Administrator/s, should the Minister choose to accept my recommendation. A newly elected Council faces inherent challenges; it would be unreasonable and untenable to expect a newly elected Council to deal with these challenges as well as the legacy of poor performance of the current Council.

This report makes further recommendations as to matters that should be addressed by the Administrator/s and also recommends that the Department provide further guidance to councils on the reporting of contractual conditions of senior staff.

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## INTRODUCTION

This is my report as Commissioner concerning the Public Inquiry (“the Inquiry”) held under section 740 of the *Local Government Act 1993* (“the Act”) into Shellharbour City Council (“the Council”) and is presented to the Minister for Local Government.

## TERMS OF REFERENCE

On 31 March 2008, the Minister for Local Government, the Hon Paul Lynch MP, appointed me as Commissioner to hold a Public Inquiry into the Council.

The Terms of Reference authorised for the Inquiry are:

*"To inquire, report and provide recommendations to the Minister for Local Government as to whether all civic offices at Shellharbour City Council should be declared vacant.*

*The Inquiry will have particular regard to:*

- 1. The conduct of the elected representatives of council (whether individually or collectively as the governing body of council) including their relationships with senior and other staff of council.*
- 2. Whether the elected representatives fully understand their roles and responsibilities and have adequately, appropriately and reasonably carried out their roles and responsibilities in the best interests of all ratepayers and residents.*
- 3. Any other matters that warrant mention, particularly when it may impact on the effective administration of the council area.*

*The Commissioner may make other recommendations as the Commissioner sees fit."*

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## **ASSISTANCE TO THE COMMISSIONER**

I appointed Mr Daniel Meltz as Counsel Assisting pursuant to section 740(4) of the Act and sections 7 and 12 of the *Royal Commissions Act 1923*. I authorised Mr Richard Murphy to assist in the conduct of the Inquiry under the provisions of section 12 of the *Royal Commissions Act 1923*.

## **PROCEDURAL MATTERS**

Public notice of the Inquiry was published in the Sydney Morning Herald, the Illawarra Mercury and the Lake Times newspapers in April 2008. The notice included the terms of reference. The notice invited submissions relevant to the terms of reference. A Notice of Hearings was subsequently advertised in the Illawarra Mercury and the Lake Times.

Information related to the Inquiry was published on a dedicated website. The information included the Inquiry's terms of reference, a copy of the Notice of Hearings, a detailed information paper outlining the Inquiry's procedures and the publicly available submissions.

The Mayor and General Manager were notified in writing of the Inquiry. Letters were also issued to each of the Councillors with a copy of the Notice of Inquiry. Councillors were invited to make a submission relevant to the terms of reference of the Inquiry. A similar letter was sent to the General Manager inviting submissions from him and from Council staff.

The Office of the Commissioner wrote to Council on a number of occasions asking for certain documentary evidence in relation to matters relevant to the terms of reference. The Inquiry also sought information relevant to the terms of reference from the Department of Local Government ("the DLG"), the Independent Commission Against Corruption and the NSW Ombudsman.

Submissions were required to be lodged by 28 April 2008. However, some submissions received after this date containing information relevant to the terms of reference of the Inquiry were accepted.

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## **Procedure at hearings**

A preliminary hearing was held on 21 April 2008.

Evidence was obtained during hearings held over 7 days from 26 to 29 May 2008 and from 2 to 4 June 2008.

A further hearing was held on 11 June 2008 to hear oral submissions in reply and closing submissions from the Counsel Assisting.

During the hearings, the Counsel Assisting and myself asked questions of witnesses in relation to matters relevant to the terms of reference. Questioning and cross-examination of witnesses by any other party was permitted only by my leave.

I indicated that I would not allow cross-examination to be used for the purpose of rebutting evidence or putting a counter-argument. There were other means offered and available to affected parties for doing this.

Prior to the hearings, I received an application from the Council to be represented by Mr David Clark and Mr Gerry Holmes. I granted leave to Mr Clark and Mr Holmes to appear as Council's representatives. Leave was also granted to Mr Bruce McCann who appeared on behalf of the Council staff called as witnesses, Mr John McEwan who appeared on behalf of Mayor Hamilton, Mr Mark Johnston who appeared on behalf of Clr Greig, Mr Sachin Naidu who appeared on behalf of Clr Hawker and Mr Martin Culleton who appeared on behalf of Clr Rose.

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

During the hearings, the Inquiry heard from the Mayor, all the other Councillors with the exception of Clrs Stewart and Bailey, the General Manager and several other staff. The Inquiry also heard from a number of members of the community, who had made a request to be heard by the Inquiry and/or where

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the Counsel Assisting or myself considered they had information that may be relevant to the terms of reference.

### **Procedural fairness**

In my opening speech, I indicated that I would allow all Councillors or their representatives the opportunity to make oral or written submissions in reply to evidence heard during the course of the hearings. I indicated I would prefer such submissions to be made in writing and advised that these submissions could be made at any time during the hearing.

Councillors, Council staff and any other person whose interests were potentially adversely affected had the opportunity to make submissions in reply. At the hearing held on 4 June 2008 I advised that I would hear oral submissions in reply on 11 June 2008 and receive written submissions in reply until 5 pm on 25 June 2008.

To assist in making submissions, a copy of the transcript of the hearings was provided to Council. In providing a copy to Council, the Officer Assisting the Inquiry asked that it be made available to Councillors and staff who gave evidence. A copy of the transcript was provided to Counsel granted leave to appear. Mr Peter Moran was also provided with a copy of the transcript for days 2 – 8. Mr Bernard Payne was provided with a copy of the transcript for Day 8.

There were no applications from Councillors, Council staff or their respective Counsel to make an oral submission in reply.

Six members of the public sought my leave to make an oral submission in reply. I granted leave to three members of the public who considered that material raised in the course of the hearings had the potential to have an adverse impact on them.

I received some written submissions in reply from members of the public. I have not canvassed the nature and content of those submissions in this report, as I do not intend making any adverse finding in relation to the individual conduct of

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the persons who made those submissions. Nor have I referred or relied upon them in any way, and in particular I have not considered them in making my findings in relation to the terms of reference.

The Inquiry received written submissions in reply from the governing body of Council (“Council’s submission in reply”), from Mr Culleton on behalf of Clr Rose (“Clr Rose’s submission in reply”), from Heard McEwan Legal on behalf of Clr Hamilton (“Clr Hamilton’s submission in reply”), from Clr Thomas Hawker (“Clr Hawker’s submission in reply”), from Clr Michele Greig (“Clr Greig’s submission in reply”), from Clr Helen Stewart (“Clr Stewart’s submission in reply”) and from Mr Brian Weir (“the General Manager’s submission in reply”).

Following the conclusion of the hearings, I received correspondence from Mr John Kossieris of Dunmore Equestrian Centre Pty Ltd. It raises a number of concerns about the conduct of Council staff and refers to him being served with “Court documentation”. It is beyond the scope of this Inquiry to consider the merit of the Development Applications referred to in his correspondence and the timing of his submission precludes me from giving it proper consideration.

I have published extracts from some of the submissions in reply and I have published Clr Hawker’s final submission in reply as an Appendix to this report. I have not cited Clr Stewart’s submission in reply as it was endorsed as being “Private and Confidential”. I have not published all of the submissions in reply because some contain explicit and implicit criticisms of persons other than the author of the submission and those persons so criticised have not had the opportunity to respond to those criticisms.

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## **FINDINGS**

As Commissioner, I was appointed to inquire, report and provide a recommendation to the Minister for Local Government as to whether all civic offices at Shellharbour City Council should be declared vacant. In doing so I was required to have regard to three specific terms of reference. This section of the report details my findings in relation to each specific term of reference. My recommendations to the Minister are detailed in the following section of the report.

### **TERM OF REFERENCE 1**

*The conduct of the elected representatives of Council (whether individually or collectively as the governing body of Council) including their relationships with senior and other staff of council.*

1. Some Councillors have engaged in behaviour that could be determined to be misconduct.
2. There have been frequent acts of disorder during Council meetings.
3. Relationships amongst Councillors and between the Councillors and staff have been irretrievably damaged.
4. Councillors have failed to have due regard to the professional advice of Council officers and this has had a detrimental effect on the relationship between Councillors and Council staff.

### **TERM OF REFERENCE 2**

*Whether the elected representatives fully understand their roles and responsibilities and have adequately, appropriately and reasonably carried out their roles and responsibilities in the best interests of all ratepayers and residents.*

5. Councillors have failed to demonstrate, through their statements and actions, a full understanding of their roles and responsibilities.

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6. Councillors collectively have failed to have due regard to the statutory, policy and procedural requirements and frameworks within which they are required to operate.
  7. The governing body of Council has failed to fulfil its charter to be a responsible employer in regard to its management of the General Manager.

### **TERM OF REFERENCE 3**

*Any other matters that warrant mention, particularly when it may impact on the effective administration of the council area.*

8. The manner in which the Council has implemented the Model Code of Conduct for Local Councils in NSW has been flawed.
9. The manner in which Council meetings have been chaired has contributed to the current circumstances of Council.
10. The General Manager has failed to report to the Council annually on the contractual conditions of senior staff as required by s. 339 of the Act.
11. The current number of councillors (13) and the current ward structure (6) is an impediment to good governance.

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## RECOMMENDATIONS

Having regard to my findings, I recommend that:

1. All civic offices at Shellharbour City Council are declared vacant as soon as possible.
2. An Administrator/s be appointed until the ordinary council elections scheduled for 2012.
3. The local government area is divided into three wards, with 3 councillors each.
4. The Council, in consultation with the Department of Local Government, implement all outstanding recommendations of the Promoting Better Practice Review that remain relevant.
5. The Administrator/s review Council's performance, plans and forecasts in relation to Shell Cove, and ensure the adequacy of the ongoing supervisory and reporting arrangements.
6. The Council review and revise its procedures for public participation and community consultation, having regard to the relevant obligations imposed by section 8 of the Act for such consultation and for the involvement of the public and users of facilities and services.
7. Prior to the next election being held, the Council review its delegations, policies and procedures and ensure a comprehensive induction and ongoing training program is available to support councillors in the proper exercise of their roles and responsibilities.
8. Guidelines are provided to general managers on the content of the annual report to councils on the contractual conditions of senior staff, to facilitate comprehensive reporting on such matters.

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## **ANALYSIS**

This section of the report provides the analysis on which my findings are based.

## **BACKGROUND**

### **Changes in the composition of Council arising from the election**

Council was elected on 27 March 2004 with 8 Australian Labor Party (“ALP”) endorsed candidates and 5 independents.

Only three of the current Councillors (Clrs Bird, Briggs and Hawker) were on the previous Council (although it should be noted that Clr Hamilton and Clr Greig had previously served as councillors).

None of the independent Councillors had served previously as a councillor.

The Mayor had not previously fulfilled that role.

The ALP Councillors gave evidence that there was a caucus of ALP councillors that operated during the term of Council. While it is apparent that some of the independent Councillors met as a group early in the term of Council, there is no evidence that they met on an ongoing basis.

Overall, the governing body of Council elected in 2004 lacked experience as Councillors, the Councillors lacked experience working with each other and they lacked experience working with Council staff. It is not unreasonable to conclude that these factors have contributed to the current circumstances of Council.

This report discusses actions and factors that could have helped meld such a group into a functional governing body. It considers matters such as councillor induction and training, the Promoting Better Practice (“PBP”) review process, the Mayor’s approach to his role, the composition of Council committees, the provision of councillor briefings, the General Manager’s approach to his role and the use of the Code of Conduct.

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## **Council staff**

The staff of Council who gave evidence generally had extensive experience in local government. The experience of the General Manager, the Director Operations and Services and the Director Community Planning and Strategies, while extensive, has been primarily gained while working for this Council.

## **Councillor Induction**

Shortly after the election, the General Manager arranged for Councillors to be provided with an induction weekend at Jamberoo. He gave evidence this was an approach he had used with the previous Council to good effect.

It was intended that all Councillors attend and stay overnight at a conference centre in Jamberoo. It potentially could and should have been an opportunity for the Councillors to get to know each other and the senior staff. It could have also been an opportunity for the more experienced Councillors to share their knowledge about local government.

It was evident from the testimony of the General Manager that, from his point of view, the seeds were sown at that induction weekend whereby he and some Councillors would eventually lose trust amongst one another.

Mr Weir gave evidence that *“I don't think I ever recovered from the shock of what happened to me a week or two after Jamberoo.”* He was asked to describe what happened after Jamberoo and he responded:

*“The last thing on the agenda at Jamberoo as I recall was, where do we go from here. We had barely touched the surface in terms of what you need to know, we were trying to give ... a basic overview of things, to give ... enough information to get through the next few council meetings, bearing in mind maybe three quarters of the council had not been in the last council. And there was just this incredible media frenzy blew up, including some of these councillors attacking the induction, attacking the training, attacking the cost, attacking the venue, and it just, well, how can you go forward, we have just blown all this cost, we have blown this*

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*partnership, we have blown - and that just really put me on the back foot in terms of, well, how do I take this forward."*

He went on to state, *"after Jamberoo I think I was put very much under siege, I believe, for the next 18 months"*.

Mr Weir was asked to comment on the level of engagement of Councillors in the Induction process. While he qualified his answer by stating that *"It is a long while ago and a heck of a lot of water has passed under the bridge"* he went on to state *"This whole thing is about there not being trust. I didn't feel, compared to the previous induction, that there was an engagement already, a trust and a respect and an acceptance of what we were saying."*

Mr Webster also gave evidence about the engagement of Councillors at that initial induction and training. He responded that it was:

*"Very disappointing. I think what we were trying to do with that induction is what we have done with previous councillors, to get them in a forum where we could work with them, bring them up to speed on what was happening with the council, some ideas of council policies as they stood at the present time, give them an understanding of what their roles and responsibilities were, and in fact there were consultants we had facilitating the meetings.*

*I think it was enormously important that they took heed of what was being said and I know all the Council staff freely devoted their time and resources to provide for information and presentations to that, that we were very keen to see it work, but the disappointment we got was some councillors selectively attended sections of it, but then councillors were very vocal in the media of their criticism and the total waste of community money on having such a function, and it showed me that they have completely lost the point.*

*For a weekend where we were supposed to develop partnerships, in fact we went the other way, there was a distinct line between some*

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*councillors and the staff and we were heading down a path of conflict rather than one of partnership.”*

The Mayor testified that he didn't attend all sessions as he had a prior commitment to play bowls. He gave evidence that he *“would have expected most councillors to attend, especially the new councillors to attend, and I'm not saying I'm different, but I would have expected most of them to attend as a priority, but other commitments may have - you know, like if one of their daughters was getting married, you wouldn't expect them, you know, for extenuating circumstances, sure. There may have been others the same as myself.”* It was not clear from the evidence that any of the Councillors who did not attend all of the sessions failed to do so because of a need to attend a significant event of the type alluded to in the Mayor's testimony.

### **Early Concerns**

Early on in the term of Council the General Manager had cause to write to the Mayor about the situation developing at Council. The memo, dated 19 October 2004, referred to the *“deteriorating situation over the last six months of various situations and circumstances”*. The memo set out concerns in relation to meetings and possible breaches of EEO policies of Council and planning matters where Council officers' recommendations were not necessarily being followed, in the absence of substantial grounds not to. Cllr Hamilton apparently shared the concerns as he had cause to write to Councillors on 1 November 2004 in relation to Councillor conduct, attaching a copy of the memo from the General Manager.

### **The Model Code of Conduct for Local Councils in NSW**

The requirement for all councils in NSW to have a Code of Conduct dates back to 1994. In 2004, the *Local Government Act 1993* was amended to require councils to adopt a Code of Conduct that incorporated the provisions of a Model Code prescribed by the regulations. The Model Code came into effect on 1 January 2005. Council adopted the Model Code in February 2005. A revised

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Model Code was promulgated in June 2008. The analysis in this report has been based on the Council's adopted Code of Conduct and the original Model Code.

The introduction of the Model Code was accompanied by changes that provided for the suspension of individual councillors for misconduct. The Model Code is predicated on Councils taking responsibility for dealing with complaints about misconduct in the first instance.

This is important background to the circumstances of Council because it indicates that within twelve months of being elected, the Council was provided with a tool which could and should have been used to deal with misconduct but which wasn't. The Council's adoption and implementation of the Model Code of Conduct is discussed later in this report in more detail.

### **The Promoting Better Practice Review**

The DLG conducted a PBP review during 2005, which was finalised in July 2006. The final report was sent to the Council on 2 August 2006 and tabled at a Council meeting on 15 August 2006. While the report described Council operations in a generally positive manner, it details concerns about the Councillors and Council meetings. The report included 48 recommendations, a number of which pertained to governance matters.

According to information on the DLG's website, the PBP program was designed in part as an "early intervention" program. In this regard, the PBP Review process at Shellharbour gave the Council the opportunity to reflect on its own performance and to benefit from the expertise and perspective of the DLG's reviewers.

The General Manager wrote to the DLG twice setting out progress reports on how Council was dealing with the implementation of the recommendations. It was not evident that Councillors were aware of the specifics of the response to the recommendations, and if they were not, that any particular effort was made

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by them to acquaint themselves with the Council's ongoing response to the recommendations.

The issues identified in the PBP report, its recommendations and Council's response are discussed in further detail later in this report.

### **Breaches of Confidentiality/Land and Environment Court Proceedings**

There have been a number of websites that have been used by persons with an interest in the affairs of the Council to post comments about the Council. It came to Council's notice that confidential Council information was being posted on the websites. Council subsequently embarked on an extensive and expensive investigation into Councillors, members of staff and certain members of the public. This investigation gave rise to a decision to undertake proceedings in the Land and Environment Court to seek a determination as to the identity of the person or persons who leaked the confidential information.

It is apparent from the evidence that the impact of the leaking of confidential information and the manner in which Council resolved to deal with it has been pervasive. Mr Davies from the DLG commented on this in his evidence:

*“certain information was being withheld from councillors, confidential information, because they couldn't be trusted with it. Clearly, that has arisen as a result of the Land and Environment Court litigation, but on its face, that suggests to me quite a serious breakdown in what is a key relationship between the operational side of the council and its governing body. Councillors are the key decision makers, they need access to information in order to make informed decisions. A senior staff member with sufficient distrust for the councillors as to feel reluctant to provide that information, that's a major concern”.*

### **Councillor training**

The Inquiry examined whether a lack of councillor training may have been a causal factor in the current situation faced by Council. Given the relative

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inexperience of the majority of Councillors, it is not unreasonable to conclude that significant training would have been required or at the very least been beneficial. The PBP review recommended that further training be provided and the DLG has recently issued a Circular (08/22) that stresses the need for Councils to provide induction and training following the election.

One recurrent theme identified in the evidence was that Councillors, by and large, were open to, and required, further training. However, Cllr Rose expressed a somewhat contrary view in December 2005 when he responded to a survey for the PBP review that Councillors would not benefit from training “*one iota*”.

The Council clearly had the capacity to fund councillor training and there are organisations such as the Local Government and Shires Associations that offered a range of courses targeting the needs of councillors over the course of this term of Council.

Council’s section 252 policy, on the payment of expenses and provision of facilities to Councillors in relation to the discharge of their civic duties, includes adequate provision for funding for attendance at seminars and conferences by Councillors. Clause 1.16 of the current version of the policy provides that each Councillor is eligible to attend up to two (2) conferences and seminars per year, in addition to attendance at the Local Government Association’s Annual Conference, provided the total cost does not exceed \$3000 for each individual councillor; there is also provision for attendance at further seminars with approval of the Mayor/General Manager.

Councillors gave evidence that they had made use of this provision to attend conferences and seminars.

The Local Government and Shires Associations scheduled a weekend training program for Councillors that was held in Wollongong on 18 and 19 August 2006. While all councillors were offered the opportunity to attend this training, only 4 councillors took up the offer.

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The PBP recommended that the Mayor undertake further skills development to assist him in chairing Council meetings. He does not appear to have undertaken any structured or formal training in response to this recommendation. However, the evidence does indicate that he sought advice from a number of sources.

“In-house” training has been provided to Councillors during this term. This has included, amongst other things, a weekend induction session at Jamberoo shortly after the election in 2004, training in relation to the introduction of the Code of Conduct in or about March 2005 and a seminar on governance in August 2006.

There was evidence that Councillors have attended a training programme on the Model Code of Conduct for Local Councils in New South Wales that was conducted by an accredited facilitator.

Following the onsite component of the PBP Review in December 2005, Council arranged for a seminar on governance issues. This seminar is canvassed in Council’s own submission to the Inquiry. The seminar was conducted on 14 August 2006. One of the key messages provided to Councillors (and I stress this is a message that is documented in Council’s own submission) was that Councillors “*need to act in accordance with the law, council’s Code of Conduct, and associated council policies and protocols when exercising civic duties.*” The attendance sheet, which was submitted by Council in its submission to the inquiry, indicates that all Councillors with the exception of Clrs Greig, Mifsud and Rose attended. Clr Greig has submitted that she was overseas at the time of this seminar and does not recall being provided with any papers from the seminar when she returned.

By and large Councillors were satisfied that they had had access to training, although certain Councillors were critical of the extent and content of that training. For example, Clr Greig was very critical of the quality of the training in her written submission to the Inquiry.

Mr Weir gave evidence that the initial training appeared not to have worked as it had in previous years and with previous councils.

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This lack of training, or lack of understanding of the training, appears to have had consequences in the divide between operational matters and policy matters, with the effect that certain Councillors lacked and/or failed to demonstrate an understanding of their roles in the discharge of their duties. This is particularly apparent in areas such as planning and development, tenders, meeting practice, interaction generally with staff, and management of the General Manager's contract.

Some Councillors read DLG circulars on occasion but it was not the case, with some exceptions, that Councillors on the whole were sufficiently concerned so as to have sought or required further training outside of that which was provided.

I have made a finding to the effect that Councillors lacked a requisite understanding of their roles and responsibilities. Had they had such an understanding, they would have presumably recognised the need for further training and been more proactive in seeking such training.

The General Manager in his submission in reply, has responded to any potential criticism of himself in regard to Councillor training. The relevant section of his submission is reproduced hereunder.

**Extract – General Manager's submission in reply**

**Training**

If it be suggested that I in any way failed to facilitate or assist the Councillors to have appropriate or sufficient training then that suggestion is denied. I do not believe there is evidence before the Inquiry of lack of knowledge (due to lack of training) but rather a reluctance/refusal by some Councillors to apply that knowledge and/or accept advice from Council's management.

In addition, throughout this term all Councillors have been made aware of training opportunities. They have been encouraged to attend either external or in house courses. Ample funds are allocated annually for seminars/training should Councillors independently seek training.

Any suggestion that I have not given Councillors sufficient opportunities to obtain training is at odds with the evidence.

Council's submission in reply asserts that inadequate steps were taken to ensure Councillors were made aware of the importance of undertaking

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professional development to undertake their role. While it may be the case that more could have been done in this regard, I am of the view that the need for professional development should have been self-evident to Councillors within a short time of being elected, if they were applying themselves to their new role in a diligent manner. It is self-serving of the Councillors to seek to lay blame elsewhere if they have not pursued professional development.

While I have recommended that a structured training program be prepared for an incoming Council, it will remain contingent on individual Councillors to critically assess their own training needs and for them to accept personal responsibility for ensuring they are capable of exercising their roles and responsibilities in a proper manner.

### **Warnings**

During the course of 2007, the Minister and the DLG became increasingly concerned about the cost of the litigation and the overall governance situation at Council. During 2007 both the Mayor and the General Manager had expressed concerns to the DLG about the situation at Council.

During the term of Council both the Minister and the DLG wrote to the Council to convey their concerns and to warn Council about the need to improve its performance.

The position was such that by 3 December 2007, the Hon. Ernie Page was dispatched by the Minister to, in his words, '*in effect read them the riot act*'. Mr Page indicated that it was expected that there would be an '*immediate and permanent change in council's performance*' and that if there was no change, the next step would be an Inquiry and the possible appointment of an Administrator.

On 17 March 2008, the General Manager wrote to the DLG to report on the Council's progress in implementing the PBP review recommendations. In that letter, he indicated that he had delayed submitting the report as he wanted to

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see how Council responded following Mr Page's visit. In the letter he stated that he continued to be:

*“extremely concerned with the governance situation at the Council, which I believe has substantially deteriorated since I last formally reported on June 1. I reaffirm my comments made previously that I am unable to fulfil my statutory role and duties to the level I would expect in normal circumstances. I am also unable to devote sufficient time to my role with respect to the \$1.5 bn Shell Cove Project. The present situation is in my considered opinion most undesirable, and I am currently devoting much of my time to governance issues. It is my considered opinion that there has not been any improvement since the visit of the Minister's delegate, the Honourable Ernie Page in early December.”*

On 31 March 2008, the Minister signed the Instrument appointing me to conduct this Public Inquiry.

## **COUNCILLORS' ROLES, RESPONSIBILITIES AND CONDUCT**

The terms of reference required me to consider the roles and responsibilities of local councillors, the level of understanding Shellharbour Councillors had of those roles and responsibilities and the manner in which the Councillors have carried out their roles and responsibilities.

### **Regulatory context**

Section 8 of the Act contains a set of principles intended to guide councils in the way they carry out their functions. The Charter includes the following powers and functions that are particularly relevant to the terms of reference. It requires councils, amongst other things, to:

- exercise community leadership
- have regard to the long term and cumulative effects of their decisions

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- to facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government
  - to keep the local community and the State government (and through it, the wider community) informed about their activities
  - to ensure that, in the exercise of their regulatory functions, they act consistently and without bias, particularly where an activity of the council is affected
  - to be a responsible employer.

The Act prescribes the role of the elected body as being the governing body, the decision-making body of council. Section 223 of the Act provides that a councillor's role, as a member of the governing body, is:

- to direct and control the affairs of the council in accordance with the Act;
- to participate in the optimum allocation of council's resources for the benefit of the area;
- to play a key role in the creation and review of council's policies and objectives and criteria relating to the exercise of council's regulatory functions; and
- to review the performance of the council and its delivery of services, and the management plans and revenue policies of the council.

The section provides that a councillor's role, as an elected person, is

- to represent the interests of the residents and ratepayers,
- to provide leadership and guidance to the community, and
- to facilitate communication between the community and the council.

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The Act also stipulates that the elected body must determine an organisation structure, the positions within the structure that are senior staff positions and the resources to be allocated to the employment of staff. The elected body must appoint a General Manager on a performance-based contract.

To properly understand the roles and responsibilities of Councillors, it is necessary to consider them having regard to the roles and responsibilities of the General Manager and Council staff. The General Manager has the general functions of:

- the day-to-day management of the Council;
- exercising such functions as are delegated;
- appointing, directing and dismissing staff; and
- implementing Council's policies.

Chapter 14 of the Act places obligations on Councillors, Council delegates and staff of councils to act honestly and responsibly in carrying out their functions. These obligations are further defined in the Model Code of Conduct. Council's current Code of Conduct is based on the Model Code.

The Act, the Regulation and the Model Code of Conduct for Local Councils in NSW give certain guidance on the manner in which individual Councillors are to exercise their functions. One such duty is the requirement pursuant to s.439 of the Act that a councillor exercise "*a reasonable degree of care and diligence*" in carrying out his or her functions.

Clause 4.1 of the Council's Current Code of Conduct which was adopted by it on 16 February 2005 and last reviewed on 7 February 2007 (and which is required to be consistent with the provisions of the Model Code), states "*you must not place yourself under any financial **or other obligation** to any individual or organisation that might reasonably be thought to influence you in the performance of your duties*" (emphasis added).

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Clause 4.3 says Council officials have a “*duty to make decisions solely in the public interest*”. Clause 4.4 states Council officials “*must make decisions solely on merit and in accordance with your statutory obligations when carrying out public business. This includes making of appointments, awarding of contracts...this means fairness to all; impartial assessment; merit selection in recruitment and in purchase and sale of council’s resources; considering only relevant matters*”.

Clause 4.5 is headed “**Accountability**”. It states that Council officials “*are accountable to the public for your decisions and actions and must consider issues on their merits, taking into account the views of others. This means recording reasons for decisions; submitting to scrutiny, keeping proper records, establishing audit trails.*”

Clause 5.3 of Council’s adopted Code of Conduct is headed “**Being Objectively Aware**”. It states that Council officials “*must take all relevant facts known to you, or that you should be reasonably aware of, into consideration and have regard to the particular merits of each case. You must not take irrelevant matters or circumstances into consideration when making decisions.*”

While in a very broad sense some Councillors exhibited an understanding of the fundamentals of their roles and responsibilities, as between themselves and the body of Council under the Act, Regulations and the Council policies and guidelines, there is a marked incongruence between this understanding and the reality of the way in which Council has operated.

### **Code of Conduct**

The Model Code of Conduct for Local Councils in NSW was promulgated by regulation with effect from 1 January 2005. The manner in which Council has implemented the requirements of the Model Code was the subject of extensive examination during the course of the Inquiry.

Councils are required to adopt a Code of Conduct that is consistent with the Model Code of Conduct for Local Councils in NSW. Councils are required to

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appoint a Code of Conduct committee. The governing body is required to deal with misconduct occurring at meetings and misconduct allegations reported to it by the Conduct committee. The governing body is required to impose sanctions for misconduct on the part of a councillor or the general manager and in prescribed circumstances, the governing body can request action be taken to suspend a councillor for misconduct.

Section 440F of the Act defines misbehaviour of a councillor as any of the following:

- (a) a contravention by the councillor of the Act or the regulations;*
- (b) a failure by the councillor to comply with an applicable requirement of the Council's adopted Code of Conduct;*
- (c) an act of disorder committed by the councillor at a meeting of the council or a committee of the council.*

Section 440G prescribes a mechanism for the formal censure of a councillor for misbehaviour, s. 440H prescribes the process for suspension of a councillor and s. 440I stipulates the grounds for suspension. The grounds on which a councillor may be suspended from civic office for misbehaviour are that:

- (a) the councillor's behaviour has:*
  - (i) been disruptive over a period; and*
  - (ii) involved more than one incident of misbehaviour during that period, and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension, or*
- (b) the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.*

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Council minutes show Council adopted a new Code of Conduct on 16 February 2005 and that it appointed its first Code of Conduct committee. The DLG's PBP review report noted that Council had adopted a Code of Conduct that was consistent with the Model Code. By doing this, the Council armed itself with a tool to deal with misconduct. However, the evidence indicates that the Council has failed to make effective use of the Code.

The report provided to Councillors on 16 February 2005 about the Code and the minutes of that meeting are informative. The report clearly communicates that it was essential that Councillors properly understand the provisions of the Code, relevant legislation and regulations. The report refers to the likelihood of breaches of the Code by persons who did not quickly achieve a clear understanding of the new Code. The report indicated that the only legal option for Council was to stick as closely as possible to the DLG's Model Code and pointed out that the main area of change for Council was the requirement for establishment of a "Conduct committee" of Council, to be made up of the Mayor, General Manager and at least one independent person. The report noted the importance of proper training and the relevant council resolution provided for such training.

The minutes of the meeting of 16 February 2005 indicate all Councillors were present at the meeting and that the motion that resulted in adoption of the Code was carried unanimously. However the minutes also indicate *"The Mayor, on hearing comments made by Councillor Rose, gave Councillor Rose a warning and censured him and Councillor Mifsud stating that he would not accept verbal threats in the Council Chamber. He indicated that the comment he was referring to was that Councillor Rose would take this matter to the media."*

Not only are Councillors required to comply with the Code; as a member of the governing body, they are vested with the responsibility of determining whether there has been a breach of the Code and the taking of action in relation to any such determination. Given this, it was contingent on them to ensure they were well versed in the operation of the Code.

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The PBP report noted that many of the Councillors the review team spoke to appeared to lack a clear understanding of their obligations under the Code of Conduct.<sup>1</sup> This is surprising in that the Councillors themselves had adopted the new Code and they had received training before the time of the PBP onsite review.

Mr Davies, one of the Senior Investigators who conducted the PBP review gave evidence that there were numerous examples that indicated that Councillors did not comprehend their obligations under the Code. In his testimony he referred to an incident that occurred when the review team was onsite, where the Council officer who was responsible for councillor liaison was *“abused by a councillor over the phone, with the result she was reduced to tears.”*<sup>2</sup>

The DLG’s report made the point that *“Ultimately, Councillors are responsible for their own actions. However the fact that some Councillors apparently regularly conduct themselves in a manner that is inconsistent with their obligations is also due to the fact that they have been permitted to do so without any action being taken against them.”* The report went on to suggest that *“By taking appropriate action under the Code of Conduct and enforcing the disorder provisions of the code of meeting practice, council will not only discourage future breaches, but it will also serve an educative function in reinforcing to Councillors their obligations.”* The evidence available to me indicates that the Council failed to heed the advice.

The evidence available to the Inquiry relating to the period prior to 2007 indicates that there were perhaps only two or three matters referred to the Code of Conduct committee. Mr Davies of the DLG gave evidence at the hearings that at the time of the onsite component of the DLG’s review in December 2005 *“council had not in fact dealt with a single complaint under its Code of Conduct”*;

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<sup>1</sup> Department of Local Government, Review Report - Shellharbour City Council, July 2006. p. 9

<sup>2</sup> The General Manager has submitted in reply that this matter was not referred to the Code of Conduct Committee because the councillor *“phoned up and apologised later that same day”*.

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at this point in time the Council had had the Code of Conduct available as a tool for near on a year. He was asked if this was unusual and he commented that it was unusual in relation to Shellharbour, given the conduct he observed and the incidents the DLG was aware of.

The General Manager has submitted in reply that *“Only four complaints were received for possible referral to the Conduct Committee from the beginning of 2005 to October 2007.”* Such an inordinately low number of complaints is at odds with other evidence about concerns about Councillor conduct.

Two of the initial Code of Conduct complaints were made against Clr Greig. The governing body did not deal with the matter until November 2007. Ultimately, this matter was not the subject of a report from the Code of Conduct committee to Council and the Council resolved to discontinue any action in relation to the matter and pay the legal costs of the Councillor concerned. The Model Code requires the Mayor to be a member of the Code of Conduct committee but in regard to these complaints, he did not fulfil his responsibilities on the grounds that the subject of the complaint was Clr Greig, a fellow ALP Councillor and on that basis he considered himself conflicted.

The November 2007 report to Council indicates the Code of Conduct Committee’s handling of the matter was problematic. The General Manager wrote in the report that *“there were numerous flaws in the formation of and the procedure adopted by the Conduct committee, as this was the first occasion the Committee had met. I believe that the Conduct committee exhibited a number of technical and legal breaches against Council staff and myself and in its overall operations. This view is confirmed by Council’s legal advisors.”*

The initial Chairperson of the Code of Conduct committee, The Hon Marcus Einfeld QC withdrew as Council’s Committee Chairman and the Mayor and General Manager appointed Mr G Barry Hall QC, based on the recommendation of Council’s Solicitor, Mr McCann, to replace him in September 2006. According to the General Manager’s report to Council, the Conduct committee was found by Mr Hall to have been acting

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unconstitutionally, because it should have, at all times, been constituted with five members, rather than three (there being only three because the Mayor and General Manager were not replaced).

The General Manager's November 2007 report to Council also indicates that Council's Solicitor considered the Committee could not hand down a credible decision because not only had its operations been so technically flawed but it had also not sought any evidence from Council in support of the complaints made. Mr McCann gave evidence about this matter at the hearings. He said "*It became a very expensive and protracted exercise.*" He went on to indicate that Mr Hall QC took the view that he could not simply pick up the reins and run with that matter, it would involve a complete rehearing, and that was just commercially unacceptable. Mr McCann indicated that both external members of the Committee shared that view.

The situation would appear to be that in late 2005 and earlier 2006 some Council staff had concerns about Clr Greig's conduct, these matters were referred to the Code of Conduct committee, the Code of Conduct committee made enquiries into the matter and at least two of the members of that Committee formed a view that the evidence did not indicate a breach. There were concerns about the operation/membership of the Committee and the concerns were such that a complete rehearing of the matter would have been required to make a proper report from the Code of Conduct committee to the governing body.

Clr Greig in her submission in reply, drew attention to the apparent view of the two members the Committee that they did not consider a breach had occurred. I have not made any adverse finding in relation to Clr Greig's conduct in relation to the matters that were the subject of the Code of Conduct complaint. It would be unreasonable for someone to draw any adverse inference about Clr Greig's conduct in relation to the matters that were the subject of complaint, merely on the basis that the complaint was made and referred to the Code of Conduct Committee.

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Ultimately, Council resolved as follows at its meeting on 13 November 2007: *"that the report be received and noted and that council take no further action in the matter, that Council pay the subject councillor's full costs in the matter."* When Cllr Greig was asked about whether she was satisfied with the manner in which the complaint was dealt with, she indicated the length of time was unreasonable.

The Minutes of Council Committee of the Whole meeting of 13 November 2007 also indicate that during the debate of this matter, Cllr Gillett moved a point of order that Councillors should not be attacking the Mayor while he was not there to defend himself; they also record that Cllr Leedham asked the General Manager if Councillors could take council officers to the Code of Conduct committee.

The apparent attacks on the Mayor at the very time that the Council was deliberating on a Code of Conduct matter suggests that some Councillors had little regard for the Code. Cllr Leedham's question displays a lack of knowledge on his part about the Code, given that it had, at that time been in operation for a number of years.

Another of the initial Code of Conduct complaints was against Cllr Rose in relation to the manner in which he communicated with Council staff. The General Manager determined to handle this matter by counselling Cllr Rose about his behaviour. While this may have been in the circumstances not an unreasonable course of action, it was ineffective, given Cllr Rose's own evidence of the manner in which he behaved toward staff in Council meetings, and his conduct at a briefing where he suggested that he and a Council officer *"step outside"* to resolve a matter. When Cllr Rose was asked during these proceedings whether the counselling was effective, he said *"Oh, yes and no. I took it on board."* Mr Weir was asked if it was effective and he responded *"Not really"*.

The Mayor gave evidence that the Council voted to disband its Code of Conduct committee. Council minutes indicate that Council resolved on 22 May 2007

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*“That, subject to the finalisation of outstanding business of the Committee, all independent (non-council) members of the original Shellharbour Council Conduct committee be discharged as at June 30th 2007”.* Pursuant to the same motion, the Council also resolved on that date *“That Council call for expressions of interest from persons of appropriate standing and qualification from within or outside of Shellharbour City, to serve as the independent members on this Council’s Code of Conduct committee for a period of two years.”* And *“That Council, as soon as possible, consider all expressions of interest and identify three appropriate persons from whom the independent membership may be selected on an ‘as required’ basis.”* It is apparent this resolution was not acted upon in a timely manner.

For a period of some months in 2007, the Council did not have an operational Code of Conduct committee. The Mayor confirmed this in his evidence at the hearings. The deterrent effect of having a process in place to deal with misconduct was not present during this period. There were no proper means for Council Officials and members of the public to have Code of Conduct complaints dealt with during this period.

The Mayor conceded that it was very important for Council to have an active Code of Conduct committee and that it should have been active throughout the entire term of council.

Council was provided with a report recommending reconstitution of the Council’s Code of Conduct committee in November 2007. However, the motion to accept the recommendation was not successful and the Mayor exercised his executive powers to reconstitute the committee in accordance with the recommendation. A number of observations can be made in relation to this issue.

First, a majority of the Councillors present at the meeting where the motion to reconstitute the committee was put apparently failed to recognise the statutory obligation on Council to appoint a Code of Conduct committee.

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Secondly, the composition and membership of the current Conduct committee has not been endorsed by a majority of the body it will be providing advice to; this may well prove problematic when and if Council deals with a report from the Committee. It may also give rise to problems when the Committee deals with Councillors who are the subject of complaints.

Thirdly, a number of Councillors who did not vote in favour of adopting the recommendation to reconstitute the Committee have given evidence during the hearings that they were mindful of advice contained in the report that indicated the DLG was revising the Model Code and its report was due before the end of the year. However they failed to demonstrate that they are cognisant of the fact that Council had been without an operational Code of Conduct committee for some time and that this may have been a factor in the circumstances of Council at that time.

Clr Hawker, in his submission in reply, provided a somewhat detailed explanation on his decision in relation to the reconstitution of the Code of Conduct Committee. His submission has been included as an Appendix to this report.

Clr Greig in her evidence was asked why she voted against the reconstitution of the Code of Conduct committee. She indicated that a week or two before the Council considered the matter she had received a letter from the Mayor to say that in his view, the Code of Conduct committee should not be reconstituted. She said she also made enquiries of Council officers about the matter after reading the business paper and she testified that they expressed the opinion that it should wait possibly until the new regulations came out from the DLG.

Clr Rose gave evidence that he has always said that the Conduct committee is flawed, that he is not against the Code of Conduct, but he was against the system. In giving his evidence he commented that *“has cost something like \$147,000 to run the code of conduct”* and suggested *“if that is fair to the ratepayers of this city, I'm Mickey Mouse.”*

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Clause 10.7 of Council's adopted Code of Conduct requires enquiries to be conducted without undue delay. However, Council's current Code of Conduct committee has not provided a final report to the governing body of Council on any of the matters referred to it.

A number of the Councillors gave evidence about the operation of the Council's Code of Conduct and the Committee, either as complainants, as the subject of the complaint and/or as a witness in Code of Conduct proceedings.

Clr Briggs expressed surprise at how the committee operated and described the manner it operates as "*strange*".

Clr Greig gave evidence that the length of time Council took to deal with the initial complaint against her was unreasonable.

Clr Bird made a Code of Conduct complaint against two Councillors in May 2007 and in the complaint he specifically asked that it be dealt with as soon as possible. He was asked whether it was and he said no. In fact, it does not appear to have even been considered by the Code of Conduct committee until after it was reconstituted in November 2007 – some six months or more since it was lodged.

Clr Hore was the subject of a complaint. He indicated that he was "*very much concerned*" that a letter sent to him about the complaint didn't fully detail the allegations against him. He further testified that he did not consider the matter was one that should have been referred to the Code of Conduct committee.

Clr Jeffreys, in her evidence described the three complaints about her as being "*petty*".

Clr Jeffreys gave evidence that she was not surprised at the number of matters currently before the Code of Conduct committee and cited the conduct that she witnessed every three weeks in the chamber as the foundation for this view.

Information provided to the Inquiry by Council indicates there have been in excess of 25 matters to be dealt with by the Code of Conduct committee

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constituted in November 2007. The evidence suggests that a significant number of these matters may well be deemed by the Committee to be trivial and result in no action being taken. This suggests that these complaints, the majority of which have been made by Council officials, should not have been made or at the very least should not have been referred to the Conduct committee in the first instance.

Clr Briggs asserted during the course of the hearings that “*some of the things that have been alleged are quite silly*”. Clr Jeffreys, in her evidence suggested that at least 18 of the complaints would be petty. However, she did not appear to appreciate there were already provisions in the Code for such complaints to be dealt with, in certain circumstances, without them being referred to the Code of Conduct committee.

The Model Code contemplates that some matters complained about should not be referred to the Conduct committee. Such matters might include those that are trivial in nature or which manifestly do not indicate a breach of the Code of Conduct has occurred. The Model Code provides that such complaints will be dealt with by the General Manager by him not referring the complaint and advising the complainant of his reason for not doing so. However, the evidence indicates that a decision was made following the reconstitution of the new Conduct committee in November 2007 to refer all complaints to a three person sub-committee of the Code of Conduct committee.

The General Manager addressed this issue in his submission in reply. He explained that:

*“The decision to refer all matters to a Subcommittee was the recommendation of the independent members of (sic) Conduct Committee including Chair, G Barry Hall QC, to myself. The members made this recommendation for two reasons:*

- a. *The relationship between myself and some councillors had reached the point where any consideration by me as to whether or not a matter was trivial would be regarded by some Councillors as*

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*being assessed by myself in a biased fashion. By passing this responsibility to the sub committee comprising external professional persons any perception of bias in the assessment of what constituted trivial behaviour would be overcome.*

- b. *The breakdown in governance standards at Shellharbour City Council had reached such a low level at this time that much of my time was being spent on investigating conversations/documentation to ascertain whether there had been a governance breach or whether the matter warranted referral to external organisations eg ICAC. As a result there are a number of matters which I either decided not to refer on to the sub committee for initial assessment and others which I did pass on and were subsequently assessed by the sub committee as trivial or serious and thus requiring formal Conduct Committee consideration. As a result, I became the complainant in some seven matters which were referred on to the sub committee and the Conduct Committee since 1 November 2007.”*

Council now has a five person Code of Conduct committee with three external members who are paid for their involvement. One of these members is Mr G Barry Hall QC, another is a solicitor and another is a representative of Council's external auditors. The three external members form the sub-committee referred to earlier. While it was open to Council to appoint a five person committee, it was only required by the Model Code to appoint a three person committee that included one independent. There are significant costs being incurred by ratepayers as a consequence of the volume of the matters referred to the Committee, the decision to appoint three external paid members and the decision to have those external members do some of the work that might otherwise be performed in-house by the General Manager.

Information provided to the Inquiry indicated that there have been a small number of complaints from members of the public about the conduct of Councillors. It was suggested by one member of the public, Mr Moran, that he

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did not consider a complaint about the Mayor would be dealt with properly because he believed that the General Manager would be expected to back up the Mayor and he suggested the independent members of the committee probably had close connections with Council and on that basis he suggested they were not independent at all. He testified *“I have never made any complaints to the code of conduct committee for that reason.”*

Another member of the public, Mr Bernard Payne, alleged he had made a Code of Conduct complaint about his banning and exclusion from a Council meeting and that he had not received a response from Council.

Some of the Councillors giving evidence at the hearings indicated they were of a view that some of their colleagues deserved to be dismissed but the Council as a whole did not.

While dismissal of individual Councillors is not an option, it would have been open to the Council to initiate the process for suspension of individual Councillors on the grounds of misconduct, by resolving to communicate a request for suspension to the Director General of DLG. However, the Council would have needed to have first complied with the process prescribed in section 440I(2) of the Act; the process requires action by the Council, by way of censure for misbehaviour, or by way of expulsion from a meeting for misbehaviour. Council has failed to take such action and on that basis the Council is not currently in a position to address the conduct of its members using this option.

The Mayor conceded in his evidence that this is something that might have better been utilised during the course of this council term. However, in his submission in reply, he explained Council’s non-use of the misconduct provisions as follows:

*“such action would be categorised as extreme bias as most of the errant behaviour of Councillors involved independent Councillors who would no doubt claim that they were victimised by a Labor controlled caucus. The Mayor obviously determined that it was not appropriate to seek to*

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*formally censure or ultimately move to suspend a Councillor under the Misbehaviour provisions of the Act for that reason.”*

The submission then goes on to explain that:

Additionally, the Mayor was reluctant to seek to invoke the censure and suspension provisions of the Local Government Act against errant Councillors as there was always the possibility that any censure and suspension motion might be lost on a ballot which would severely undermine the position of the Chair and the stability of the Council.

The aforementioned views, expressed in the Mayor’s submission in reply, suggest to me that it was unlikely that the Council was ever going to be able to make effective use of the misbehaviour provisions in the Act.

It is apparent that the concerns about the leaking of confidential information have been a major issue impacting on the operation of the governing body of Council and Council generally.

Submissions and evidence at the hearings indicate that there have been leaks of confidential information. While this issue is discussed later in the report, it is important to note in relation to the Code of Conduct, that such leaks can only have come from or through the agency of a council official. It remains an open question as to who leaked the information, why they did so and whether they were aware of their obligations under Council’s Code of Conduct.

Council’s adopted Code of Conduct specifically deals with the Use and Security of Council Information. Clause 9.3 of the Code requires Council officials to protect confidential information, not use confidential information for any non-official purpose, only release confidential information if they have authority to do so, only use confidential information for the purpose it is intended to be used and not disclose any information discussed during a confidential session of a council meeting. It states that Council officials *“must not use confidential information with the intention to improperly cause harm or detriment to your council or any other person or body.”* Clause 9.4 of the Code requires Council

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officials to take care to maintain the integrity and security of confidential documents and information in their possession, or for which they are responsible.

When Council initially considered the leaking of information, Cllr Hawker contended he and some other Councillors thought the matter was going to be dealt with as a Code of Conduct matter and he thought this is what should have happened.

The Council has not made use of the Code of Conduct to deal with the leaking of confidential information. It was inferred in a question by Mr McCann and indicated in documents provided to the Inquiry that Council intends dealing with any finding by the Court, that a Councillor had leaked confidential information, by referring it to the Code of Conduct committee. When this proposition was put to Cllr Hawker, he responded that such a course of action was "*inconceivable*".

### **Caucusing**

There was much evidence in relation to the subject of caucusing. The issue of caucusing was examined having regard to whether the practice is consistent with the proper exercise of a councillor's roles and responsibilities.

Caucusing per se is not expressly prohibited but it must be seen in light of the guidance given by the Act and Regulations and the matters prescribed in the Code of Conduct.

In considering the issue of caucusing I was mindful that the Act makes provision for the registration of political parties and that the Act allows registered political parties to endorse candidates. However I was also mindful that once elected, persons have an obligation to fulfil their individual statutory obligations as councillors and such obligations are of a higher order than any obligation they may have to a political party to which they belong; a contrary view would imply the rules of a political party can legitimately override a statutory obligation.

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The obligations of Councillors imposed by and embodied in the Council's Code of Conduct are particularly relevant in relation to an analysis of caucusing. A number of these were detailed earlier in this report.

During the hearings, the ALP Councillors were asked about caucusing. Their evidence indicates that they met on a regular basis throughout the term for the purpose of caucusing on certain matters listed on the agenda of Council meetings.

Clr Briggs gave evidence that he was the Secretary of the ALP Caucus and that he kept minutes of its meetings. The Inquiry issued summons to Clr Briggs and Clr Hamilton requiring production of the minutes and other documents pertaining to the operation of the caucus. We were provided with the minutes of the meetings held from 2 July 2007 to 17 March 2008.

While the Mayor gave evidence that only policy matters were caucused and that 80% of matters are not caucused, Clr Briggs, was of a different view; his view was that once a matter had been caucused, and a vote had been taken, there was not going to be a change in the caucus vote and accordingly, public participation was a total waste of time. In effect, Clr Briggs indicated that once the caucus decision had been made the minds of the majority were closed to any further argument or consideration of the matter. Not all ALP Councillors shared this view in its entirety; however the weight of evidence suggests that there were certainly matters that were the subject of a binding caucus decision prior to the Council meeting itself.

There is a wide compass of matters that appear to have been the subject of ALP caucus decisions. These include: the re-zoning of land; leases and the award of tenders.

One councillor suggested that the matter of the Equestrian Centre was caucused but other Councillors did not confirm this assertion. Moreover, Clr Briggs indicated that while development applications were prohibited from caucusing in recent times, there were times during the term where such matters had been caucused. That suggestion also received no support from other

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Councillors. I note the ALP rules prohibit caucusing on development applications.

A specific issue that was caucused was the motion put by Clrs Greig, Leedham and Hawker as to the resolution of the Land and Environment Court proceedings. The motion was dated 11 November 2007 and listed for consideration on 18 December 2007.

The minutes show that when the motion sponsored by those Councillors was put, they subsequently abstained, thereby voting against their own motion. Each of these Councillors when asked indicated that they had a genuine independently held belief that this motion was in the best interest of Council (and by inference residents and ratepayers). The evidence of these Councillors and their actions in abstaining (rather than clearly voting for or against the motion) is at odds with the contention in Council's closing submission in reply, which suggests that they *"may have genuinely reached a different conclusion of (sic) the issue after reflection on the caucus debate."* The submission in reply does not draw my attention to any evidence that this may have been the case and it was certainly open for the Councillors in question to put that proposition to me.

Clr Greig explained her abstention in relation to her own motion about the Land and Environment Court case during her testimony. The Counsel Assisting asked her *"did you exercise your independent view as to what the position should be in relation to those Land and Environment Court proceedings?"* and she responded *"I explained that due to being a Labor Party member, I could not vote for my own rescission motion."* She had made it clear earlier in her testimony that she considered that Mr Page had recently visited and indicated the need for improvement, that a letter from the DLG had been issued outlining its concerns in relation to the resolution of the matter and that the individuals ought to have been sent to the Code of Conduct committee.

The fact was that the motion met with strong resistance in caucus with caucus split four/four and the Mayor exercising his casting vote. Accordingly, the motion

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was lost in caucus. Notwithstanding the strong individual belief those Councillors resisted exercising that personal belief in favour of their obligation to the ALP and its Rules.

The aforementioned example in relation to the motion in relation to the Land and Environment Court case indicates that caucusing can give rise to a situation where individual members of a caucus do not vote in accordance with their own considered view as to what is in the best interest of residents and ratepayers (in relation to specific matters being considered by the Council), in order to comply with what they consider to be binding decision of the caucus, notwithstanding their duty to electors of the Council expressed in the Code of Conduct which states *“you must not place yourself under any financial or other obligation to any individual or organisation that might reasonably be thought to influence you in the performance of your duties”*.

I have noted the Mayor’s submission in reply that asserts that ALP Councillors effectively change their mind every time they are in a minority position in caucus. He explains *“Whilst Councillors may hold a strong individual belief, once the matter is debated at caucus and their individual belief is “out-voted” they then embrace the caucus opinion so that the caucus opinion becomes their individual belief. Whilst this may seem incongruous, it is in fact the only rational approach which can be taken to reconcile with the fact Councillors are elected primarily as ALP Councillors, not as individuals.”*

I have noted the observation in Council’s submission in reply that the Counsel Assisting only drew attention to one example in his closing submissions where Councillors voted against their will in the Chamber. However, I think that it is likely that the Land and Environment example is not the only time that it occurred, having regard to the evidence in Council minutes of the ALP councillors voting as one and the fact that there were sanctions in place in the ALP rules, to bring pressure to bear to ensure votes in accordance with caucus decisions.

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The practice of caucusing also appears to give rise to a situation where Councillors are making their mind up on at least some decisions of Council prior to having had the benefit of hearing the views of their non-ALP councillors, prior to having heard the views expressed in public participation and prior to having benefited from hearing the answers to questions asked of Council officers at the Council meeting. In making this observation, I note that Clr Hawker asserted in his submission in reply that the decision of caucus were not finalised until after public participation.

I have noted the Mayor's submission in reply, that where the ALP councillors were sufficiently moved by either public participation or debate at Council, they could move to defer consideration of the issue before Council, reconvene caucus and reconsider the matter in light of the disclosure at Council. I have also noted that he also puts an alternative scenario, to the effect that if the ALP councillors felt sufficiently moved by the debate in the Council Chamber or the public participation, they could absent themselves from voting as opposed to abstaining.

I find the first suggestion, while possible, unsupported by the evidence; the Mayor has not provided me with any examples in his submission in reply to support his position. The second scenario is disturbing as it suggests that Councillors might abrogate their responsibilities as a councillor rather than vote against an ALP caucus decision.

As caucusing occurs in private, there can be no assurance that good governance practices in relation to dealing with conflict of interests are being maintained. A number of ALP councillors gave evidence that colleagues with pecuniary interests in matters considered by the caucus did not always leave the meeting when the caucus dealt with the matter. Further, the minutes of the meetings contained scant detail of the caucus process.

Further, the practice of caucusing in local government allows a relatively small number of persons to determine the collective decision of Council. For example, in the case of Shellharbour, a minority group of 4 councillors including the

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Mayor (who has a casting vote in the caucus) can determine the vote of all 8 of the ALP councillors and thereby determine what the decision of Council will be. In a 7 member council, with 4 ALP councillors, 2 councillors could effectively determine the decision of that council. There are inherent risks in concentrating the power of the governing body in such small numbers of people.

Though common in State and Federal politics it is questionable as to how councillors, who are bound by legislative requirements as to the exercise of their office as councillors and who hold a genuine belief in the correctness of one course, can properly disavow that opinion in favour of caucus opinion and remain consistent with the Act and Code of Conduct.

Clr Rose, albeit from his perspective as an “independent” councillor, submitted to me in reply that it is his view that caucusing is “*unacceptable at a local level.*” However, he also submitted that while caucusing can give rise to the “absurd” situation of a councillor abstaining when voting on his or her own motion, this is a matter which should be subject to review by the Government or the ALP.

Clr Hawker used his submission in reply to provide further clarification on his perspective on caucusing. I have included his submission in reply as an Appendix to this report. In particular, I draw the reader’s attention to paragraphs 51 – 60 of his submission that pertain to the issue of caucusing.

Clr Hawker makes the observation that “*Balancing personally held beliefs and the public interest of the constituency is itself a difficult proposition.*” This may well be the case for Clr Hawker. However, I would suggest that one of the purposes of the Model Code of Conduct for Local Councils is to assist Council officials make decisions in the public interest and the consideration of the Model Code is paramount relative to the consideration of ALP rules on caucusing.

I should point out that I do not hold concerns about candidates for election as a local councillor being endorsed by political parties; there are certainly positive benefits that can accrue from such endorsement. Council, in its closing submission in reply submitted “*there are no grounds for the Commissioner to make an adverse finding in regard to the adoption and the endorsement of*

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*candidates in a local government election by a political party*". I have made no such finding.

I should also point out that I do not consider the prospect of councillors getting together to discuss items on the business paper as necessarily being a bad thing; rather my concerns are specific to the operation of a caucusing system that binds councillors to vote in a particular way and which can effectively give rise to decisions of the Council effectively being made in private, before all of the relevant information has been considered.

### **Conduct of meetings**

One of the key functions exercised by councillors in their capacity as members of the governing body of council is their participation in council meetings. Council meetings are the forum in which decisions on key policy and strategic matters are made. They also represent an important accountability mechanism as reflected in the requirement under the Act that council meetings be open to the public, except in limited circumstances.

For a council to exercise its functions effectively and to meet its obligations to the community it serves, it is vital that council meetings are conducted in an orderly and efficient manner. The failure to conduct a council meeting in an orderly manner also has the potential to erode community confidence in the council and in the local government sector as a whole.

The manner in which council meetings are to be conducted is prescribed under the Act and the *Local Government (General) Regulation 2005* (the Regulation).

Under section 360 of the Act, a council may adopt a code of meeting practice that incorporates the regulations and supplements it with provisions that are not inconsistent with them. Council has adopted a code of meeting practice under section 360 of the Act.

There was a substantial amount of evidence from members of the public, Mr Davies of the DLG, Council staff and Councillors that meetings of the Council

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have been chaotic, have lacked decorum and have on occasion been conducted outside of the Council Code of Meeting Practice and other meeting requirements. Some Councillors and staff indicated meetings had improved somewhat recently.

Clr Hawker has submitted in reply that *“the procedures undertaken in public meetings and confidential meetings was always assumed to be in accordance with the Council meetings policy”* and *“If there were any contraventions of the Council meeting policy the responsibility to advise the Councillors of any contravention is vested in the General Manager and the Corporate Solicitor for the Council.”*

While I acknowledge the implication in Clr Hawker’s submission that he did not knowingly acquiesce to contraventions in meeting practices, the DLG Meeting Practice Note (Practice Note No. 16) makes it clear that *“As a councillor you should take responsibility for your own behaviour that that of your colleagues.”* Council’s General Manager and Council’s Corporate Solicitor are not empowered to move points of order at a meeting whereas Clr Hawker and his fellow Councillors were and are in a position to do so.

Clr Hawker’s further submitted that *“At no stage were Councillors as a group advised by either the General Manager or the Corporate Solicitor that meeting policy had been contravened.”* This allegation is untested and as such, it would not be appropriate for an adverse inference to be drawn from this reporting on the alleged conduct of the General Manager and the Corporate Solicitor.

Certain members of the public observed, in relation to Council meetings, that their was a failure of the Mayor to be able to keep order, insulting conduct (by words and gestures) between Councillors and between Councillors and the public, and the berating of staff in front of the public. Certain members of staff indicated that some Councillors had spoken to them in an aggressive manner on the floor of the Council chamber in front of the public.

There can be little doubt that certain members of the public engaged in conduct from the gallery that was disrespectful of Councillors and the Mayor. On the

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evidence this has included quite juvenile behaviour on the part of some members of the public, and as between Councillors. However, there is also evidence to suggest that there were other members of the public who regularly attended Council meetings who did not engage in such conduct.

Certain members of the public who gave evidence indicated that they were or had been candidates for the Council or were strongly opposed to certain council decisions and policies. However, I do not consider that this invalidates their observations or experience during meetings. This is particularly so because similar observations were supported by Mr Davies of the DLG (albeit that he only attended one meeting), Mr Weir and other members of staff, and indeed a number of Councillors. Moreover it is the Councillors who hold statutory office, not the members of the public, and it is they who are responsible for controlling conduct at their own meetings.

In this regard it was surprising that the General Manager reported that the meeting of 4 December 2007, being the first Council meeting after the visit of the Hon Ernie Page, was one of the worst he observed. It is noted that some Councillors considered that meetings had improved since the visit of Mr Page in that there was a greater display of respect between Councillors but others considered that meetings were characterised by short-term improvements followed by lapses.

So far as the Chairmanship of the Mayor is concerned, this has been criticised in a number of corners, not least by Clr Briggs, a member of his own party, who described it as a '*bloody shambles*'. The Mayor sought to explain this (and Councillor Briggs' evidence in general) by claiming that, in effect, this evidence ought not to be given any credence, because Clr Briggs had designs on his Mayoral chair.

Clr Greig considered that the Mayor "*struggles because of the continuous interjection*".

Some members of the public who gave evidence were critical of the Mayor's performance in the chair, claiming that it seemed to them that he favoured

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certain people against others. On the other hand some staff and Councillors considered that the level of interjection and lack of respect for the chair was to blame, and not necessarily the Mayor's performance.

It is apparent that even the most experienced chairman would have had difficulty chairing meetings at the Council during this term. However, the Mayor has on occasion become involved in the debate rather than having risen above it and exercised his chairmanship skills. He appears to have lost his temper in and out of the Council chamber and during the course of performing his duties, such as during a meeting at the golf club.

In regard to the criticism of the Mayor becoming involved in debate, he has submitted in reply *“that in circumstances where the Mayor is an elected Councillor, it is not totally inappropriate for him to be involved in some circumstances in a debate, particularly in light of the fact that the Mayor is the leader of the ALP caucus and has a significant working knowledge of Council, policy and operational matters. It may be beneficial to other Councillors for the Mayor to have some input into the debate based on that knowledge and experience.”*

While it is conceivable that there will be occasions when a council decision may well benefit from a mayor's input into the debate, it must be recognised that actively participating in a debate on a motion put by councillors (rather than by way of mayoral minute) and the simultaneous exercise of the function of chairing the meeting, can be problematic. In such circumstances, I am of the view that mayors should ask someone else to Chair the meeting, as provided for in section 369 of the Act, while they are engaging in substantive debate.

Given that, on the Mayor's evidence, his skill as a chairman is significant, and that he sought further input from other mayors as to how he might improve, it is difficult to understand why he has not been able to keep better order at meetings and used the provisions of the Code of Meeting Practice to a greater degree, particularly early on in the term when he might more effectively have been able to exercise control over proceedings.

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It seems though, that even when Council does attempt to exercise control it has, on at least one occasion, done so in a misguided fashion. The banning of Mr Moran and Mr Payne from a future meeting of Council by purported resolution on 18 December 2007 was a serious matter, not least because it resulted in the very public removal by Police of Mr Moran from the next meeting of Council. Mr Moran expressed in his evidence the indignity he considered he suffered as a result of this action.

Although Council may have had different advice, the position taken by the DLG was that the banning might not have been lawful. While Messrs Moran and Payne were frank in their evidence as to the nature of the disruption they at one stage caused, neither Mr Moran nor Mr Payne considers that they have had a proper apology in relation to this incident.

In the broader context of the matters considered by this Inquiry, the events that gave rise to the “banning” and the subsequent events and consequences that arose from this decision provide yet another example that highlights the need for intervention and a clear and consistent approach to dealing with disorder at meetings.

On 24 June 2008, the Council met to consider its submission in reply to this Inquiry. I have reviewed the unconfirmed minutes of the meeting. It is apparent that there was an unsuccessful attempt to close the meeting to members of the public while Council considered the matter.

The minutes indicated that the Council resolved to exclude members of the public citing section 10A(2)a of the Act, which provides for closure for discussion of matters and information pertaining to personnel matters considering individuals (other than councillors). Having reviewed the Council’s submission in reply, and having regard to the personnel matters that were canvassed during the course of the Inquiry, it is not inconceivable that the Council had a legitimate basis to exclude members of the public.

It is apparent from the minutes that a member of the public objected to the closure. The minutes indicate that the Mayor adjourned the Meeting for 15

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minutes and asked all Councillors to go into the Mayor's Office to continue the Confidential Meeting. The minutes record that the member of the public stated he too would go into the Mayor's Office, that the Councillors and public continued to exchange comments and the Mayor did not proceed to take the meeting into Confidential Session in his office.

It is significant that the Council was apparently unable to consider the matter in accordance with its resolution.

While the Council was able to reach a position by which the Mayor considered that he was authorised to submit the Council's submission in reply to me, and I have accepted that submission, there is a clear need for intervention, so that the Council may conduct its future meetings without members of the public being able to disrupt them with impunity.

While members of the public could potentially disrupt a meeting chaired by an Administrator, I am confident that the appointment of a competent Administrator/s will fundamentally change the dynamic of the Council and its relationship with certain members of the public. This change will both reduce the likelihood of disruption and make it easier to respond to if it does reoccur.

Preparation for meetings was another area that was canvassed during the course of the Inquiry. More than one Councillor indicated that they had not necessarily had time to read business papers before attending a meeting. At least one Councillor – Cllr Leedham – said positively that he had attended meetings without having read his confidential business paper on one occasion and that he elected at that meeting to '*abstain*' from voting. However, I accept the position put in Council's submission in reply that suggests lack of preparation for meetings is not a significant issue contributing to the current circumstances of Council.

Councillor Leedham and certain other Councillors appeared to lack a proper understanding that there is no provision for abstention under the Act or Regulations and that a councillor who fails to vote on a motion put to the meeting is taken to have voted against the motion. It was not apparent from the

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evidence that Clr Leedham understood fully that by abstaining, he was in fact dissenting in relation to the business that was to be considered at that meeting. In essence, rather than absenting himself from the vote by leaving the chamber, Clr Leedham effectively voted against the business at hand. Other Councillors, including for example, Clrs Hawker and Greig, also had a practice on occasion of abstaining. In the case of Clr Hawker, his view was that, in relation to abstentions, it was the Act that ought to be changed not his conduct.

Minute taking, which was an area of concern in the DLG's PBP report, continues to be a problem for Council, with some Councillors wanting to use the minutes as a means of recording the debate. Council's Code of Meeting Practice stipulate that Minutes are to be kept in accordance with the Corporate Meetings – Minutes Policy POL 0012-V03. Clause 3.1 of that policy is reproduced hereunder:

3.1 ) This Policy is concerned with the recording of Members' attendances, meeting Minutes, meeting procedures and movements of Members during significant meetings. It is also concerned with the recording of professional advice requested or given at significant meetings. **This policy is NOT concerned with the detailed recording of debate, argument or discussion, which may accompany consideration of matters at Council meetings.**

The fact that the scope of this Policy has not always been recognised has resulted in a substantial allocation of Council time and has also been the source of continued debate and re-debate of what had previously been agreed. It is, in small part, an example of the lack of goodwill between Councillors themselves and, on occasion, between the Councillors and the General Manager. By way of example, the General Manager and Clr Greig have diametrically opposing views as to what the minutes of the meeting of 18 December 2007, which purported to ban Messrs Moran and Payne, should have recorded.

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Moreover, the fact that minutes are on numerous occasions adopted by majority and not unanimously, demonstrates a failure of basic goodwill and trust. It was submitted to me by the Mayor in reply, that this is a *“somewhat extreme conclusion and that it is not uncommon for Councillors to wish to have recorded critical parts of the debate”*. While I acknowledge the submission, I suggest it misses the point, that even after prolonged debate, the Council on occasions is still unable to reach a consensus on what the minutes of a previous meeting should record.

Clr Hawker, in his submission in reply, states *“As a Councillor of considerable experience, it my understanding that the Policy entitles the Council to record debate and the context in within which a particular decision is reached.”* Such an interpretation is at odds with my reading of the Council’s Corporate Meetings – Minutes Policy. While it is clear to me that the Policy provides for the recording of reasons for decisions in certain circumstances, it clearly does not contemplate the detailed recording of debate.

Clr Hawker has submitted in reply that Council has always strived to achieve the broad objectives of accountability and transparency by recording the reasons for decisions. However, I note in relation to the two tender matters referred to later in this report that no reasons are recorded by resolving contrary to the Council officer’s recommendations.

Clr Hawker has submitted in reply that he was *“particularly forthright about my opinions in relation to the consideration of the various tenders which had been submitted for the collection of Waste in the Shellharbour district.”* It is not clear from his submission as whether he was referring to his testimony at the Hearing, Caucus debate or debate at the Council meeting. If he was referring to being forthright at the Council meeting, there is no record of him seeking to have his views recorded in the Minutes of the relevant meeting.

The Mayor, in his submission in reply, has made the point that Councillors are not directly responsible for the taking the minutes. While this is correct, they have clearly demonstrated their understanding of their role in reviewing and

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adopting minutes; it was clearly open to the Councillors to have the unconfirmed minutes amended to record the reasons for their decision in relation to the tender.

Council has been exploring other ways of recording minutes. This was suggested in the PBP report back in 2006. While Council has investigated changes it is yet to implement any change. This may be because there is a difference of opinion between Councillors with one councillor indicating that the whole session ought to be recorded and others indicating that the minutes be typed and placed on a screen.

Council's submission in reply acknowledges that, in regard to the past conduct of Council meetings "*the conduct of Ordinary Meetings of Council was at times a problem*" and "*councillors accept they could and should have done more to improve the overall standard of behaviour at Ordinary Meetings of Council*".

Council submission in reply included a report on the recent conduct of Council meetings that was prepared by Mr Chris Vardon, who served on Eurobodalla Shire Council for a number of terms, some of which were as Mayor. I accept the proposition that Mr Vardon has extensive experience in local government as an elected representative and is well placed to provide comment on the conduct of Council meetings, albeit as a paid consultant of the Council. I have included a copy of Mr Vardon's report as an attachment to this report.

I note that Mr Vardon concludes his commentary on Council's meeting of 20 May 2008 with the observation that "*My overall impression of the meeting that night was that the Mayor and the Councillors and senior staff conducted themselves in a reasonable manner typical of other councils in the State of New South Wales.*" I suggest if this is the case, than there is a wide spread need for councils to improve their meeting practice.

I have reviewed Mr Vardon's report. Matters of concern, in relation to Council's meeting of 20 May 2008 include:

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- Members of the public ignoring a request to stop speaking without any action apparently being taken;
  - The Mayor being “*vigorously questioned*” by a member of the public, which “*led to a minor disruption*” which in turn was described as “*unpleasant*”;
  - A failure on the part of the Council to seek to advise the member of the public of the rules set down in the Code of Meeting Conduct;
  - A possible misuse of the term of resolving into “*Committee of the Whole*” when in fact it is apparent to me that the Council’s intention by the resolution was to close the meeting to members of the public. As explained in DLG Circular 07/08, the process of resolving into Committee of the Whole and the process of closing a meeting to members of the public are two different matters;
  - According to Mr Vardon, the adoption of the minutes of the previous meeting took “about 25 minutes to conclude with a number of requests for inclusions in the Minutes being requested by a couple of the councillors. This led to much discussion and dissent. Mr Vardon counted 13 Points of Order being called by councillors and reported the Mayor being put under some pressure to keep the meeting in order. Mr Vardon indicates this with some difficulty but with good grace.”
  - Mr Vardon observed “*strict adherence to normal meeting procedure were not in evidence*”. In fairness, I note his comment that the meeting proceeded to conclusion in a fair and responsible manner. However, having regard to the circumstances of the Council, I have difficulty reconciling non-compliance with meeting procedure and the responsible conduct of a meeting.
  - Councillors chatting amongst themselves during the meeting and having to be “*called to order on several occasions*”.
  - On one occasion “*a councillor made what could have been interpreted as disparaging remarks about a senior member of staff. The Mayor did not ask*

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*the councillor to withdraw the remarks*"; I note that the councillor did so later in the meeting.

- Mr Vardon observed the practice of abstaining. Mr Vardon reported that in one case, this gave rise to the Mayor needing to exercise his casting vote.
- One councillor *"did appear to speak on a matter in which that councillor could, prima facie, be considered to have an interest. The Mayor made an attempt to advise the councillor by the councillor concerned proceeded to speak."*

I find Mr Vardon's observations of the meeting both concerning and telling in relation to the Council's capacity to conduct itself in a proper manner. This meeting took place when the Inquiry was underway and Councillors presumably knew Mr Vardon was present; if there was ever to be a circumstance where the Councillors alleged good will and commitment to improve was to be manifest, I suggest the meeting represented such an occasion.

It would appear from Mr Vardon's report that the other meeting he observed, on 10 June 2008, was less problematic.

I note Mr Vardon's observation that *"Mayor Hamilton, as the Chair, demonstrated knowledge of the Council's Code of Meeting Practice to conduct the meeting in accordance with the Local Government Act 1993."* This is consistent with Mr Davies' testimony in relation to the Mayor's knowledge of meeting procedures. I note however, Mr Vardon's further observation that where a council dispenses with a formal approach to meetings:

*"It requires a particularly talented Chairman to note the need to rein in the freedom to ensure the continued success of this measure. I am not convinced Cr Hamilton has entirely mastered this aspect of chairmanship. I concluded that the Mayor is not particularly helped by his factional colleagues."*

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I note and agree with Mr Vardon's observation that the proper conduct of a council meeting "*can only be achieved if all elected representatives are mindful of their obligations*" and "*It should not be left entirely to the Mayor to enforce*".

It was suggested to me in the Mayor's submission in reply that the conduct of Council meetings "*appear to have taken on a much greater level of importance throughout the inquiry than it deserves.*" The submission states that "*Whilst it is accepted that formal Council meetings have been disruptive and disrupted by various Councillors and members of the public from time to time, it is submitted that this had little or no impact on the functionality of Council as a whole and ought not occupy too much of the Commissioner's time in determining the outcome with regard to the terms of reference.*" I do not agree with this proposition; I consider there is significant evidence as to the impact of the conduct of meetings on the functioning of Council. This evidence includes but is not limited to the impact of the meetings on relationships with staff, the relationships between councillors and relationships with certain members of the public.

I have noted the stated commitment in Council's submission in reply that "*councillors are fully committed to setting, reaching and maintaining a high standard of behaviour at the remaining meetings of Council*" and have given careful consideration to what weight can be attached to such an assurance. I also note admission of the errors of their ways.

I must also have regard to whether even an immediate improvement in the conduct of meetings will be enough to fundamentally change the circumstances of Council, noting the damage that has been done to the relationship between the governing body and operational arms of Council and the community's confidence in the Council's capacity to conduct itself in a proper manner.

I have made a finding that Councillors collectively have failed to have due regard to the statutory, policy and procedural requirements and frameworks within which they are required to operate. The evidence for such a finding is

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particularly manifest in the way Council meetings have been conducted and what has occurred at those meetings.

I have also made a finding that the manner in which Council meetings have been chaired has contributed to the current circumstances of Council. It is acknowledged that the Mayor has endeavoured to bring order to meetings and that he acted in a way that he considered best suited the circumstances. In his submission in reply he explains his position on the use of the Code of Meeting Practice as follows:

**Extract from Mayor's Submission in Reply**

As to the suggestion that the Mayor might have used the provisions of the code of meeting practice to a greater degree, the Mayor's position is simply that he tried to adopt a particular meeting protocol as Chairman which allowed for the free flow of information and discussion in a less formal way and was reluctant to invoke censure or code of conduct discipline in an attempt to avoid the somewhat damaging impact that these actions could have and further fuelling the rumour of perceived bias against the independent Councillors or community activists.

While I note the position and accept the Mayor acted in good faith, there is evidence that he has limited success in maintaining order on occasions and that a more formal approach might have better served him and the Council.

**Assessment of Development Applications**

The manner in which Councillors have understood their role and exercised their responsibilities in relation to determination of development applications was canvassed during the course of the Inquiry.

Council must assess the merits of each application having given due consideration to all relevant matters it must consider under section 79C of the *Environmental Planning and Assessment Act 1979* (NSW).

There has been evidence in these proceedings that the governing body of Council has resolved, in relation to land use matters, contrary to the

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recommendation of Council officers. In making this observation, it should be noted that Councillors are generally free to do so provided that they give due consideration to the relevant matters.

Mr Hoynes, the Group Manager – Planning, was asked whether he had an opportunity to observe the understanding of Councillors in relation to land use issues and responded “*Yes, it is my opinion that the majority of Councillors have a very limited understanding of the statutory requirements of land use planning in New South Wales.*”

I have given significant weight to Mr Hoynes’ testimony, having regard to his evidence that he has been involved in planning matters for 18 years, he has been employed in his current role for 2 years, he holds a Bachelor in Town Planning from the University of New South Wales and he is a member of the Planning Institute of Australia.

Council, in its submission in reply, submitted that the view expressed by Mr Hoynes in relation to the Councillors understanding was “*an erroneous view held by many planning professionals eager to protect their professional discipline*”. While I have noted the rationale put forward by Council in its closing submission and its suggestion, in relation to councillors, that “*In reality it more often is a confusion of terms rather than lack of understanding*” I am not swayed in my view that I should prefer the testimony of Mr Hoynes.

I consider Mr Hoynes was well placed to observe and comment on the Councillors. I reject the notion that Mr Hoynes was motivated by self-interest; on the contrary he was placed in the difficult position of having to give, under oath, evidence that was adverse to the governing body that he serves.

Mr Hoynes was asked to provide examples to support his contention about the level of Councillor understanding and responded in part by giving the following testimony: “*I have presented rezoning applications to Councillors and briefed them on those rezoning applications and have had Councillors refer to them as development applications, wanting to know what sort of conditions of consent could be applied to the rezoning applications.*” He went on to suggest that he

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had observed, on the part of Councillors, a basic lack of understanding of the structure of plan making and also the difference between plan making and development assessment. He was asked about a number of specific planning matters that had been considered by Council and his comments about some Councillors generally in relation to these matters was adverse.

Mr Hoynes gave evidence that Councillors should keep an open mind in relation to planning matters. Specifically in regard to development applications said: *“Councillors should be open-minded but not empty minded when they come to the chamber to assess applications, so really the view should be formed at the meeting once the Councillors have heard the debate.”*

While there has been a divergence in the evidence in relation to caucusing on development applications, there is a weight of evidence to suggest that the ALP Councillors caucused on planning matters other than development applications. While ALP rules may allow caucusing on town planning matters, such a practice, which locks in a decision prior to the meeting, runs contrary to the principles of natural justice and is fraught with risk in relation to the potential it gives for decisions that do not have proper regard to all of the relevant information, some of which may not come to light until the time of the debate in the Chamber.

During the course of these proceedings evidence was elicited from a number of witnesses in relation to Council’s consideration of *Development Application 10 of 2007*. That is a designated integrated development in relation to an equestrian stables and exercise yards at Riverside Drive, Dunmore.<sup>3</sup> Mr Hoynes in his testimony gave evidence that when the application was first put to Council, refusal of the application was recommended, for eight different reasons, the reasons were substantial and significant, and the primary

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<sup>3</sup> *Following the conclusion of the Hearings, I received correspondence from Mr John Kosseris of Dunmore Equestrian Centre Pty Ltd about this matter. It is discussed under the heading “Submissions in Reply” later in this report.*

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overriding reason for refusal was that it was considered by council officers that it was a prohibited development. Cllr Rose at this meeting foreshadowed a motion that the development be approved, albeit with conditions. Such actions suggested either a lack of understanding of the implications of a development being prohibited or a willingness to act contrary to law.

Cllr Rose was asked about his view on the evidence from Council staff who had suggested that Councillors don't have proper regard to professional advice and his response was to the effect that at the end of the day, Councillors are there as the decision-makers and as such were free to decide in a manner contrary to the recommendation.

Cllr Rose was also given the opportunity in his testimony to describe how he goes about reaching a view on a development application listed for consideration. In his testimony, he indicated he goes through a process by which he assesses the application. The questions he says he considers are:

- i. "Is this type of development legally allowed in the zone? In other words, is this prohibited use in the LEP. Yes or no.*
- ii. Does this development comply with all the setbacks? Yes or no.*
- iii. Does the development comply with the height? Yes or no.*
- iv. Do we or do we not allow variations to the guidelines and the DCP. Yes or no.*
- v. Did this council approve a development using the same DCP. Yes or no*
- vi. Has there been other information or drawings submitted to council. Yes or no.*
- vii. If not, why don't we have it Or, If so, why don't we have it?*

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viii. *If the DA was refused, could the applicant go to court? What would our chances of winning be, given we have approved a similar development in the same zone under the same DCP?"*

Clr Rose was asked specifically whether he applied the criteria to the Equestrian Centre development and he indicated did. His testimony was as follows:

*"Yes, along those lines, especially the Land and Environment Court one that I said at the finish, and I'm still adamant on this - I think there is still an ongoing case going on with it. As far as the way I voted on it, I think I voted for approval. I'm sure I did. I have no qualms on voting that way. Because I thought everything -when I read the bits of paper, and the applicant also brought his legal people in and briefed us at a council meeting, that this was done and that was done, and this had that many conditions placed on it, I personally could not see this not working."*

He also said *"I couldn't see anything wrong with it, and I still can't."* He admitted that he had sought to have the application approved when it first came before Council.

Mr Hoynes testified that he was *"extremely surprised"* when Clr Rose foreshadowing a motion that the application be approved with the relevant conditions. When asked why he testified:

*"Given the substantial and detailed council report that the councillors had presented to them, and the quite specific reasons for the refusal of the application, for a councillor to turn around and foreshadow a motion that the application be approved with the relevant conditions demonstrated to me a lack of insight into the matter that the council was considering or there was some other motive or factor that was guiding his decision-making."*

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In relation to the reference to “*some other motive or factor*”, I do not have evidence before me to suggest that this was the case and in the absence of such evidence I draw no such conclusion.

Clr Rose was not the only councillor who wanted to approve the development according to Mr Hoynes. He gave evidence that another councillor suggested they come up with conditions of consent on the night. Putting aside the prohibited development issue, the suggestion regarding the conditions indicates a lack of understanding of the complexity of the development and a desire to become involved in the operational aspect of development assessment and approval.

When the matter came before Council on 12 June 2007, there was a motion to defer the consideration of the application in spite of the fact that there was legal advice which was presented to the Councillors that indicated that the council had no legal ability to approve the application as it stood. Six Councillors supported the motion (Clr Greig, Clr Hawker, Clr Briggs, Clr Mifsud, Clr Rose, Clr Stewart) and the Mayor had to exercise his casting vote to ensure the motion was not successful.

While that may have been the end of the matter, it wasn't. At Council's meeting of 3 July 2007, Clrs Rose, Mifsud and Briggs moved a notice of rescission as to the refusal. While this was an action open to them, Mr Hoynes evidence in relation to the matter is informative. He stated, in relation to the rescission motion, that:

*“At that point the council meeting was reduced to a bit of a farce because the Councillors were incapable of actually moving the correct motion to have the rescission put in place before they could proceed to have a notice of motion to have the application approved and there was some quite lengthy debate between the Councillors and the gallery at that point. The gallery was interjecting and advising the Councillors on how to move their own motion.”*

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The rescission motion was successful and Council subsequently resolved to approve the application, delegating authority to the General Manager to apply the standard conditions and imposing a requirement that all outstanding issues be satisfactorily addressed all prior to a Construction Certificate being issued.

Mr Hoynes testified that this was not an appropriate use of delegation, explaining that *“there are a range of reasons that were spelled out in the council report that were conditions precedent to any application actually being approved”*. He testified that he found it extraordinary *“for council to exercise its authority to determine a development application when there are so many fundamental issues that are outstanding and cannot be addressed”*.

According to Mr Hoynes, ultimately the General Manager reported back to Council and advised that upon seeking legal advice, he was not prepared to act under delegated authority and issue the consent until Councillors reconsidered the matter and he had a clear direction to do so addressing those outstanding issues. Apparently, at that meeting, there were still some Councillors who were adamant that the application had to be approved.

These events took place over three years into the term of Council. Further there is evidence that indicates Councillors have received advice and reports explaining the relevant statutory framework and their role in it. Mr Hoynes testified that:

*Personally, I try, at any opportunity where a briefing has been requested, to educate the councillors on the planning regime that operates within New South Wales. Early in my time here at council, I presented a briefing to the councillors on the draft Illawarra regional strategy. At that meeting I pointed out at length the hierarchy of planning controls that exist under the Environmental Planning and Assessment Act and how all those planning controls relate to each other. On other occasions I have discussed at length what a plan of management is under the Local Government Act and what the difference is between community land and*

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*operational land. So I feel that, yes, they have been given an opportunity - not formally requested but formally provided through my briefings.*

There is further evidence as to the manner in which Councillors have exercised their roles and responsibilities in relation to planning and land use matters that would tend to suggest that the example in relation to the Equestrian centre application was not an isolated incident.

In addition to matters canvassed with Mr Hoynes, Mr Mitchell, Council's Manager – Development Services also provided evidence as to the Councillors conduct in relation to development assessment and the disdain some Councillors have displayed for the professional planning advice provided by officers. He testified that:

*“There are a number of councillors that were on previous councils and the majority of those would have an understanding of the assessment process. I think a lot of the new ones are developing an understanding, but I've found that in a lot of the matters that are reported to council, there's either a preconceived outcome ... or they are more prepared to listen to the applicant or objectors rather than to give proper consideration, in my view, to the professional report that's been presented in the business paper.”*

While I accept the assertion in Council's submission in reply that *“in the overwhelming number of cases the recommendations of planning staff are routinely accepted by Shellharbour City councillors”*, I also note the sentiments expressed in this testimony from Mr Mitchell:

*“I guess one of the things we sometimes do in reviewing our applications before they go to council is to make a bet on, if it is a small application it will get a lot of debate; if it is a major application it will go through in two minutes; and that if it is a controversial application that we recommend refusal, it is likely to be approved. And that is a standing joke that we have.*

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*It led me, probably two years ago, to put a memo through to my director expressing our concerns and dismay of the attitude a lot of the councillors took to the professional approach that we took to our reports, that they were being totally ignored and that they would take a view or comments from in some cases an objector, or in some cases an applicant, to be more relevant than our professional view.”*

## **Tenders**

Another issue that arose during the course of the Inquiry was tendering and in particular, the award of what was described during the Hearings as the Waste Management Tender. This issue threw light on the lack of apparent regard some Councillors had for the professional advice and expertise of Council staff and the conduct of the eight ALP Councillors in relation to their responsibilities under the Act, Regulations and Code of Conduct.

Section 377(1) of the Act stipulates that the acceptance of tenders is not delegable by councils. That is, only the governing body can award contracts that have been the subject of a tender process. This is clearly appropriate given the significant value of such contracts and it can facilitate good governance. For example, it allows for the assessment process to be undertaken by technical experts and allows the governing body to oversee the process to ensure due process has been followed in assessing the tenders.

Clause 178 of the Regulation requires Council to consider the tenders submitted and having regard to all the circumstances, either accept the most advantageous or decline to accept any of the tenders.

In making its decision, Council cannot take into account circumstances so remote that if it were to do so would require the tender process to be aborted and a new one commenced. Council must take into account all relevant considerations and must not take into account any irrelevant considerations in coming to its decision. This is not only consistent with the common law but also with Council's own Code of Conduct.

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As to what is relevant and irrelevant would ultimately be up to a Tribunal or Court of competent jurisdiction. An example of an irrelevant consideration *might* be where Councillors take into account the future employment of the current workers when this was not specifically included in the tender specifications/criteria. Council must be able to justify its position as prudence suggests that Council would follow the recommendation of the Tender Evaluation Panel unless good reasons existed not to do so.

In 2007 Council went to tender for a contract on the Collection of Waste and Recoverable Resources and/or the processing of Recyclables (Tender No 2007/36). There were two parts to the tender. Part A was for Collection Services and Part B for Recyclables Processing Services. Tenderers were invited to submit a tender for the services in Part A only, Part B only or both Parts A and B together.

Clause 2.3 of the tender document indicated “*the ultimate decision makers were the Councillors of the Council*”.

A tender evaluation panel of both Council and non-Council staff was formed to assess the tenders. Independent experts were retained and consulted. The Council considered a report on the tender on 18 December 2007.

According to the report, the tenders were assessed in accordance with the *Local Government (General) Regulation 2005*, the *Code of Practice for Tendering* and the *Tender Assessment & Evaluation criteria and Probity Plans* developed for the tender.

The report clearly indicates nominated non-price and price criteria were considered during the evaluation. The report recommended a bidder that the Evaluation Panel “*assessed as being the most advantageous to Council.*”

Evidence was given that the tender was the subject of a ALP caucus decision prior to the Council meeting. The minutes of the relevant meeting indicate the eight ALP councillors voted as one to award the contract to the incumbent tenderer; four independent councillors voted against the motion to award the

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contract to Theiss and one councillor was not present due to a declared conflict of interest.

Various reasons were offered during the course of the Hearings for the decision of caucus not to support the recommendation of staff. Some the reasons were:

- i. concerns that there might be job losses before Christmas, notwithstanding that the new contract was to commence in the middle of the following year;
- ii. the fact that the incumbent had facilities in the LGA; and
- iii. concerns about the financial capacity of the winning bidder, notwithstanding that these had been addressed in the tender evaluation and that this issue was addressed in the report provided to Council.

Clr Hawker in his submission in reply, asserts *“Along with the specific criteria stipulated by the tender approval process, public interest is part of the context within which submission for the collection of waste contract was considered.”* He further submitted that he did not believe that he was fulfilling his *“role as a Councillor if costs associated with particular tender proposals were the critical determinant in reaching a final decision”* It is clear he is of a view that the Tender Evaluation Panel should have given more weight to non-price criteria.

There is evidence that the consequence of the decision to reject the preferred tenderer was a financial cost to ratepayers of some \$1.9 million over the term of the contract.

There is evidence that the incumbent tenderer who was awarded the contract has been a donor to the ALP. I note that the evidence suggests that none of the Councillors were aware of the donation in coming to their decision.

I have noted that Council submission in reply implies that the cost difference may not have been as high. The submission suggests there were some costs inherent in the acceptance of the recommended tenderer which would have been borne by Council. However, I have also noted that this was not an issue

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raised by any of the Councillors in their testimony in relation to this matter and further I note that *“on call cleanup services”* were excluded from the assessment because it was suggested that one of the tenderers (not the one recommended by the Panel) *“submitted an extremely high price for this item which distorts comparison.”* Had this been included, the apparent cost difference may well have been greater, not less as suggested by Council in its submission in reply.

I am not convinced that there is merit in the argument put forward by Council in its submission in reply about the price difference. I consider there is overwhelming evidence that the recommended tenderer would have been significantly less costly to Council than the tenderer selected by the ALP Councillors.

I have noted that Council submission in reply asserts, *“on the objective criteria determined by the Evaluation Panel the tenderer with the best total rating was Theiss”*, that *“the recommendation by the Evaluation Panel that the other company ... was the most advantageous was wrong and not supported by the ratings”* and *“the Panel ignored their own objective assessment and recommended a company with a lower rating with Theiss”*.

Having due regard to Council’s submission in reply, I have again closely reviewed the report that was presented to Council on 18 December 2008. The report makes it clear that both the Theiss (the successful tenderer), the tenderer recommended by the Panel, and a third tenderer *“demonstrated that they are capable of undertaking the work and fulfilling the contract”*. This was based on an evaluation of the non-price criteria. The report makes the point that their scores in relation to the non-price criteria were within 10% of each other.

The report then deals with price and it’s clear the recommended tenderer was cheaper than the selected tenderer. It states *“the preferred tenderer for the collection services (Part A) ... is the most advantageous as they offer a quality service comparable to Theiss (next preferred tenderer) at the lowest price of all tenderers.”*

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Council's submission in reply correctly states that the company recommended by the Tender Evaluation Panel in relation to Part A of the tender had a lower score than that of Theiss. However, my reading of the report indicates that the Panel, rather than ignoring the difference, actually drew attention to it and indicated that the score difference between the two were not significant whereas the price difference was.

The act of Council in awarding the contract to a non-recommended tenderer was not an illegal act in the sense that Councillors do have the power to make decisions different to what is recommended by the Tender Review Panel. Rather, it was submitted to me by the Counsel Assisting, in his closing submissions, that as a matter of prudential decision making, Councillors may not have given due regard to the transparent processes put in place by the Tender Evaluation Process.

I also note that the members of the Tender Evaluation Panel appear to have been well placed to form the correct opinion as to which tender was the most advantageous. I have considered the likely expertise they brought to the process and the extensive opportunity they would have had to review the tenders, relative to the expertise and decision process of the ALP caucus who rejected the Panel's recommendation.

I note that Council has sought to explain its decision in relation to the tender in its submission in reply. The submission in reply states:

Of greater concern which should have been specifically addressed in more detail by the Evaluation Panel was that the company recommended based their Tender B on the basis of being able to negotiate an agreement with another council for the use of their facilities to perform the services as required under the contract. In essence, at the time of submitting Tender B the company was not in a position to confirm they had access to the recycling facilities provided by the other Council. Even if an agreement was forthcoming it does raise some issues as to how the tender could have been realistically costed given that there was no agreement on the terms and conditions of access. It could be argued that as the company were not in a position to guarantee access to the other Council's recycling facilities as to whether at this stage the Tenderer had submitted a complying tender and should have been considered. Therefore, as can be appreciated, the attempt on the part of Mr. Meltz to submit that the councillors were in breach of their duty in respect of the award of Part B of the Waste Management Tender failed to take into consideration a number of important factors that were not forthcoming during the public examination of the councillors and staff.

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This explanation does not accord with the rationale put forward by some of the ALP Councillors at the hearings, when they explained their decision. Further, elements of the explanation do not accord with my own reading of the report provided to Council.

Contrary to the position suggested in Council's submission, the report provided to Council, under the heading "*Legal and Policy Considerations*" clearly indicates that the issue of the agreement with the other Council had been considered. The report makes it clear that the matter had been investigated and the other Council had already resolved to endorse the agreement with the recommended tenderer. Further the report to Council went on to indicate that the recommended tenderer "*is considered to be the preferred tenderer for Shellharbour City Council*" regardless of the contingent agreement.

My primary concerns about the ALP Councillors' conduct in relation to this matter are:

- The matter was the subject of a caucus decision prior to the Council meeting, even though the report clearly indicated additional information would be available at the Council meeting.
- There are inconsistencies between the reasons provided for the decision during the hearings to those put forward in Council's submission in reply.
- Some of the reasons put forward by Councillors to justify their decision are potentially not relevant to those that properly should have been considered.
- The Caucus and the Council failed to record reasons for such a significant decision that was made contrary to the recommendation before it.
- The Councillors do not appear to have had due regard to the professional advice and expertise of the Tender Evaluation Panel.

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It is noted that the minutes of the Council meeting do not record the reasons for Council's decision in relation to the apparent rejection of the recommendation of the Council Officer and the Tender Evaluation Panel. This is in breach of *Council and Corporate Meetings – Minutes Policy*, which requires such reasons where the decision of Council is contrary to professional officers' recommendations that have been explained in detail in related reports.

As one of the principles of tendering is the promotion of transparency, the fact that the incumbent tenderer happened to be a donor to the ALP, even in circumstances where this was not known to Councillors, may lead to the perception that the integrity of the tender process is affected by an apprehension of bias. It is noted the Director General sent out a Circular addressing these issues dated 25 January 2006 and which states that tender *“processes need to be based on clearly articulated and defensible evaluation criteria...”*.

There was further evidence about a contract that was awarded against the advice of Council officers after tenders had been called. Tender 2005/11 for the Shellharbour Beachside Tourist Park Management Agreement resulted in the Council voting to award the contract to the incumbent tenderer, notwithstanding the fact that it was not the recommended tenderer. The criteria included both mandatory and non-mandatory factors and involved the assessment of 13 bidders by Council staff. The minutes of meeting of 30 August 2005 do not record any reasons for overturning the officers' suggestions. Council's submission in reply does not address this evidence.

It is also relevant to note that many substantial contracts will have to be let in the future given the programme of works anticipated for Council. If tenderers cannot have confidence in the integrity of the processes put in place by Council then this may impact adversely on all residents in future years. A period of Administration may assist in building confidence that tenders submitted to Council will be assessed on their merits.

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## **COUNCILLOR RELATIONSHIPS WITH STAFF**

### **Regulatory context**

Section 8 of the Act Council's Charter requires the Council to be a responsible employer.

The Act and the Model Code of Conduct (the Model Code) define the roles of and relationships between council officials.

The Council also has policies and procedures that prescribe protocols for interactions between staff and councillors.

### **Relationship between councillors and the general manager**

Council has employed Mr Weir, the General Manager, in one capacity or another for over 34 years. He gave evidence to the effect that from his point of view, from the outset of this term, and even in the run up to the 2004 election, there was a different dynamic.

He indicated that he felt under a state of siege even at the time of the Jamberoo training weekend in early 2004, and particularly from the reaction to the weekend, notwithstanding that sessions had been held at Jamberoo on previous occasions.

While the General Manager considered that he had the trust of Councillors on one level, on another level he indicated in his evidence that he did not have their trust, in particular where he had to give advice that was not in accordance with what Councillors wanted to hear.

A number of issues appear to have given rise to what is now an unsatisfactory relationship between Councillors and the General Manager. These include, amongst others things:

- the Land and Environment court case and in particular its conduct and cost;
- the leaking of information about the General Manager's employment;

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- the fact that the General Manager considered certain Councillors attacked his and his staff's professionalism publicly;
  - the fact that Conduct committee matters were pursued by the General Manager against certain Councillors;
  - the General Manager's relationship with the Mayor, where he felt he had to pull back in his relationship with the Mayor at times;
  - the fact that the General Manager considered that information was being sought from either himself or his staff for political purposes to for use in attacks against others.

There a number of indications in addition to the aforementioned issues that indicate the current situation is unsatisfactory and unsustainable. These include:

- the fact that as far back as October/November 2004, these issues were having an impact on governance at the Council and the fact they are still an issue and still having an impact;
- the fact that in recent times, the General Manager has not had his performance reviewed by the governing body;
- the fact that the General Manager considers the Council has not been a responsible employer; and
- the fact the General Manager considers he has been unable to discharge his primary duties as a general manager and in relation to Shell Cove because of the governance issues which have consumed him and his time.

There are other serious indications of the extent and impact of the current circumstances. The General Manager in his submission in reply states:

*"I believe I was unable to use the Code of Conduct Committee effectively as there was clear evidence of a breakdown of trust ...between myself and probably five councillors";*

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*“The evidence by a number of Councillors that they have a “professional relationship with myself is at odds with the other evidence”;*

*“I was interrogated in regard to the Land and Environment Court matter and the Code of Conduct matter dealing with Councillor Greig”;*

The General Manager also refers to what he describes as an “outrageous” allegation in recent Notice of Motion. He claims a councillor *“said that I had acted in my own interests, based on my friendship with an executive of Australand Corporation, in negotiating a deal on behalf of Council, and I had not been acting in the interests of the Council or the Shellharbour community”*. I must point out that the allegations, in relation to the General Manager conduct and conduct of the Councillor who allegedly made the claims about him, were not canvassed during the course of the Inquiry.

However, regardless of the untested nature of the General Manager’s view in relation to what transpired, his view in relation to the Notice of Motion and the other quoted statements from his submission in reply, are significant because of what they indicate about his view his relationship with certain councillors.

### **Management of the General Manager’s employment**

An issue that was canvassed during the course of the Inquiry was the role and responsibilities of the governing body in employing the General Manager and managing his performance.

Pursuant to s. 338 and s. 339 of the Act, the General Manager must be employed on a performance based contract and must report annually to the council on the contractual conditions of senior staff.

An important means by which councils and their general managers can address relationship issues is through the operation of the performance agreements and performance reviews.

During the course of the Inquiry I obtained copies of the General Manager’s contracts of employment (two) that have been in effect during this term of

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Council. Both contracts indicate that the General Manager has been retained on a performance based contracts and pursuant to the terms of both contracts, the General Manager and the Council were supposed to sign an annual performance agreement and the General Manager was to undergo a performance review annually or at some other period agreed to by the parties. It is common ground that a performance review has not been done in a formal sense by the Staff Committee since the renewal of the present contract in 2006, and it is not apparent that it had been done previously during the term by the Staff Committee.

There was some suggestion on the evidence that such a review might have been conducted at the time of the renewal of the contract in 2006, at which time an independent consultant reported on aspects of the General Manager's contract renewal, however that would not appear to have constituted a benchmarked performance review. There was a further suggestion that Council had, at some stage, varied the conditions of the General Manager's contract in relation to the conduct of the annual performance review requirement.

The fact that the Council and the General Manager have not entered into annual performance agreements in recent times as required and the fact that the General Manager has not had his performance formally assessed and reviewed on at least an annual basis is a matter of concern, given the difficulties Council has been facing.

From the General Manager's point of view, he considered that given the Land and Environment Court proceedings and a personally held belief that he would not necessarily be able to obtain a fair performance review from Councillors Greig and Leedham (against whom complaints had been alleged before the Conduct committee) that the delay of the review was understandable in the circumstances. Mr Gearon shared the perception that it would have been difficult for the General Manager to have a fair review during this time.

Both Cllrs Greig and Leedham indicated that they did not share the General Manager's perception that he might not have been able to achieve a fair review,

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noting instead that they would have discharged this function in a professional manner.

In the case of Cllr Greig she rejected the proposition that there was any breakdown in trust between herself and the General Manager. During the hearings she was asked by the Counsel Assisting *"Is it your evidence that you have never expressed concern to the general manager in terms of you not being able to trust him?"* and she testified that *"I've never said that to him."* She was then asked *"You've never had a conversation with the general manager saying, 'I will never trust you again,' or words to that effect?"* to which she responded, *"I have never said that ever."* This was in contrast to evidence in the form of a file note by the General Manager on 7 March 2007 to the effect that he had been told by Cllr Greig that she would never trust him again.

Cllr Rose has submitted in reply that the outstanding performance review for the General Manager should be conducted immediately and that he *"would be someone willing to be involved in that performance review process."*

Other Councillors agreed with the view that the review had been delayed by reason of the Land & Environment Court proceedings but rejected the view that the General Manager would not be able to obtain a fair review. The General Manager indicated that he felt intimidated by the fact that Cllr Leedham was raising the issue of his review shortly after the time at which he (the General Manager) had made a complaint against Cllr Leedham.

While it may have been open for the Council and the General Manager to agree to postpone the annual performance review pursuant to the terms of the contract of employment, there is no such latitude provided in the contract, in regard to the requirement to enter into an annual performance agreement.

Given that the governing body of Council employs only the General Manager, it is a serious failing on the Staff Committee and Councillors generally, in their discharge of their duties, to have neglected to comply with the statutory and contractual provisions.

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I am also concerned as to the adequacy of the formal reporting to the governing body on the General Manager's contractual conditions. Such reporting, if it was comprehensive, might well have provided the catalyst for the Council and the General Manager to enter into a performance agreement early in the term and thereby provided the foundation for a subsequent comprehensive and systematic review, by the governing body, of the General Manager's performance. On the face of it, this could have occurred well before the issues arising from the leaking of confidential information and other matters came to significantly bear on the relationship. Had the first agreement and review taken place within the first twelve months of the term, some issues may have been able to be resolved prior to them getting out of hand.

In relation to the annual reporting of the contractual conditions of senior staff pursuant to s. 339 of the Act, the General Manager, in his submission in reply, contends that he was not required to submit such reports to Council. It is his position that the intent of the Act is to provide a mechanism requiring general managers to keep their Councils informed about other senior staff (who report to the General Manager) and in the case where there are no other senior staff, no report is required. However, his current position in relation to this matter is somewhat at odds with the one report he did make to Council pursuant to section 339, in 2005. A copy of that report and the relevant section of the General Manager's submission in reply are included as an Appendix to this report. I should point out that reporting in the Annual Report does not in and of itself constitute a report to Council. Nor do I consider the 2005 report or the information in the Annual Report comprehensive.

I have made a recommendation that guidelines be provided to general managers to facilitate comprehensive reporting on such matters to the governing body of councils. I have provided, as an Appendix to this report, a list of matters which I consider would go some way to providing the governing body with the information they need to fulfil their role and responsibilities in relation to the employment of senior staff.

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## **Relationship between councillors and staff**

The Inquiry considered the nature and quality of relationships between Councillors and Council staff generally. While Councillors were positive from their perspective, Council staff were not.

There was evidence that staff were treated inappropriately at public meetings in terms of being subjected to aggressive questions and criticisms. This evidence has been disputed.

Some staff considered their interactions with Councillors to be intimidating. One staff member was allegedly told by a Councillor that the matter would be 'settled outside'.

Staff alluded to a distressing environment which some, who had served at previous councils and other councils over long periods of time had never observed before to the same degree. This aspect has also impacted on the capacity of the General Manager to discharge his duties towards his staff, specifically in having to cancel meetings of the senior management group, to attend to other matters concerning governance.

The Mayor, in his submission in reply draws attention to comments made by two of the members of the public that some of the staff were "*precious*". He suggests that the staff members' perception of how they were treated is inconsistent with the Councillors' and that "*the perception of aggressive questions, criticisms and abusive conduct arises from the fragility of some senior staff members arising out of their frustration at their perceived dysfunctionality of Council meetings.*"

While I have noted the contrary view put by the Mayor, there is evidence from the Councillors themselves that Councillors have acted in an aggressive manner towards staff. For the example, the Mayor himself testified, "*I would say I have given the general manager a bawling out on quite a few occasions, on personal differences of opinion.*" In his response to a subsequent question he testified in part "*I'm a pretty forceful person, I will admit to that, ...if I have a*

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*disagreement with people, I tend to stress my point.*” Clr Rose’s conduct in relation to staff has already been canvassed earlier in this report; at the hearings he admitted to having been counselled in his words *“to pull back and don’t go in boots and all, and whatever.”* As for the comment in relation to the *“perceived dysfunctionality of Council meetings”* I think the evidence suggests such a perception is a valid one.

There was significant evidence, particularly in relation to Council’s assessment of tenders and Council’s assessment of planning matters that indicates that Councillors failed to pay due regard to the professional expertise and advice of Council staff. I have discussed this evidence elsewhere in this report.

Perhaps to the most fundamental impediment to improving the circumstances of Council is the apparent distrust that exists within the organisation. While there are no doubt a number of factors that have contributed to this such as the aforementioned ones, such as Councillor conduct towards staff, the impact of the leaking of confidential information and Council’s inability to identify the source of such leaks cannot be underestimated.

It is clear that ongoing leaks of confidential Council information can only occur by or through the agency of either Councillors and/or Council staff. It would not be unreasonable for innocent Councillors and innocent Council staff to be distrustful of each other and their colleagues given the leaks that have apparently occurred.

The leaking of confidential information has impacted on the Council staff to such a degree as they considered that sensitive documents ought not go to Councillors in their early stage if there was a risk matters might be leaked. This was particularly apparent, per the evidence of Mr Hoynes, where land values were an issue in relation to the preparation of draft LEP’s.

Another example of how confidentiality was a problem was in relation to the golf course. Senior staff considered that recent moves to take possession of the golf course could not be shared with any Councillors (other than the Mayor at the last minute) because of the risk that the matter would leak and efforts to obtain

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possession might be frustrated. While it is arguable that such a matter is not one that should or needed to be shared with Councillors before the event, it was the staff's view that they couldn't share the matter because of the likelihood of a leak.

Clearly, such distrust and its consequences for not sharing information appropriately, is not sustainable.

## **OTHER MATTERS**

### **Land and Environment Court Proceedings**

The General Manager wrote in the Council's Annual Report for 2006/2007 that

*“One of the more unfortunate aspects of the year's operations has been the need to embark upon a complex investigation into the leaking of confidential Council information. This has been an extremely challenging situation for all involved.”*

The impact of the investigation and Land & Environment Court proceedings cannot be underestimated on the impact it has had on Council, Councillors and Council staff. This impact has manifested itself in substantial time and money allocated to the proceedings. The proceedings were commenced against numerous individuals with only two Councillors eventually the subject of a full hearing. One councillor, Cllr Rose, was exonerated. An adverse finding was made against Cllr Stewart in relation to one of the three breaches of confidentiality on which the Court was asked to make a determination.

Cllr Rose, in his submission in reply, affirmed his evidence as to *“the dramatic effect of these proceedings upon himself and his family.”* The submission suggests:

*“The clear issues arising from these proceedings are as follows:*

- 1. Why is that these proceedings were ever commenced?;*

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2. *Were these proceedings justified in the circumstances?;*
  3. *Why is that Mr Geoff Rose and Ms Helen Stewart were parties to these proceedings?;*
  4. *After the proceedings included the above Councillors, was it appropriate to have those proceedings continued notwithstanding the adverse publicity and involvement of the Local Government?;*
  5. *The costs of these proceedings.”*

Clr Rose’s submission makes the observation that:

*“On a cost basis alone, it seems the legal proceedings this stage has cost SCC well over \$1 million. Mr Rose will most certainly receive an order in the foreseeable future for the majority of his legal costs to be paid by the Council.”*

Many views were expressed as to how this issue might better have been dealt with other than through the expenditure of such resources. These included the possibility of having the matter dealt with by the Code of Conduct committee in relation to the Councillors in question, although it is accepted that the Conduct committee would not have had the coercive powers of a Court to investigate the matter, nor would it have been able to deal with the wider initial allegations against members of the public.

The DLG, which at first expressed support for the proceedings later adopted a different position when it suggested that the proceedings ought to be resolved. Different Councillors interpreted this letter differently. Nonetheless, the apparent change of position by the DLG did cause internal difficulty between Councillors, some of whom argued the proceedings should be dropped or otherwise resolved and others who wanted the proceedings to be prosecuted.

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I have declined to make an adverse finding in relation to the Council instigating the proceedings in the Court. I have noted Council' submission in reply which made the following points about this matter:

- *“the regular leaking of confidential information was a serious problem for Council;*
- *it required a robust response on the part of Council;*
- *Council undertook an investigation to determine the source of the leaking;*
- *acting on the information provided by the investigation Council sought legal advice;*
- *the legal advice indicated a course of action;*
- *the councillors accepted that legal advice and acted in accordance with it;*
- *their actions which at the time were following the advice of their legal advisors was a prudent course of action;*
- *the DLG was kept informed of the proposed course of action and did not raise any objections at the time...; and*
- *once the legal proceedings commenced it was difficult for the Council to stop the proceedings as it would have denied the opportunity of the two defendant councillors to establish their innocence.”*

Council, in its submission in reply that states *“With the benefit of hindsight, it is very doubtful if Council would recommend this course of action or recommend it to other councils.”* Given what I have observed and heard about the monetary and other costs of Council's pursuit of this matter in the Court, I encourage Councils to carefully study the Shellharbour experience before embarking on a similar course of action.

### **PBP Review & Council's Response**

The DLG conducted a PBP review during 2005, which was finalised in July 2006. The final report was sent to the Council on 2 August 2006 and tabled at a Council meeting on 15 August 2006. While the report described Council

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operations in a generally positive manner, it details concerns about a range of matters including the conduct of Councillors and Council meetings. The report included 48 recommendations, a number of which pertained to governance matters.

According to information on the DLG's website, the PBP program is designed in part as an "early intervention" program. In this regard, the PBP review process at Shellharbour gave the Council the opportunity to reflect on its own performance and to benefit from the expertise and perspective of the DLG's reviewers. I have given consideration to how the Council responded to this opportunity.

The DLG provided the Council with a draft report on the PBP review in May 2006 seeking comments from the Council prior to finalisation of the report. Council provided a written response on 4 July 2006. A copy of the Council's response is included in the finalised version of the report.

Council, in its response to the draft report, noted "*practically all the recommendations made ... are in fact very similar to, or follow on from*" those identified by Council in a self audit. The consistency between the DLG's and the Council's self audit suggest that the PBP review provided an accurate assessment of Council at that point in time.

The final report was considered by the governing body of Council at its meeting of 15 August 2006. The relevant section of the minutes is reproduced hereunder:

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### 10.3 Promoting Better Practice Review Final Report (8589768)

375 RESOLVED: Briggs/Leedham

1. That the Promoting Better Practice Review Report be tabled and noted.
2. That the Action Plan be prepared and forwarded to the Department of Local Government.
3. That the Department of Local Government review team be thanked for their assistance in reviewing Council's practices and for their recommendations for improvement.

CARRIED (Councillors Rose and Mifsud dissenting).

The evidence suggests to me that all Councillors were aware of the initial report. However, the weight of evidence suggests that the governing body did little to follow up to ensure its resolution was complied with.

While documents available to me indicate that an "Action Plan" to address the recommendations was prepared and forwarded to the DLG on 20 October 2006, the evidence suggests that the governing body did not subsequently enquire as to whether the recommendations contained in the report were being addressed.

The Mayor testified that the Council has embraced that report, that in his view, many of the recommendations had been significantly implemented and that the Council is in the process of addressing those other matters that might take a little longer to address. However, his evidence needs to be considered having regard to his responses to earlier questions put to him during the hearings.

The Mayor testified that the elected council has a direct interest in following up on the implementation of the PBP report and that two progress reports had been sent to the DLG. However, he indicated that he couldn't remember having been involved in producing those documents. It was then pointed out to him that the second report was quite recent as it was dated 17 March 2008. He responded, *"I had no involvement in that one."* He went on to testify *"it would have been nice to have a copy (of the March 2008 report) before it went out."* But he understood not seeing the previous one *"because I was the same as*

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*every other councillor - I was under investigation, you see. So I don't take a grudge to that at all.*" He testified that he only had seen the second report after the Inquiry had commenced.

Clr Rose testified that he couldn't remember discussing the progress reports with the General Manager or anybody else.

Clr Hawker testified that he had read the original report, that he recalled seeing an action plan and that he has not made any inquiries to apprise himself of Council's progress in addressing those recommendations. He explained that he believed *"it's the general manager's job and he would come back to us with reports, and I assumed that it was on target."*

Clr Mifsud couldn't recall having any input in relation to the progress reports.

Clr Jeffreys was asked whether she thought that Council had been diligent in following up on the recommendations and she responded, *"I believe that at both sides of the fence, we could have been a lot more diligent."* When asked to explain what she meant she indicated *"Councillors and Council as an entity, yes."*

Clr Bird testified that he had read the report, that he recalled seeing the action plan and that Council was required to report on the progress of implementing the action plan. He was asked if he had made any inquiries to apprise himself of Council's progress in addressing the recommendations to which he responded, *"No"*. He explained that he thought Council was making progress but then gave evidence that he had not ever made inquiries of Council staff in relation to the status of implementation of a council decision in relation to that report.

Clr Greig testified that she was aware of the Promoting Better Practice report and that Council passed a resolution to note the report and that an action plan be prepared to address the recommendations therein. She testified that she did not recall ever seeing such an action plan, that this surprised her but that she had not taken that issue up with anyone. When asked why, she responded, *"I*

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*can't answer it.*" It is apparent from a subsequent answer that she relied on Council officers to address the issues arising.

I note the testimony of Mr Weir that suggests the Council was not provided with progress reports from him and that he saw it largely as his responsibility to ensure the recommendations were implemented. He was asked what his experience was with Councillors in responding to the PBP report and he testified:

*"My recollection is that I put it up for the council initially as the action plan and from then on I took it as being pretty much an operational matter. 95 per cent of the recommendations, I suppose, dealt with the staff, the management operations of it. There was, I guess, the training of councillors, the briefing and the meeting conduct, which were three recommendations which had to be dealt with at the elected level. I thought we would deal with those as separate items through training and that sort of thing, so that was in that here as a major item, extra item, to deal with."*

Council's submission in reply has asserted *"there was failure on the part of the General Manager to advise the councillors that he had been requested to provide progress reports to the DLG"*. However, I note that the PBP report that was considered by the Councillors on 15 August 2006 included the following statement *"The department expects councils to ... provide progress reports on the implementation of the action plan."*<sup>4</sup> Further, the General Manager's report that was considered at the meeting included the advice *"It is intended that the Council and the Department will jointly monitor progress toward the implementation of the Action Plan. Council is required to advise the Department on its progress with the implementation of the Action Plan within six months of tabling the report."*

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<sup>4</sup> *Department of Local Government, Review Report - Shellharbour City Council, July 2006. p. 6*

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It is my view that it was part of the role of Councillors, pursuant to section 232 of the Act, to review the Council's performance in implementing the PBP Action Plan and to ensure the PBP recommendations were considered when the Council adopted its annual management plans. Given the significance of the PBP review process, these are matters that might have also featured in the General Manager's annual performance agreement and subsequent performance appraisals, had they been conducted on an annual basis.

I acknowledge the suggestion in Council's submission in reply that *"it was more of an unfortunate organisational failure than a deliberate avoidance of responsibility on the part of the elected representatives"*; however, the need for Council to review and revisit the PBP Report and its recommendations should have been apparent to them as Council continued to experience ongoing problems.

There seems little doubt that the recommendations contained in the PBP report were well founded. Given this, it remains contingent upon the Council to ensure that the recommendations are implemented. It should not be left to the General Manager or other persons other than the governing body to determine in isolation that a recommendation is not going to be addressed.

I have recommended that the Council, in consultation with the DLG implement all outstanding recommendations of the PBP review. If it becomes apparent that a recommendation is no longer relevant, because of the passage of time or other events, this should be a matter for review and agreement between the Council and the DLG. The governing body of Council (be it an Administrator/s or an elected body) should be diligent in ensuring the recommendations are addressed.

Council, in its submission in reply, submitted that I should not declare vacant the civic offices of Shellharbour City on the basis of the elected representatives' response to the PBP report.

The recommendation I have made in this report has had regard a multitude of factors that were canvassed in the course of the Inquiry and which are

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discussed in this report. No single factor has formed the basis for my recommendation.

It is a matter for the Minister as to whether or not to declare the civic offices vacant; my role is confined to making a recommendation.

### **Public Participation**

The Council conducts both public participation and Council meetings. Public participation, which is now conducted at 5.00 pm at Council's chambers, allows residents 3 minutes to speak on a subject for which prior notice must be given. There is no legislative requirement for the Council to hold such public participation. Nevertheless, Councillors who were asked expressed the view that it was a tradition of the Council that ought to be maintained.

Certain members of the public were critical on a number of grounds of public participation, including the time at which it commences (which is too early for some who wish to participate to leave work), the fact that there is only a short time to speak, the requirement for them to indicate a positive or negative view on a matter on the business paper and the observation that their concerns are not being listened to by Councillors. There was one specific example of a Councillor (Clr Hore) who indicated he refused to listen to what one member of the public had to say and left the room on two occasions until that member of public had finished. This was done with the leave of the Mayor.

One Councillor considered public participation was pointless and likened it to *"walking into a telephone booth and having a conversation without picking up the phone"*. That may also in part have to do with the suggestion that once a caucus decision was made it was unusual for the decision to be changed after public participation, although there was some evidence to suggest that this had, on occasion, occurred.

Clr Hawker, in his submission in reply, makes a number of valid observations in relation to public participation. I have reproduced his observations hereunder.

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**Extract from Cllr Hawker's Submission in Reply**

6. While government at State and Federal level involve broader issues involving vast numbers of people, comparatively Local Government decisions will have an immediate and direct impact on the individuals residing within the particular jurisdiction of a particular Council.
7. Therefore, particularly at a Local Government level, the importance of the public participation process is heightened.
8. In relation to the Council, at the very least, ideologically the concept of the public participation is a direct and importantly transparent manner in which decision making is conducted.
9. Fundamentally, the process is critical in continuing to foster the transparency and accessibility of the Council. Public participation is therefore a worthwhile and valuable asset to Local Government practice and policy implementation.
10. The only concern is the degree of sanctity and respect which the public and community place in the Council and office of Mayor.
11. The manner in which the forum for public participation which the Council has devised encourages any party to voice their opinion.

Council's submission in reply makes the following observation *"Unfortunately for Shellharbour City Council the idea of public participation is an example of a good idea that has turned sour."*

Cllr Rose's submission in reply makes the point that *"It is submitted that there is also a need for the members of the public to act fairly and reasonably"* and *"if there is a better model then that should be implemented and followed by Council."* I am happy to adopt these points.

I am of the view that public participation can be a very valuable means for the Council to stay in touch with the views of the community it serves over the course of its term in office. I am also of the view that it is important, from an access and equity perspective, to afford members of the community an option

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to put their views to Councillors orally and as a group. However, I make the observations that public participation is of limited value if:

- Councillors have already made their mind up on an issue.
- Councillors are precluded from engaging with the members of the public by way of asking questions to clarify matters that are being put to them by the public.
- Members of the public seek to use the process to undermine the capacity to the Council to conduct its meetings in a proper manner.

Section 8 of the Act requires Councils to consult with their communities and provide for the involvement of the public and users of facilities and services. I have recommended that the Council review and revise its procedures for public participation and community consultation, having regard to these obligations and the limitations of the current public participation process. I acknowledge that Council's submission in reply expresses a commitment to persevering with public participation and indicates that consideration will be given to "*getting it back on track*".

### **Review of Wards/Reduction in the number of councillors**

I have been provided with evidence that indicates that there may be two structural issues impacting on the operation of Council. These issues are the number of Councillors and the ward structure.

Section 224 of the Act prescribes that a council must have at least 5 councillors and no more than 15 councillors. Section 210 provides the division of a council area into wards and the alteration of ward boundaries. It also provides that a council may abolish all wards provided it has obtained approval at a constitutional referendum to do so.

The DLG's PBP report noted that the Shellharbour local government area covers a relatively small area and now largely consists of a single urban area. It found that the current ward system no longer accurately represents the

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communities that make up the local government area. Witnesses, including the Mayor gave evidence of the extent and nature of change that has taken place in the LGA.

The DLG recommended, in the PBP report, that in the circumstances, Council needed to review the ward system to determine whether it continues to be relevant, the impact it has on council's capacity to meet the needs of the community as a whole and whether it inhibits the promotion of a coherent vision or strategic outlook at the elected level.

Mr O'Rourke, Council's Director for Community Planning and Strategies gave evidence *that "wards have all sorts of grotesque shapes based on fulfilling that requirement of the regulations, but having far less to do with local organic communities of interest."* He went on to testify, *"I do not believe the ward structure, ... is conducive to engendering a whole of city approach to the challenges and opportunities that we have ahead of us."* He indicated that the shape of the wards essentially dictated by the need to maintain balance in the number of electors and that they had far less to do with organic communities of interest.

Mayor Hamilton gave evidence that the maintenance of ward boundaries is problematic.

Mr Davies also gave evidence as to what he observed to be preoccupation on the part of councillors with their wards, as distinct from their responsibilities as councillors of Shellharbour City Council.

Mayor Hamilton indicated that he held a personal view that a reduction in councillor numbers to 6 councillors and a mayor was a good option. He gave evidence that he believed it would lead to better governance and save money. He testified that he believed that *"it would lead to better governance"* and that *"it would save dollars"* and that *"councillors would still be able to represent the residents at a high level"*.

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I note that Council, in its submission in reply, acknowledges *“it is accepted that there are advantages to reducing the number of councillors”* and that *“there are anomalies in the current ward system”*. I also note its submission that the current Council inherited this situation. I consider it important to ensure that this legacy is not passed on to a future Council.

It is apparent to me that Council would operate better with fewer wards and fewer Councillors and I have made a recommendation to this effect. However, in making such a recommendation, I acknowledge the difficulty in implementing it, given the current statutory framework applying to Councils with two councillor wards.

During the Inquiry process I sought documentation from Council on the implementation of recommendation 7 of the PBP Review report, which pertains to this issue. Mr Gearon also gave evidence that Council had been provided and considered reports on this issue. While it is apparent the Council has given consideration to the matter, it has not resolved to take any action that will result in changes to its structure.

Mr O'Rourke made the following observation about the Council's response to this issue:

*“I think some people in the community have mistaken the Council's options as being somehow bloody-minded or keeping the status quo because it serves a particular party's agenda without realising that the council was constrained because the State Government framework did not give the Council the option of both reducing the number of councillors and reducing the number of wards, so the only alternative we would be left with to reduce the number of councillors, without a referendum, without going to all that convoluted expense and time, would be six wards of one.”*

While I have considered Mr O'Rourke's evidence, given the current provisions of the Act, it would seem open for the Council, after due consultation in accordance with section 210A of the Act, to divide the area into three wards

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instead of the current six. While I do not wish to pre-empt the consideration of any matters that may arise during the consultation process, the reduction of the number of wards is a relatively straightforward process and should be undertaken without delay, as a precursor to taking action to reduce the number of councillors.

Had Council modified its ward structure so that it had three wards of four councillors, it would have then been able to take advantage of the opportunity that was available to Councils to seek Ministerial approval to reduce the number of councillors to three per ward. However this opportunity was only available for a fixed time and that time is past. The only option that is now open to Council is to seek approval of the community, via a referendum, for such a reduction.

In recommending a course of action that will necessitate the conducting of a referendum, I am very mindful that there will be significant costs incurred in implementing the recommendation. Not only will there be the costs of the process itself, there will be attendant costs incurred in properly informing the community about the issue. However, I consider that it is imperative that there be a reduction in the number of Councillors before the next elections in 2012.

In the circumstances, it might be reasonable for such a referendum to be delayed for up to twelve months. This would allow time for the implementation of the reduction in the number of wards by administrative action, it will allow the Administrator time to start addressing the other issues arising from this report and it would also provide time for the Government and the Parliament to give consideration as to whether to provide a further opportunity to Councils to reduce their numbers by Ministerial approval without the need to incur the costs of a referendum.

Finally in this issue, I make the observation that there may well be other Councils who would benefit from a simpler means of amending their structure and there may be a role for an independent body such as a Boundaries Commission in such a process. Council, in its submission in reply advocates for consideration of the options by the Parliament.

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## **Shell Cove**

Council's Annual Report for 2006/2007 refers to the Shell Cove Project as the "Council's biggest initiative" and refers to it as being a \$1.5 billion project. A number of submissions from members of the public raised concerns about the project and the General Manager testified that the current circumstances of Council were adversely impacting upon his capacity to fulfil his responsibilities in relation to this project.

I have not, during the course of this Inquiry, examined the merit of this project and Council's operational performance in relation to this project. To do so would have required significantly more resources and time and I did not consider that the outcome of such an examination would be of determinative weight in forming a view as to whether all civic offices should be declared vacant. However, I accept that the project is significant in its vision. I further note that it was conceived and instigated long before the current Council was elected.

I should point out that the Inquiry did have particular regard to:

- The significant dollar value attached to the project and given this, the potential for it to impact on the overall performance of the Council and its capacity to meet the needs of residents and ratepayers. I note that this impact could range from a very positive impact to a very negative impact.
- The General Manager's evidence about his role in relation to this project.
- The General Manager's evidence about the adverse impact of the current circumstances of Council on his ability to fulfil his responsibilities in relation to the project.
- The oversight arrangements that are in place to ensure the proper administration of the project.

While the General Manager and his staff are responsible for implementing Council's policies and the day-to-day management of Council, there is clearly a role for the governing body in making key strategic decisions in relation to a

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project of this magnitude, and in monitoring the performance of the General Manager in relation to the project.

The significance of the governing body's role in such matters was highlighted in the recent Inquiry into the Port Macquarie Hastings Council. That Inquiry examined the management of the Glasshouse Project, which subsequently led to the dismissal of the governing body of that Council.

At the hearings, the Counsel Assisting asked Mr O'Rourke, Council's Director for Community Planning and Strategies whether he thought the Councillors had the capacity to comprehend very complex issues such as Shell Cove marina and he responded, *"It's not easy. I can't answer for individual councillors, but my suspicion is that their grasp of the detail could be improved."* This is significant, as there is evidence that Councillors are provided with what was described as a very detailed report on Shell Cove on a quarterly basis.

The General Manager has delegated authority for the project. However, as discussed earlier in this report, his performance has not been the subject of a performance agreement and regular performance appraisals. Such processes would afford the opportunity for a proper examination of his performance in relation to the project.

Mr Gearon, Council's Group Manager, Corporate Services was asked whether there was any risk management plan adopted in relation to the General Manager's role in relation to Shell Cove and he responded *"Not specifically prepared by the staff that report to me, no."* He was then asked whether Council has an internal audit function to which he responded *"No it doesn't"*.

It would be prudent for the governing body of Council to undertake a comprehensive review of the Council's performance, plans and forecasts in relation to Shell Cove, and for it to ensure the adequacy of the ongoing supervisory and reporting arrangements and the associated internal controls.

I have made a recommendation about this that assumes that an Administrator/s will be appointed. I am of the view that a newly elected Council,

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in the current circumstances, would not be as well placed as an Administrator to undertake such a review, particularly given the complexity of the Shell Cove Project and the commercially sensitive nature of the information that would be required for such a review.

### **Use of Council Funds for a political fundraiser**

During the course of the Inquiry, the attendance of three councillors at a political fundraiser was considered.

It is apparent from Council documents provided to this Inquiry that Council drew a cheque in the favour of the Noreen Hay Campaign Fund, in the amount of \$1250, being payment for attendance of five persons at a dinner held at the Lagoon Restaurant on 10 December 2004.<sup>5</sup>

It is apparent from the documents that the payment was for the attendance of three ALP councillors (Clrs Hamilton, Greig and Gillett) and the spouses of the Mayor and Clr Greig.

Council documents indicate that Clr Greig promptly sought to have the cost of her and her husband's attendance deducted from the councillor fees due to her from Council and that such a deduction was made.

Council documents indicate that Clr Gillett has recently sought to have the cost of her attendance deducted from the councillor fees due to her and such a deduction was made from a payment made to her on 29 May 2008. She explained the reasons for this delay in her testimony during these proceedings.

Council documents indicate that on or before 17 January 2005, the Mayor requested that a \$250 deduction be made from the councillor fees due to him, to pay for his wife's attendance at the fundraiser and such a deduction was made.

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<sup>5</sup> Ms Hay is the Member for Wollongong and a member of the ALP.

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The evidence indicates that Council and thereby its ratepayers have funded the Mayor's attendance at the dinner. This matter was put to Cllr Hamilton, during the course of the proceedings.

Cllr Hamilton indicated that his understanding was that it was a "Meet the Ministers" dinner. When asked where he thought the cost for the dinner was being paid to, he responded that he "*never gave it any thought*".

The Mayor suggested that it was essentially good value for money, given the cost he would have incurred if he had gone to Sydney to see the Ministers. However, he also gave evidence that he goes to Sydney on a regular basis in any case and meets with Ministers, so it is not clear that there was any genuine need for the Mayor to attend the dinner in question, in the exercise of discharging the functions of his civic office.

Cllr Hamilton was asked whether he considered he would get better access to Ministers if he attended either a ministerial briefing or a party fundraiser and he responded in the negative. This was following testimony in which he indicated he had extensive access to Ministers. He was then asked "*If you don't get better access, what would be the purpose of attending these functions?*" In his response, he reaffirmed his position that he did not know it was a fundraiser until after attending and that, "*in the future, my advice would be to any mayor, anywhere, if you can't meet with the ministers and you go to these, to pay for himself if its for election funding. But if it is a Meet the Ministers, if it is organised to meet the ministers, I believe that it is quite logical for the council to pay that bill, for the mayor.*"

There is no evidence that indicates that the Mayor knew, until after attending the dinner, that profits from the dinner would be used for a political campaign.

I note the apparent standard adopted by his two colleagues, Cllrs Greig and Gillett, whose actions in repaying the council for the attendance suggests to me they do not consider it appropriate for ratepayer funds to be used for the purpose of funding their attendance at a political fund-raising dinner.

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I note the Mayor, in his submission in reply, makes the point that neither Cllr Gillett nor Cllr Greig is the Mayor. While I accept there may well be events where it is appropriate for the Mayor to be funded to attend and not other councillors, the use of ratepayer funds to attend a political fundraising dinner cannot be condoned.

Council, in its submission in reply, indicates that the Council proposes to develop a set of draft guidelines for acceptance of invitations issued by charitable organisations and that these guidelines will prohibit the acceptance and payment on the part of Council, for invitations which fall into a number of categories including *“support of fund-raising events fro a political party”*. While such guidelines may be beneficial, the Council should be mindful that there are already statutory provisions that should be considered by Council including s.356 of the Act, which addresses the question of *“Can a council financially assist others?”* and s. 252 of the Act and the related Guidelines on the payment of expenses and the provision of facilities.

### **Submissions in Reply**

I have referred to the various submissions in reply in the body of this report where it was informative to do so. I have made some additional comments on specific matters in this section of the report.

Council’s submission in reply asserts that there was an effort on the part of Councillors to improve their performance following Mr Page’s visit to Council in December 2007 and I note that the submission acknowledges that there is disagreement as to the extent and duration of the improvement.

Cllr Rose, in his submission in reply, contends that *“the behaviour of each Councillor has improved in most recent times”* and *“the behaviour of the Council is improving dramatically”*.

While I accept the evidence of some of the Councillors that they made an effort, it is apparent to me that by the time of Mr Page’s visit, the situation at Council was such that there was little prospect of the current Council being able to

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repair the damage that had already been done and there has been conduct and other events and circumstances since that time that have exacerbated what was and remains an unsustainable situation.

Council's submission in reply seeks to cast doubt on the General Manager's assertion in his letter to the DLG of 17 March 2008 that the governance situation at Council has substantially deteriorated since he last formally reported in the PBP action plan (which was on 1 June 2007). The submission makes the claim that "*No details were provided to the DLG nor to the Public Inquiry, which would support such a contentious statement*". Such an assertion is at odds with the information provided to me in the publicly available submission and in the course of the hearings.

Council in its submission in reply asserts that a competent General Manager, with the depth and breadth of experience, should have been able to assist in resolving these difficulties; the inference being that they now consider their General Manager as being incompetent and lacking in depth and breadth of experience.

I express no view on the competence or otherwise of the General Manager – such an assessment is the responsibility of the governing body of Council and it is they who must bear the ultimate responsibility and take appropriate action if they consider the General Manager is not performing at the required standard. However, I do note that Council voted to renew the General Manager's contract in 2006 and apparently was not so concerned about his performance before very recent times as to instigate a performance review.

I have noted the Council's submission in reply that asserts that "*in regard to the issue of councillor training, the residents of Shellharbour City should not be denied the opportunity to elect their local civic leaders ... because councillors did not attend training courses.*" My recommendation to the Minister is not based on such a simplistic notion, as demonstrated in the analysis provided in this report.

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The Mayor's and Council's submissions in reply assert that while there have been problems during this term of Council, the Council has continued to perform well and that there is a level of community satisfaction in relation to the Council and Councillors. There is evidence in support of their assertion. Cllr Rose's submission also makes a similar observation.

The DLG's PBP report comments favourably on many aspects of Council's operations and Council's annual reports during this term of Council also chronicle a multitude of public works and achievements.

I have been provided with a copy of a report prepared for Council by IRIS Research titled "2007 Shellharbour City Community Survey Management Report". The report is based on the results of 500 telephone interviews with residents. I have noted the survey's finding that *"Overall, 54.3% of Shellharbour residents were satisfied with the performance of Council"*. While it might reasonably be suggested this also indicates a significant level of dissatisfaction, the survey points out that *"In relative terms, Shellharbour's result is very respectable when compared to similar sized and resourced councils"*.

I have noted that the survey indicates that *"Satisfaction with Councillors was lower than staff satisfaction"* While 67.3% of respondents indicated a high level of satisfaction with staff only 35.1% of respondents expressed this in relation to Councillors. However, I note a further 36% of respondents were moderately satisfied with councillors.

In considering what weight to attach to the results of the community survey, I have had regard to the number of the respondents that had had direct contact with Councillors in the last twelve months (prior to the survey). Only 8.9% (44) of the respondents had any direct contact with Councillors. I have considered this against the evidence of others including the Councillors, Council staff and members of the public who regularly attended Council meetings.

While I have considered the submissions regarding Council's general performance, my focus in this Inquiry has been the conduct of Councillors, their relationships with staff and whether Councillors have adequately, appropriately

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and reasonably carried out their roles and responsibilities in the best interest of all ratepayers and residents. After considering the evidence available to me, I am of the view that at best, Council is continuing to deliver its services in spite of the problems of the governing body and its relationship with Council staff. I do not consider such a situation desirable or sustainable.

I have noted the suggestion in Council's submission in reply *"that if the difficulties are with the current councillors then the forthcoming elections provides the opportunity for the new Council to re-establish the trust and confidence of senior staff."* While a new Council will have this opportunity in due course, I believe it will have a much greater chance of success if there is a significant change in the composition of Council and significant period of time to allow the organisation to recover from the legacy of the current Council.

I have noted the Mayor's submission in reply and in particular, his submissions, that the issues raised throughout the Inquiry do not either individually or collectively support a recommendation that all civic offices should be declared vacant. However, I have reached a different view, having regard to the matters detailed in this report.

A lengthy period of Administration will allow the Council to re-establish the proper management of the General Manager's performance (as provided for in his contract of employment) and allow the current Councillors a fuller opportunity to reflect on whether they are the best persons to take this Council forward or whether there are others in the community better placed to undertake their role.

One of the options put to me by the Counsel Assisting in his closing submission was that I could recommend that all civic offices be declared vacant and recommend the appointment of an interim Administrator until the election scheduled in September. In considering this option, I have formed a view that the option has little to offer by way of advantages over the other options open to me. However, I do note that an immediate appointment of an Administrator would preclude the governing body from compounding the current difficulties of

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Council in the lead up to the election; in my experience is it not unusual for the level of politicking in a council to increase in the lead up to an election and a such a scenario is one that this Council can ill-afford.

In the final part of the analysis section of the report, I deal with the Council's capacity to improve. In doing so I have had regard to the submissions in reply.

### **Capacity to Improve**

In forming a view on whether to recommend that all civic offices be declared vacant, I have given consideration to whether the Council has demonstrated a capacity to improve its current circumstances of its own volition and whether it can now do so without the use of an inordinate amount of public resources that might otherwise be used for some other purpose.

I note that:

- Councillors have had ample opportunity to improve over the course of this term.
- That while the training undertaken by Councillors was not comprehensive, there was ample opportunity and options for individual Councillors to obtain the requisite knowledge and skills. These options included but were not limited to attending all of the in-house training that was offered, attending courses offered by the Local Government and Shire Associations throughout the term and by reviewing the practice notes, guidelines and circulars published by the DLG from time to time.
- Any improvement that has occurred has, in all likelihood been at least in part driven by external intervention and threats of punitive action. It therefore must be questionable whether any such improvements will be sustained if the threat of external intervention was no longer likely.
- Council has already expended very significant resources in seeking to identify the leaks of confidential information and in dealing with Conduct matters. Limited benefit to the community has come from such expenditure;

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apparently, leaks continue and at the very least, the source/s of the leaks have not been sanctioned for their conduct.

- The Act is underpinned by there being a positive relationship between the governing body and operational arms of Council. There has been significant damage to the relationship between Councillors and Council staff over a sustained period of time.
- The Council has mismanaged the General Manager's employment contract. It would take some time to address the relevant matters and it is questionable whether an elected Council would be in a position to do so in the short term.
- There is a very short period of time between now and the next scheduled election. The time is manifestly inadequate to address the problems that have built up over an entire term of Council.
- If the election proceeds, a significant number of the current Councillors could be re-elected and there could also be a significant number of new inexperienced Councillors. Any combination of these scenarios will compound the current challenges faced by Council.
- Any new Councillors, while not burdened in the same way by the current councillors in regard to the legacy of their past conduct, would still face significant challenges upon being elected to office, even in a normally functioning Council. Their capacity to fulfil the expectations of their electors would inevitably be compromised by them having to deal with the legacy of the current Council.
- Council's submission in reply, in relation to meetings submits *"there is nothing that can be done to rectify the errors of the past other than to seek to ensure they are not repeated."* While this is true, it belies the fact that the attitudes, personalities and learnt behaviours of the individuals whose conduct was manifest in those errors, will continue to impact on the future

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conduct of meetings, while ever those persons continue to be active in local government in the Shellharbour LGA.

- The current Councillors must accept that they bear collective responsibility for the current circumstances of Council and as such there must be some significant doubt about their capacity to deal with the issues facing Council.

The evidence suggests that some of the current Councillors do not consider some of their colleagues fit to hold office. Clr Hore suggested during his testimony that one or two councillors ought to be sacked and at times he thought administrators ought to be appointed. Clr Jeffreys had mixed feelings but said if that's the only way to get a clean slate for the Council "*then so be it*".

Clrs Gillette and Bird were unequivocal about their views. Clr Bird said "*I do have concerns about whether the elected arm of council can conduct itself with decorum, with dignity and in the best interest of ratepayers between now and September.*" Clr Gillette's view was that all civic offices should be declared vacant and "*the sooner the better*" and further that "*it would be best to have administrators instead of elected representatives for the next term, to give some time for the Council to recover.*" She also indicated that there was a possibility that some councillors might "*re-stand and be re-elected and continue with the way they were behaving and make the next term dysfunctional as well.*"

While that was not the majority view of councillors who gave evidence or made submissions, I have had to consider the impact of this evidence on the ability of Council to serve its term.

Council's submission in reply included a section titled "The way forward" which was followed with another titled "We can do better". I have included these sections as an appendix to this report. While the suggestions and sentiments expressed in this material is not without merit, it is unfortunate in the extreme that it has taken a Inquiry such as this to bring about such an apparent epiphany on the part of the governing body of Council. It would stretch the bounds of credibility for me to recommend to the Minister that he should place

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faith in the governing body to deliver on its stated intentions, having due regard to its past performance and the legacy of its actions.

Declaring civic offices vacant is a measure of last resort and should be avoided if there is a viable alternative. It is a measure that I have recommended after having considered the alternatives. I have formed a considered view that there is no viable alternative other than a lengthy period of Administration and that such a period is in the best interest of residents and ratepayers of the Shellharbour LGA. I believe that ultimately the democratic process will be best served by ensuring that when the next Council is elected by the people, it will inherit a much improved situation that it would if the elections were allowed to proceed in September.

This concludes my report on the Public Inquiry into Shellharbour City Council.

Richard Colley  
**Commissioner**  
4 July 2008

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## **APPENDICES**

1. Report on Council Meetings – Mr Chris Vardon
2. Extract from Shellharbour City Council's Submission in Reply
3. Cllr Hawker's Further Submission in Reply
4. Report on contractual conditions of senior staff and related extract from General Manager's submission in reply
5. Suggestions for improved reporting on the contractual conditions of senior staff.



# **SHELLHARBOUR CITY COUNCIL**

## **PUBLIC INQUIRY**

### **REPORT**

#### **Appendices**

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## **Appendix 1 - Report on Council Meetings**

### **SHELLHARBOUR CITY COUNCIL REPORT**

In mid May 2008, I was contacted by Mr Gerry Holmes of Holmes and Reynolds, who are contracted to Shellharbour City Council to represent them at the Public Inquiry into the Council, and was asked to provide a report to the Council as indicated in the terms of reference provided to me by Mr Holmes.

I attended a meeting with Mr Holmes and the Mayor of Shellharbour City and the General Manager on the afternoon of 20 May 2008.

The terms of reference were discussed at this meeting and agreed upon by all parties to the discussion with the proviso, requested by me, that I attend at least two meetings of Council if that was possible given the timeframe of the Public Inquiry

**The terms of reference of the report, as agreed, are:-**

8. to review the minutes of this past five Ordinary Meetings of Council;
9. to comment, based on the review of the minutes, on the extent to which the Minutes of the Ordinary Meetings of Council reflects the judgments expressed in the Department of Local Government's submission to the Public Inquiry;
10. attend an Ordinary Meeting of Council, excepting that part closed to the public under Local Government Section 10A, as an observer;
11. prepare a report for council based on the observations at the meeting;
12. the report to have regard to the following:-
  - i. the conduct of the councillors during the course of the meeting;
  - ii. the extent to which the councillors showed knowledge and insight into the Council's Code of Meeting Practice;
  - iii. the general manner in which the business of the meeting was conducted;
  - iv. Mayor, Councillor Hamilton, as the chair, demonstrated knowledge of the Council's Code of meeting Practice to conduct the meeting in accordance with the Local Government Act 1993

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Appendix 1 continued:

- v. the exercise of control by the Mayor Councillor Hamilton to ensure the efficient conduct of the meeting, and
- vi. the behaviour of the members of the Public Gallery during the course of the meeting;

13. the extent to which the general conduct of the meeting reflects the opinions of the review team as referred to in the Department of Local Government's submission, and

14. any other matter concerning the conduct of the meeting which would assist the Commissioner Mr. Richard Colley to make an informed view as to the capacity of the councillors and the Mayor to conduct the meetings of council in an efficient and effective manner.

I was asked to give a written report as soon as possible

## **GENERAL OVERVIEW**

### **Meeting on 20 May 2008**

I attended the Ordinary Meeting of Council held on Tuesday, 20 May 2008 which commenced with a Public Participation forum at 5.15pm. This continued for approximately twenty to twenty five minutes. Seven submissions were listened to by the Mayor, councillors and senior staff present. It should be noted that one person made three of those submissions albeit at different times throughout that part of the meeting.

Each member of the public making a presentation was required to notify the Council staff of their intention to speak and to give an idea of the topic on which they intended to address Council prior to the meeting.

Members of the public were allowed three minutes in which to place their views before Council. They spoke without interruption or questions being posed to them by the Mayor, councillors or the senior staff present.

Two of the speakers went over the allotted time and were asked to stop speaking by the Mayor. This instruction was ignored by both people who went on to complete what they were saying.

One of the speakers vigorously questioned the Mayor asking if he was giving attention to what the speaker was saying. This led to a minor disruption which, whilst unpleasant, would be seen in other Councils. Another speaker was clearly abusive of particular members of staff.

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Appendix 1 continued:

On neither occasion did the Mayor or any councillor seek to advise the member of the public of the rules set down in the Code of Meeting Conduct.

After this section of the meeting concluded, the Mayor opened the official proceedings of the meeting and then the Council resolved to go into the Committee of the Whole. Members of the public including myself were excluded from this session of the meeting.

The meeting reconvened at approximately 7.15pm that evening with about 25 members of the public in attendance in the gallery. All councillors except one were in attendance.

A number of senior staff was also in attendance together with members of the press. The meeting proceeded to deal with the adoption of a set of previous Minutes of Council.

This part of the meeting took about twenty five minutes to conclude with a number of requests for inclusions in the Minutes being requested by a couple of the councillors. This led to much discussion and dissent. I counted 13 Points of Order being called by councillors with the Mayor being put under some pressure to keep the meeting in order. He did this with difficulty but with good grace.

The meeting then proceeded to deal with the remainder of the Agenda with various councillors making significant contributions to the discussions.

The meeting was conducted in a pleasant manner with the Mayor and councillors being able to speak freely on issues before them.

Formalities such as standing when speaking and strict adherence to normal meeting procedure were not in evidence but the meeting proceeded to conclusion in a fair and responsible manner. There was no undertone of discontent although it was plain that some councillors had little regard for each other. I believe this is quite normal in local government circles.

The Mayor called for order on several occasions when councillors were chatting amongst themselves. This was not loud or particularly disrespectful although three councillors made sharp comments to their colleagues on the matter when they considered the councillors were being disrespectful of their comments or right to comment.

I noted that councillors made several complimentary comments about staff during the course of various matters before the Council. These matters included the Quarterly Review and other budget discussion and a rezoning application.

On one occasion, a councillor made what could have been interpreted as disparaging remarks about a senior member of staff. The Mayor did not ask the councillor to withdraw the remarks although the councillor did so later in the meeting at Question Time.

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Appendix 1 continued:

When several votes were taken to determine issues, some councillors abstained from voting. On one occasion the Mayor asked the councillor if it was realized that to abstain is to be counted in the negative. The councillor agreed but on at least one occasion the Mayor had to use a casting vote to resolve an issue because a councillor abstained when the substantive vote was taken.

The Mayor left the Chair on one occasion. The Deputy Mayor took the Chair and the meeting proceeded in the same manner as when the Mayor was there.

One councillor did appear to speak on a matter in which that councillor could, prima facie, be considered to have an interest. The Mayor made an attempt to advise the councillor but the councillor concerned proceeded to speak.

On another occasion, the Deputy Mayor declared an interest in a matter before Council. The Deputy Mayor left the Chamber and did not take part in the discussion or the vote on the issues.

Question Time was not substantial and only one councillor used the time to question an officer about a matter regarding legal advice. The councillor accepted the advice given without demur. My knowledge of other Councils would lead me to conclude that the matter would have been more vigorously pursued at other councils.

Question Time was used by a few councillors to praise staff and each other.

At the end of the meeting, a councillor asked if, given the timing of the Public Inquiry, the Council should cancel the next Ordinary Meeting. This was not agreed with one councillor commenting that, given the circumstances, it could well be the last Meeting of Shellharbour City Council for some time.

Throughout the proceeding a gallery of about 25 people was in attendance. All of the people who spoke in the Public Participation section were in attendance. The gallery was generally respectful with a couple of exceptions. One person commented, prior to the meeting commencing, that Council Meetings were a "circus". At least five or six of the people present made disparaging remarks about councillors whilst the discussions were proceeding. A small group held the view that Council would soon be dismissed. In discussions overheard prior to 7.15pm, I heard four members of the public stating "that we will soon have our day".

A section of the gallery was enjoying a Dickensian view of proceedings.

I concluded that most of those present were less than enthusiastic about the abilities of the elected representatives and a couple of the senior staff.

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Appendix 1 continued:

My impression is that this is not dissimilar to other Councils on any particular occasion. Only people with specific interest in a particular matter to be determined or "council watchers" usually or habitually attend meetings of a council.

I gained the impression that a number of members of the public present at the meeting were anticipating and welcoming the prospect of Council being dismissed and were determined to assist in that process..

My overall impression of the meeting that night was that the Mayor and Councillors and senior staff conducted themselves in a reasonable manner typical of other councils in the State of New South Wales.

**Meeting on 10 June 2008**

There were three speakers heard during the Public Participation forum. One of these speakers spoke on two matters. These people also spoke at the meeting held on 20 May 2008.

One speaker questioned the professionalism of staff. This went unchallenged.

One speaker thanked councillors for their "attention tonight which is a nice change".

There was an altercation between the Mayor and all speakers at various times with one speaker being told that he was to receive a written warning from Council.

The speakers vigorously questioned the Mayor about their ability to speak on a late report presented to Council. This caused some unpleasantness with the Mayor ruling that as they had not booked to speak on the item they could not do so.

A councillor questioned this and indicated that Council should consider some method to allow members of the public to speak on late reports which they could not do if they had to follow the rules and pre- book a spot on the Public Participation forum without knowing that a late item was to be brought to the meeting.

Clearly, the Mayor ruled in strict accordance to the principles upon which Public Participation is allowed. It may, however, been in the best interest of being seen to be reasonable to allow the members of the public to speak on the late item issue.

A councillor called a point of order during the Public Participation forum. The Mayor stopped the speaker whilst this was dealt with.

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Appendix 1 continued:

It was not a pleasant part of the meeting but it only proceeded for about 20 minutes.

The meeting then adjourned until 7.15pm. The meeting resumed with about 20 members of the public in attendance many of whom were at the 20 May meeting

One member of the public commented "I am going to sit down the front where I can annoy them" whilst another commented "It will be their last night tonight".

Although the gallery was relatively quiet throughout the ensuing proceedings it was apparent that there was animosity towards the Mayor and some other councillors. One member of the public was overheard saying that "Mayor.....is a piece of garbage".

It makes it very difficult to hold a meeting when such animosity is evident.

My impression of this very quick meeting (it was completed by 8.10pm) was that it was a good and responsible meeting with an obvious desire to get on with things.

***Mayor Councillor Hamilton, as the Chair, demonstrated knowledge of the Council's Code of Meeting Practice to conduct the meeting in accordance with the Local Government Act 1993,***

**General overview of meetings held on 20 May and 10 June 2008**

The Mayor has adopted an easy approach to the conduct of meetings. It is apparent that Council has been allowed to dispense with normal procedure usually practiced in councils within the state. For instance, councillors are not expected to stand when speaking and the use of questions has been allowed to enable councillors to speak about a matter for determination several times. Although this is not normal meeting practice it does allow for a free flow of discussion enabling, when used properly, better decisions to be made by a council.

Unfortunately, when adopting this approach, the Chairman of the meeting is placed in a difficult position when matters become somewhat vigorous and the chairman decides then to adopt formal meeting procedure.

This is a risk that some Councils have taken and which, in most Councils adopting this procedure, has been respected by councillors, staff and the community.

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Appendix 1 continued:

When this freedom is disrespected, it becomes difficult for the Chairman and leads to disruptive and unruly behaviour. Having read the Minutes of previous meetings, it is likely that this has happened at Shellharbour in the past but was not evident during the meeting I observed.

My interpretation of the Minutes of previous meetings lead me to conclude that for this particular freedom to be allowed would require an undertaking by all elected members to respect the benefits that can flow for good decision making from such a freedom.

I recently attended a meeting of another council where the Mayor took a much more formal approach which has considerable benefits.

It requires a particularly talented Chairman to note the need to rein in the freedom to ensure the continuing success of this measure. I am not convinced that

Cr Hamilton, has entirely mastered this aspect of chairmanship. I concluded that the Mayor is not particularly helped by his factional colleagues.

I have noted in the reply to the DLG about the Review in 2005 and 2006, the Mayor indicated that he had consulted with other Mayors about aspects of chairing a meeting. He may well have been advised to continue the practice of running a less formal meeting but I believe that he may have been better advised to insist on strict protocol and formality.

I do not believe that his fellow caucus colleagues were particularly supportive of his chairmanship and they put him under pressure at times.

***the behaviour of the members of the Public Gallery during the course of the meeting;***

**Meeting on 20 May 2008**

Several matters were raised by members of the public during the time designated for Public Participation. Each person is allowed three minutes to speak. Questions are not to be asked nor will they be answered if this regulation is not met.

The majority of members of the public taking advantage of the ability to address Council did so in a respectful manner while making points which may or may not have been explored in the matter before Council.

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Appendix 1 continued:

Some speakers were not as respectful and abused the regulations. The Mayor attempted to intervene but was spoken over or ignored by the member of the public. The Mayor issued two warnings but did not need to pursue any further action.

The Code of Meeting Practice as it relates to public participation was ignored by two members of the public who made disparaging personal remarks about or directed these remarks towards members of staff. The Mayor did not stop these speakers at this point and no other councillor referred to the obvious breach of the Code..

If members of the public are to enjoy a Public Participation section of a Council meeting then the regulations need to be rigorously enforced.

Public Participation is a privilege afforded by a number of Councils in NSW but is not a mandatory provision under the Act. Communities should be mindful of this and treat the matter with due respect. If some members of the public have lost respect for a particular elected representative or staff member this leads to conflict and poor conduct during this particular section of the Meeting.

It is incumbent upon the Chairman and the other elected representatives to ensure that members of the public who abuse this opportunity are reminded to respect the institution if not the individual councillor or staff member.

This is easy to write in a report but is sometimes difficult to achieve and can only be achieved if all elected representatives are mindful of their obligations under the Act. It should not be left entirely to the Mayor to enforce this Code of Conduct alone.

It is also possible for a few people in the community to use this time to re-enforce a certain perception in the community particularly if an outcome such as the dismissal of a council is desired.

Whilst not indicating that this is apparent motive in the meeting I observed, it is a reasonable matter to consider.

I noted from perusing previous minutes that, on a few occasions, councillors have drawn the Mayor's attention to the level of interjection from the gallery. I noted that on an occasion, a motion was put to ban two members of the public from one meeting of Council and that they should offer their apology for their behaviour when at the next available meeting.

The two people concerned were at the meeting of 20 May 2008 and were disparaging of councillors, the Mayor and senior staff. Both were warned by the Mayor to stop speaking once their allotted time had expired which they ignored to varying degrees.

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Appendix 1 continued:

It requires the total co-operation of all elected representatives for the Public Participation Forum to be useful in helping councillors make decisions.

I was not convinced that this was so at the meeting of 20 May 2008.

**Meeting 10 June 2008**

Three speakers spoke on four different topics. Two of these speakers also attempted to speak on a late report but were not allowed to do so. This caused much unpleasantness which could have been avoided had the Mayor and councillors been receptive to a minor bending of the rules especially since it is clear that there is no policy covering speaking on late items.

My impression is that the Public Participation forum was as unpleasant as the one held on 20 May 2008 with a good bit of this being due to the behaviour of some the public participants who clearly have a very poor impression of the Mayor and councillors and the management of Council.

***the conduct of the councillors during the course of the meeting;***

**Meeting on 20 May 2008**

My impression was that councillors behaved in a respectful manner during the meetings I observed. Having read Minutes of previous meetings, it is apparent that this may not be the case at all times.

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Appendix 1 continued:

I have attended a couple of other Council meetings in the last few weeks and consider that the behaviour of Shellharbour City councillors at the meeting I attended was significantly better than the behaviour of councillors at other Councils I have attended recently.

I believe that councillors were informed of the presence of an observer who would be writing this report. This may have helped to curb their behaviour on this occasion..

My reading of previous Minutes would indicate that this is a possibility.

**Meeting on 10 June 2008**

This meeting was respectful and conducted in a friendly manner. The meeting was over in less than one hour with most of the recommendations being unanimous.

***the extent to which the councillors showed knowledge and insight into the Council's Code of Meeting Practice;***

***Meeting on 20 May 2008***

There appeared to be one fundamental matter about which councillors seemed to have little, if any, knowledge of meeting practice.

About twenty to twenty five minutes of time was taken up by discussion of the Confirmation of Minutes of previous meetings.

A number of Points of Order were called by a few councillors while discussing the inclusion of some words in the Minutes which were considered derogatory and for which an apology and subtraction was required at the meeting under discussion.

The Mayor was placed under pressure when these Points of Order were raised, some concurrently, and it was difficult to rule on each Point of Order.

Eventually, one councillor indicated that Council Minutes are not a Hansard report.

This was not immediately said at the commencement of the discussion and had it been so less time would have been consumed on the matter.

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Appendix 1 continued:

It appears that after, at least four years on Council, most councillors were unaware of that simple distinction.

I note that the DLG Report dated July 2006 stated *"Although the minutes should contain enough detail to make the council's decisions understood, they are not meant to be a detailed transcript of council proceedings nor a record of the behaviour of individual councillors"*

It could be interpreted that the basic issue was to ensure that two councillors should be held to account for the comments made at the previous meeting. Whilst not disagreeing that councillors should be held to account, it is possible to minute such things without resorting to the tactic of having a word for word account recorded. This is certainly so in other councils I have observed.

It is apparent that at previous meetings councillors have attempted to have the reasons for their particular voting decision recorded. This is not normal or even advisable practice.

These issues should have been dealt with in the early days of the elected term of council at a suitable induction course on meeting procedure and practice.

The DLG Report recommended that Council trial *"a process by which the minutes are typed on a computer and displayed on a data projection screen during the meeting"*.

If it was trialled, it is not in use now.

There was an issue in which a councillor chose to speak in spite of having been reminded by the Mayor that the councillor may have an interest. This advice was either not heard or was ignored and the Mayor did not further advise the councillor. It is not incumbent upon the Mayor to offer advice on the issue and the councillor may continue to speak regardless of the advice.

Any action which may subsequently happen is not a reflection upon the Code of Meeting Practice or the ability of the Chairman.

Minutes of a previous meeting indicated that it commenced over 30 minutes after the advertised time. The minutes indicated that several councillors came to the meeting at the appointed time whilst several others arrived together over thirty minutes later.

A comment from a person in the gallery on 20 May meeting indicated that it was normal for a group of councillors to arrive together. The commentator suggested that this was factional and that these councillors had met in caucus. The remark was disparaging but the *perception* was that the remark was accurate.

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Appendix 1 continued:

**Meeting on 10 June 2008**

The meeting was conducted within an hour. Most of the recommendations were passed unanimously.

There was no discussion on the Minutes of previous meetings but one councillor abstained from voting on the Minutes of the Committee of the Whole.

I have difficulty with this and believe that councillors may need further instruction on meeting procedure to cover this issue.

The general debate on the various issues before Council was good. Councillors were respectful and were pertinent in their commentary. Questions were posed by councillors which indicated that they had thought about the issues before them.

At the end of the meeting, after question time, one councillor attempted to have the meeting go into committee to enable the Council legal officer to answer a legal question which was considered confidential. The General Manager had to remind councillors of their legal obligations under the Act regarding going into the Committee of the Whole. This should not be necessary at this stage of the Council term. It is not, however, unusual for long-time councillors to be lacking in this knowledge. I have certainly seen this happen at other councils.

It is easy to assume that the councillors were on their best behaviour because of the circumstances under which they were meeting.

The conduct and overall tenor of the meeting was exemplary.

The overall impression given at the observed meetings was that the meetings were conducted in a reasonable manner.

***the extent to which the general conduct of the meeting reflects the opinions of the review team as referred to in the Department of Local Government's submission, see above for the details,***

I observed the Council Meeting of 20 May 2008 and 10 June 2008 and also reviewed Council Minutes of Meetings for each month in 2007 and 2008 and a random selection of minutes from meetings held in 2005 and 2006.

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Appendix 1 continued:

I formed the opinion that the Departmental review of the meeting of 13 December 2005 was reasonable.

My opinion is that the meetings in the following years improved with councillors displaying better knowledge of and respect for the Code of Meeting Practice and normal meeting procedure.

There are some notable exceptions to this impression as evidenced by perusal of the Minutes of these meetings. These lapses generally involve the use of Points of Order for little benefit and they seem petty and frivolous. They also appear to use questions as a means of extending their right to speak on an issue.

The use of questions to allow a councillor to speak again on an issue is evident. This is difficult for a Chairman to control and it would appear that the Mayor has attempted to do so on a few occasions but with little success.

For the most part, it appears that councillors have realized that the Minutes are used to record the decisions of Council and that they are not a detailed record of all that is said during the course of a meeting.

The meeting of 20 May 2008 is an exception to this with councillors attempting, during the process of confirming the minutes of a previous meeting to ensure that the exact disparaging comment by a councillor was recorded in the minutes. Only one councillor noted that the Minutes were not a Hansard record of proceedings.

There was an undertone of discontent and disrespect for council by members of the public. Most of their comments were heard by others in the gallery and were not picked up by the Mayor or the councillors. There was one exception to this. My general impression was that the majority of people present at the meeting had little regard for many of the councillors and the Mayor and some senior staff.

I believe that this is general discontent within council watching circles and not confined to Shellharbour City Council. It is also probable that knowledge of the current Public Inquiry into Council fuels the appetite of those who wish to see the Council dismissed and this may well distort the impression given.

***any other matter concerning the conduct of the meeting which would assist the Commissioner Mr. Richard Colley to make an informed view as to the capacity of the councillors and the Mayor to conduct the meetings of council in an efficient and effective manner.***

I have attended over 400 meetings of councils in New South Wales, South Australia, Tasmania and New Zealand. I have chaired about 200 Council

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Appendix 1 continued:

meetings as a mayor including some that could be considered difficult meetings.

I decided that the best approach to achieving good, well-balanced decisions was to adopt an easy approach to chairmanship while ensuring that all present whether a councillor, staff member or member of the public, should show respect for the institution, their colleagues and the staff and public. This can only be successful with the cooperation of all those in attendance.

It is a balancing act requiring strong leadership and mutual respect. It also requires knowledge of when to apply strict rules of debate and strict adherence to the Code of Conduct.

My impression is that these matters have improved at Shellharbour City Council in the last couple of years following the Review of Council in late 2005 and early 2006.

There have been some notable lapses at a couple of meetings even in recent times. It is debatable if this is any different to a good number of councils in New South Wales.

I believe that reasonable decisions are being made on the majority of issues by the elected representatives of Shellharbour City Council. These decisions may not find favour with all and particularly with those members of the public who attend the meetings. It does not necessarily follow that this makes the decisions suspect.

It is interesting to note that well in excess of 80% of decisions made by Council in the last 18 months have been unanimous. This is in line with most other councils in New South Wales.

I am of the opinion that, based on my observations and given the timeframe between now and the next Council elections, dismissal of Shellharbour City Council based upon councillor conduct at meetings is not warranted.



Chris Vardon OAM

11 June 2008

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## Appendix 2 – Extract from Council’s Submission in Reply

### ***The way forward***

It is open to the Commissioner to recommend to the Minister a number of measures which will enable the elected representatives to complete their current term of office and permit the elections in September to take place. The following measures are suggested;-

- an acknowledgement by the councillors that their behaviour in the past has at times not been of a standard that the community has a right to expect of its elected;
  - a public expression of 'sorry' to the community;
  - a commitment to immediately improve behaviour;
  - the adoption of an agreement to commit themselves to undertake their roles and responsibilities in an appropriate manner
  - an undertaking not to adopt any new major policies or spending initiatives (akin to a caretaker mode)
  - in consultation with the DLG the appointment of a Council mentor to assist council not just through the last few weeks of its term but to be available for the in-coming councillors
  - the mentor to provide regular reports to the community and the DLG on the performance of the current councillors and the new council post – elections September 2008.
- Within 12 months of the new Council taking office an independent governance audit to be undertaken;
  - The report of the governance audit to be made public, and
  - a recommendation to indicate that if the 2009 governance audit is not satisfactory early measures be taken to remedy the situation.

It is submitted that the above package of measures provide a more balanced and fair response and will bring long term improvements to the governance of Shellharbour City. Council is of the view that the above measures can be implemented to improve the overall governance situation and address concerns that may have emerged from evidence presented during the Public Inquiry. These proposed measures will not just see the Council through to the September elections but will provide a supportive framework for the new Council post-election.

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Appendix 2 – continued

***We can do better***

The Inquiry is to have particular regard to:

*" The conduct of the elected representatives of council (whether individually or collectively as the governing body of council) including their relationships with senior and other staff of council".*

The first and most important action is the public acknowledgment on the part of the elected representatives that at times their conduct was not up to the standard which the community have a right to expect of their elected representatives. Without this public acknowledgement there can be no way forward and the elected representatives now recognise this. In addition to the acknowledgment the next necessary step is the commitment to improve the relationships between elected representatives and also the relationship with senior staff. The elected representatives are willing to give this commitment.

Beyond question some of the material before the Commissioner in regards to the conduct of the elected representatives will not reflect credit on to the elected representatives. The corporate position of Council is to acknowledge that the past behaviour of the elected representatives should have in many instances been of a higher standard. There are a number of factors which contributed to this situation. Council does not wish to engage in an exercise of allocating blame or responsibility for past practices. Of more concern to council is to put in place arrangements which will raise the standard of behaviour on the part of the elected representatives and also to maintain it at a high level. Just as past successes are no guarantee for future success so also can it be submitted that past failures are no guarantee for future failures.

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## Appendix 2 – continued

### ***Working together for Shellharbour***

The elected representatives have recognised the fundamental importance of improving their working relationship with each other. To facilitate immediate long term improvements the elected representatives are prepared to enter into an agreement, at present referred to as *Working together for Shellharbour*, which will set out their commitment to immediately improving working relationships. It is anticipated that the agreement will have the support of all Councillors. The *Working together for Shellharbour*, will build upon the Code of Conduct and set out the following requirements of the elected representatives:-

#### ***General Principles***

- elected representatives commit themselves for the duration of their term of elective office to observing both the spirit and the letter of with Council's Code of Conduct;
- acknowledge the importance of working to create a positive environment of cooperation;
- recognise the importance of respect in conducting themselves
- are committed to developing the best outcomes for the community of Shellharbour City;
- Councillors will maintain their right as the elected representatives to act and speak freely on any issues.
- once a majority decision is made Councillors will not deliberately undermine or attack the decision;
- efforts to change a decision of Council must be undertaken in a manner consistent with the Code of Conduct.

#### ***Promoting Good Governance***

- the obligation on elected representatives is to exercise the role of civic leadership through putting in place and following processes which promote good governance;
- it is essential that the elected representatives set a high standard of ethical decision making;
- the community of Shellharbour must have confidence in the integrity of the Council processes and in the personal ethical standards of the elected representative;

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## Appendix 2 – continued

- it is anticipated that from time to time personality or political differences will emerge.

### ***Resolving disputes***

- failure to recognise the potential for personality or political conflicts can reduce the Council's capacity to deal with it in a constructive manner;
- the elected representatives recognise and accept that personal and political disagreements can be managed in a constructive manner that does not threaten the stability of Council.

### ***Be Alert not Abusive***

- there is an obligation on the elected representative is to be alert and to ask questions;
- failure on the part of a Councillor to draw attention to their concerns is a breach of due diligence;
- concerns should be raised in an appropriate manner.

### ***Right to Ask Questions***

- elected representatives recognise and respect the right of their peers to ask questions;
- should not be treated as a license to be dismissive of other councillors or staff;
- should not be used as an opportunity to make derogatory or demeaning remarks;
- when asking questions a firm but courteous approach should be adopted;
- elected representatives are required to keep the questions to staff fair and when possible to give notice of information required.

### ***Respect for views***

- the elected representatives acknowledge and respect the diversity of views represented on Council;
- elected representatives in a minority position are entitled to the same rights and considerations as elected representatives in the majority;

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Appendix 2 – continued

- neither the motives nor personalities of elected representatives should be attacked in the course of the debate;

***Following the Rules***

- elected representatives will observe and abide by the Code of Meeting Practices;
- by personal example elected representatives will seek to contribute to maintaining good order in Council meetings;
- elected representatives will not seek to use the technicalities of meeting procedures to stifle or restrict the right of debate;
- due respect and recognition will be accorded the Chair.
- The practice of public participation will be retained for the duration of term of office

It is submitted that the acceptance and commitment to the Working Together Shellharbour Agreement will provide an appropriate framework to enable the current councillors complete their term of office and permit the September election to proceed.

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## Appendix 3 - Clr Hawker's Further Submission in Reply

### **FURTHER STATUTORY DECLARATION OF THOMAS HAWKER**

I, THOMAS EDWARD HAWKER of [REDACTED] in the State of New South Wales, solemnly and sincerely declare as follows:

1. I am [REDACTED] years of age.
2. I am an Accountant.
3. My broad scope and duty as a Councillor requires careful consideration of the Public Interest.
4. Shellharbour City Council (the Council) facilitates and attempts to attain this objective by enabling the Public to engage with Councillors in what is known as the public participation process.
5. It is rare for any government body to enable the public to contribute directly to the decision making process.
6. While government at State and Federal level involve broader issues involving vast numbers of people, comparatively Local Government decisions will have an immediate and direct impact on the individuals residing within the particular jurisdiction of a particular Council.
7. Therefore, particularly at a Local Government level, the importance of the public participation process is heightened.
8. In relation to the Council, at the very least, ideologically the concept of the public participation is a direct and importantly transparent manner in which decision making is conducted.

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Appendix 3 – continued:

9. Fundamentally, the process is critical in continuing to foster the transparency and accessibility of the Council. Public participation is therefore a worthwhile and valuable asset to Local Government practice and policy implementation.
10. The only concern is the degree of sanctity and respect which the public and community place in the Council and office of Mayor.
11. The manner in which the forum for public participation which the Council has devised encourages any party to voice their opinion.
12. As a consequence of the good intentions of Council, vocal public participants have shown disrespect towards the Council and the office of Mayor.
13. In my observation and contribution in meetings open for public participation I noted disrespect by a limited group or individuals who attended the meetings.
14. Importantly it is not the concept of public participation, but rather the conduct of individuals or groups which attend Council meetings.
15. Moreover, the procedures undertaken in public meetings and confidential meetings of Councillors was always assumed to have been in accordance with the Council meetings policy.
16. If there were any contraventions of the Council meeting policy the responsibility to advise the Councillors of any contravention is vested in the General Manager and Corporate Solicitor for the Council.
17. At no stage were Councillors as a group advised by either of the abovementioned individuals noted in paragraph 14 that meeting policy had been contravened.

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Appendix 3 – continued:

18. Notwithstanding due compliance with the Council policy for meetings, Councillors were able to freely exchange ideas and thoughts and vehemently debate matters put forward for discussion.
19. In keeping with the ability of Councillors to freely express and put forward their opinions the behaviour or decorum all Councillors at the commencement of their respective appointments was initially at meetings satisfactory.
20. Gradually, through the course of their appointments, all Councillors obtained an appreciation and realisation of the appropriate and mannered approach which must be adhered to when attending Council meetings.
21. Upon this realisation all Councillors have maintained the utmost respect for each other and the office which they represent.
22. I now refer to the Council and Corporate Meetings – Minutes Policy (**the Policy**).
23. Based on my experience and training as a Councillor, strictly, the only matters which are to be recorded in meeting minutes are:
  - a. Discussions of resolutions;
  - b. Points of order;
  - c. Any specific requests put forward by Councillors which they wish or believe should be recorded.
  - d. The fundamental need for minutes is to record the results of meetings.
24. As a Councillor of considerable experience, it is my understanding that the Policy entitles the Council to record debate and the context within which a particular decision is reached.

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Appendix 3 – continued:

25. Of note is clause 3.2 of the Policy which encourages the Council to record the reasons for reasons of a decision/s to achieve the broad objectives of accountability and transparency.
26. The Council has always strived to achieve these objectives and fully appreciates the critical importance of these two pillars of local government.
27. Eventual public access to the minutes of meetings allows members of the constituency where appropriate understand the basis for a decision of the Council, thus creating greater accessibility and appreciation for their local government.
28. Moreover, the actual debate of the minutes which are made publicly available exemplifies the need for the public to be aware of the core reasoning supporting a particular decision.
29. This is an effective approach which strives to achieve the core values of transparency and accountability.
30. In addition to these core values which are imbued across the Council, my role as a Councillor at Local Government level is to apply where appropriate my personal beliefs on a particular decision.
31. I was particularly forthright about my opinions in relation to the consideration of various tenders which had been submitted for the collection of Waste in the Shellharbour district.
32. Along with the specific criteria stipulated by the tender approvals process, public interest is part of the context within which submissions for the collection of waste contract was considered.

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Appendix 3 continued:

33. I believed if the matter were to be determined in a holistic manner, regard should have been given to broader policy objectives and equal weight given to each of the criteria for the tender contract.
34. When the matter was before the Council for determination, I believed that significant weight was placed on the matter of cost and not any other relevant criteria.
35. I did not believe that I was fulfilling my role as Councillor if the costs associated with particular tender proposals were the critical determinant in reaching a final decision.
36. Further, Councillors were advised by several Council officers that that there was not enough time for an additional re-tendering process to take place.
37. It was therefore critical for the Councillors and I to reach an appropriate decision based on the various criteria.
38. Another example of the need to exercise my personal assertions is the instance in which Council was required to assent to the imposition of a Code of Conduct Committee (**the Committee**).
39. On a personal level I strongly believed that voting for the creation of the Committee was the correct decision.
40. I participated extensively in the discussions concerning the establishment of the Committee.
41. Part of the debate focused on whether or not the committee should be adopted at all in light of advice from the Department of Local Government that future changes were forthcoming in their Model Code of Conduct.

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Appendix 3 continued:

42. When the vote for creating the committee was cast, by actively engaging in the debate, I was precluded from withdrawing my vote.
43. Due to the timing of the meeting and the release of the Department of Local Government circular on their revised Model Code of Conduct, I believed that it would be appropriate to defer the matter for further consideration until such time as the amended provisions would become available. I could not in good conscience vote against something which I believed was necessary.
44. This compromised my position as voting for or against the committee was inappropriate.
45. The only alternative available to me was to abstain from voting on the matter, which is the course of action that I adopted.
46. I proceeded with this course of action notwithstanding my acknowledgment that abstaining would be construed as a vote against the decision before the Council.
47. At all times I understood the practical effect of abstaining from voting on a particular decision.
48. My strongly held personal belief that creating a Code of Conduct Committee was the correct course of action prevented me from voting against the proposal before Council.
49. Further to that personal opinion I believed that an approach which possessed a greater level of efficiency was awaiting the various amendments from the Department of Local Government.

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Appendix 3 continued:

50. But, in subsequent months the mayor utilised his mayoral powers to reconstitute the Code of Conduct. At that point I had no objection to that taking place.

51. Balancing personally held beliefs and the public interest of the constituency is in itself a difficult proposition.

52. I understand that I am elected as a Labor Party member to reflect most importantly the views of the people that I represent and achieve this objective by utilising the rules of the Labor Party, such as caucusing.

53. The only circumstance in which caucus rules are not binding or applied are the consideration of Development Applications.

54. At no stage has Council ever utilised caucusing when considering a Development Application.

55. It is my belief that any statements to the contrary are incorrect.

56. In relation to matters which are caucused the basic process involves the following steps:

- a. On either Sunday or Monday of any particular week all Labor members tentatively caucused on various items;
- b. On a Tuesday, after public participation had taken place, the position assumed by the caucus was either amended or ratified. A final decision on the items tentatively caucused on a Sunday or Monday was never reached until after public participation had taken place.

57. If I fail to adhere to caucus rules I can be suspended and dismissed from the Australian Labor Party (**the Party**).

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Appendix 3 continued:

58. Subsequently, this would require me to resign from my position of Councillor.
59. This will necessitate the need for a by election to be held, creating further instability within Council and increasing costs to rate payers.
60. As an elected member of the Party the Council constituents are aware of my membership and the general policy decisions and party rules to which I am bound.

**AND I MAKE** this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act, 1900.

**SUBSCRIBED AND DECLARED** )

At *Albion Park* )

This *29* of *June* 2008 )

Before me: *SACHIN NAIDU* )

  
Justice of the Peace/Solicitor



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## Appendix 4 – Annual reporting of contractual conditions

This is the text of the 2005 report made by the General Manager pursuant to s. 339 of the Act:

**Subject: 17.1 Section 339 Local Government Act - Contractual Conditions of Senior Staff**

Section 339 of the *Local Government Act 1993* requires me to report to Council at least once annually, on the contractual conditions of senior staff.

The definition of senior staff in the *Local Government Act 1993* means “the General Manger of the council and the holders of all other positions identified in the council’s organisation structure as senior staff positions”.

I advise that Council has no senior staff as defined in the *Local Government Act 1993*, other than myself, the General Manager, and my contract is reported through the annual report.

**Responsible Manager:** Brian Weir – General Manager

This is an extract from the General Manager’s submission in reply that addresses this matter:

During my evidence I was questioned with regard to my perceived failure to comply with Section 339 of the Local Government Act, although Mr Meltz does not make any specific criticism of me on this matter in the Closing Submission. It is my understanding that this section was an amendment to the Local Government Act in 1994. Its purpose was to ensure that the elected council was kept informed of the employment conditions relating to senior staff as defined under the Local Government Act. It was to ensure that general managers were accountable to the elected council for the decisions they made in regard to the appointment of senior staff. Such a clause was not relevant to Shellharbour City Council because Shellharbour City Council only employed one designated senior staff person - that being the General Manager. I reported to Council in accordance with my obligations under Section 339 of the Local Government Act, in 2005, informing the Council that this section did not apply to this Council at this time since, as Council was well aware, the only senior staff member employed by Council was the General Manager and that those terms and conditions were publicly available through the Council Annual Report.

The Department of Local Government did not find fault with this approach during its Promoting Better Practice Review and it is not recorded as a recommendation for change.

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## **Appendix 5 – Suggested content for annual report on the contractual conditions of senior staff**

- A list of senior staff;
- The specific term of each contract and when it was entered into;
- The value of the remuneration package and any variations that have been made in the past year or which are proposed for the ensuing year;
- The timing, method and outcome of any performance assessments that were undertaken;
- A copy of any performance agreement entered into for the current year for the General Manager and/or proposed for the ensuing year;
- In relation to the General Manager, a summary of the leave entitlements as at the report date, details of leave taken in the previous twelve months and leave proposed to be taken in the ensuing twelve months.
- Details of any other "material" matters

Other material matter could include any requirement for the general manager or other senior staff member to advise if s/he is seeking an extension of the current contract or reappointment for a further term and similarly, any requirement for the council to advise the general manager/senior staff member of any intention not to renew their appointment and/or to readvertise the position.