



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

Report of the Inquiry into the Shire of Toodyay

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



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About DLGSC

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

The department provides regulation and support to local governments and the racing, gaming and liquor industries to maintain quality and compliance with relevant legislation, for the benefit of all Western Australians. This publication is current at September 2020.

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1. Introduction

2. The Shire of Toodyay (**Shire**) borders the north edge of the Perth metropolitan area, approximately 85 kilometres north east from the Perth CBD. The Shire has a population of 4546 people, an operating expenditure of \$15,000,740 and consists of an area covering 693 square kilometres.
3. Councillors are elected by constituents and serve either a two- or four-year term with the shire consisting of nine Councillor's in total sitting on council that represent four electoral wards made up of west ward, east ward, north ward and central ward. The Shire President is elected by the Council. During the period the subject of the inquiry, the elected Shire Presidents were as follows;
 - David Dow (2013- 2017)
 - Brian Rayner (2017 – 2019)
 - Bill Manning (2019 – 2020)
 - Rosemary Madacsi (2020 – Present)
4. The current Chief Executive Officer (**CEO**) Suzie Haslehurst has been employed at the Shire since June 2020.
5. Section 8.3 of the Local Government Act 1995 (**the Act**) gives the Director General of the Department of Local Government, Sports and Cultural Industries (**the Department**) the authority to inquire into all local governments and their operations and affairs. Pursuant to section 8.3(2) of the Act, the Director General may, by written authorisation, authorise officers to inquire into and report on any aspect of local government or its operations or affairs.
6. On the 6 December 2018, the Director General of the Department authorised an inquiry pursuant to section 8.3(2) of the Act. The nature and scope of the inquiry are as follows;
 - a. the adequacy of and adherence to Council's policies and procedures by both elected members and administration staff,
 - b. enforcement action undertaken by the Shire,
 - c. the function of the audit committee,
 - d. declarations of interests by elected members,
 - e. the culture within the Shire,
 - f. any other matter that comes to the persons attention during the inquiry under section 8.4(2) of the Local Government Act 1995.
7. This report is the outcome of the Department's inquiry which has been compiled in accordance with section 8.3 of the Act by officers who were authorised to conduct the inquiry (**Authorised Persons**).

8. In order to perform their functions, the Authorised Persons issued a number of direction notices to the Shire under section 8.5 of the Act to provide documents and information. Voluntary interviews were conducted during the investigation.
9. Affected persons and members of the Council serving their terms during the period of this inquiry were given an opportunity to comment on this report in draft form before it was finalised, and provided written submissions. Those submissions were considered by the Authorised Persons and form part of this report.

2. Statutory framework

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

2.1 Governance

10. The Act and regulations define the roles and responsibilities of the Council, President, Councillors and employees. Relevantly, the Act provides:

2.7. *Role of council*

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

2.8. *Role of mayor or president*

- (1) *The mayor or president —*
 - (a) *presides at meetings in accordance with this Act; and*
 - (b) *provides leadership and guidance to the community in the district; and*
 - (c) *carries out civic and ceremonial duties on behalf of the local government; and*
 - (d) *speaks on behalf of the local government; and*
 - (e) *performs such other functions as are given to the mayor or president by this Act or any other written law; and*
 - (f) *liaises with the CEO on the local government's affairs and the performance of its functions.*
- (2) *Section 2.10 applies to a councillor who is also the mayor or president and extends to a mayor or president who is not a councillor.*

2.10. Role of councillors

A councillor —

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

11. It is important to note that individual elected members have no authority to partake in the day to day operations of the local government. All authority and oversight of the local government body sits with the council and that authority is exercised by simple or majority decisions at formal council or committee meetings.
12. As the president and councillors are not involved in operational matters, each local government employs a Chief Executive Officer (CEO) and other staff for the purposes of day-to-day running of the local government. The CEO is appointed by council and is the link between councillors and local government staff. All other local government staff report to the CEO.
13. The Act provides:

5.41 Functions of CEO

The CEO's functions are to —

- (a) advise the council in relation to the functions of a local government under this Act and other written laws; and*
- (b) ensure that advice and information is available to the council so that informed decisions can be made; and*
- (c) cause council decisions to be implemented; and*
- (d) manage the day to day operations of the local government; and*
- (e) liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
- (f) speak on behalf of the local government if the mayor or president agrees; and*

- (g) *be responsible for the employment, management, supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
 - (h) *ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
 - (i) *perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*
14. Section 5.42 of the Act allows a council to delegate in writing to the CEO the exercise of its powers or the discharge of its duties, subject to some exceptions (e.g. borrowing money, decisions requiring an absolute majority of council members, or appointing an auditor). This also includes the acquiring or disposing of any property valued at an amount exceeding an amount determined by the local government.
15. The role of local government staff is determined by the CEO and endorsed by Council. Section 5.44 of the Act allows the CEO to delegate in writing to any employee of the local government the exercise of any of the CEO's powers or the discharge of any of the CEO's duties, other than the power of delegation. With some qualifications, under section 5.44 the CEO is permitted to delegate a power or duty the exercise or discharge of which was delegated to the CEO by the Council under section 5.42 of the Act.
16. Local governments are responsible for significant property holdings. The requirements for disposal of property are outlined in the Act as below:

3.58. Disposing of property

- (1) *In this section — dispose includes to sell, lease, or otherwise dispose of, whether absolutely or not; property includes the whole or any part of the interest of a local government in property, but does not include money.*
- (2) *Except as stated in this section, a local government can only dispose of property to —*
 - (a) *the highest bidder at public auction; or*
 - (b) *the person who at public tender called by the local government makes what is, in the opinion of the local government, the most acceptable tender, whether or not it is the highest tender.*
- (3) *A local government can dispose of property other than under subsection (2) if, before agreeing to dispose of the property —*
 - (a) *it gives local public notice of the proposed disposition —*

- (i) describing the property concerned; and
 - (ii) giving details of the proposed disposition; and
 - (iii) inviting submissions to be made to the local government before a date to be specified in the notice, being a date not less than 2 weeks after the notice is first given;
- and
- (b) it considers any submissions made to it before the date specified in the notice and, if its decision is made by the council or a committee, the decision and the reasons for it are recorded in the minutes of the meeting at which the decision was made.
- (4) The details of a proposed disposition that are required by subsection (3)(a)(ii) include —
- (a) the names of all other parties concerned; and
 - (b) the consideration to be received by the local government for the disposition; and
 - (c) the market value of the disposition —
 - (i) as ascertained by a valuation carried out not more than 6 months before the proposed disposition; or
 - (ii) as declared by a resolution of the local government on the basis of a valuation carried out more than 6 months before the proposed disposition that the local government believes to be a true indication of the value at the time of the proposed disposition.
- (5) This section does not apply to —
- (a) a disposition of an interest in land under the Land Administration Act 1997 section 189 or 190; or
 - (b) a disposition of property in the course of carrying on a trading undertaking as defined in section 3.59; or
 - (c) anything that the local government provides to a particular person, for a fee or otherwise, in the performance of a function that it has under any written law; or
 - (d) any other disposition that is excluded by regulations from the application of this section.

2.2 Disclosure of financial interests

17. Part 5, Division 6 of the Act sets out the requirements of all local councils regarding disclosure of "interests". Relevantly:

Section 5.60. *When person has an interest*

For the purposes of this Subdivision, a relevant person has an interest in a matter if either —

- (a) *the relevant person; or*
- (b) *a person with whom the relevant person is closely associated,*
has —
- (c) *a direct or indirect financial interest in the matter; or*
- (d) *a proximity interest in the matter.*

Section 5.60A. Financial interest

For the purposes of this Subdivision, a person has a financial interest in a matter if it is reasonable to expect that the matter will, if dealt with by the local government, or an employee or committee of the local government or member of the council of the local government, in a particular way, result in a financial gain, loss, benefit or detriment for the person.

Section 5.60B. Proximity interest

- (1) *For the purposes of this Subdivision, a person has a proximity interest in a matter if the matter concerns —*
 - (a) *a proposed change to a planning scheme affecting land that adjoins the person's land; or*
 - (b) *a proposed change to the zoning or use of land that adjoins the person's land; or*
 - (c) *a proposed development (as defined in section 5.63(5)) of land that adjoins the person's land.*

- (2) *In this section, land (the proposal land) adjoins a person's land if*
 - (a) *the proposal land, not being a thoroughfare, has a common boundary with the person's land; or*
 - (b) *the proposal land, or any part of it, is directly across a thoroughfare from, the person's land; or*
 - (c) *the proposal land is that part of a thoroughfare that has a common boundary with the person's land.*

- (3) *In this section a reference to a person's land is a reference to any land owned by the person or in which the person has any estate or interest.*

Section 5.62. Closely associated persons

- (1) *For the purposes of this Subdivision a person is to be treated as being closely associated with a relevant person if —*
 - (a) *the person is in partnership with the relevant person;*
or
 - (b) *the person is an employer of the relevant person; or*
 - (c) *the person is a beneficiary under a trust, or an object of a discretionary trust, of which the relevant person is a trustee; or*

- (ca) *the person belongs to a class of persons that is prescribed; or*
- ...
- (e) *the person is the spouse, de facto partner or child of the relevant person and is living with the relevant person; or*
- (ea) *the relevant person is a council member and the person —*
 - (i) *gave a notifiable gift to the relevant person in relation to the election at which the relevant person was last elected; or*
 - (ii) *has given a notifiable gift to the relevant person since the relevant person was last elected; or*
- (eb) *the relevant person is a council member and since the relevant person was last elected the person —*
 - (i) *gave to the relevant person a gift that section 5.82 requires the relevant person to disclose; or*
 - (ii) *made a contribution to travel undertaken by the relevant person that section 5.83 requires the relevant person to disclose; or*
- (f) *the person has a relationship specified in any of paragraphs (a) to (d) in respect of the relevant person's spouse or de facto partner if the spouse or de facto partner is living with the relevant person.*

18. Pursuant to section 5.68(1) of the Act, if a member has disclosed an interest in a matter, the members present at the meeting who are entitled to vote on the matter:

- (a) *may allow the disclosing member to be present during any discussion or decision making procedure relating to the matter; and*
- (b) *may allow ... the disclosing member ... to participate in discussions and the decision making procedures relating to the matter if —*
 - (i) *the disclosing member also discloses the extent of the interest; and*
 - (ii) *those members decide that the interest —*
 - (I) *is so trivial or insignificant as to be unlikely to influence the disclosing member's conduct in relation to the matter; or*
 - (II) *is common to a significant number of electors or ratepayers.*

19. Pursuant to section 5.68(2), a decision under section 5.68(1) is to be recorded in the minutes of the meeting relating to the matter together with the extent of any participation allowed by the council or committee.

2.3 Financial and Audit Requirements

20. The CEO has significant responsibilities for the general operations of the administration of a local government, but also for the financial management of the local government under the Local Government (Financial Management) Regulations 1996 (**Financial Management Regs**). Regulation 5 states;

5. CEO's duties as to financial management

(1) Efficient systems and procedures are to be established by the CEO of a local government —

(a) for the proper collection of all money owing to the local government; and

(b) for the safe custody and security of all money collected or held by the local government; and

(c) for the proper maintenance and security of the financial records of the local government (whether maintained in written form or by electronic or other means or process); and

(d) to ensure proper accounting for municipal or trust —

(i) revenue received or receivable; and

(ii) expenses paid or payable; and

(iii) assets and liabilities; and

(e) to ensure proper authorisation for the incurring of liabilities and the making of payments; and

(f) for the maintenance of payroll, stock control and costing records; and

(g) to assist in the preparation of budgets, budget reviews, accounts and reports required by the Act or these regulations.

(2) The CEO is to —

(a) ensure that the resources of the local government are effectively and efficiently managed; and

(b) assist the council to undertake reviews of fees and charges regularly (and not less than once in every financial year); and

(c) undertake reviews of the appropriateness and effectiveness of the financial management systems and procedures of the local government regularly (and not less than once in every 4 financial years) and report to the local government the results of those reviews.

21. There is a requirement of every local government body to have an Audit Committee of three or more persons of which a majority of the members need to be council members. It is a further requirement that the CEO is not to be a member of the Audit Committee and may not nominate a person to be a member of the Audit Committee or have a person to represent the CEO a a member of the Audit Committee. Section 7.12A of the Act clarifies the requirements from the local government in relation to the audit.

7.12A. Duties of local government with respect to audits

(1) A local government is to do everything in its power to —

(a) assist the auditor of the local government to conduct an audit and carry out the auditor's other duties under this Act in respect of the local government

22. The Local Government (Audit) Regulations 1996 (**Audit Regs**) regulation 16 and 17 states;

16. Functions of audit committee

An audit committee has the following functions —

(a) *to guide and assist the local government in carrying out —*

(i) *its functions under Part 6 of the Act; and*

(ii) *its functions relating to other audits and other matters related to financial management;*

(b) *to guide and assist the local government in carrying out the local government's functions in relation to audits conducted under Part 7 of the Act;*

(c) *to review a report given to it by the CEO under regulation 17(3) (the **CEO's report**) and is to —*

(d) *to monitor and advise the CEO when the CEO is carrying out functions in relation to a review under —*

(e) *to support the auditor of the local government to conduct an audit and carry out the auditor's other duties under the Act in respect of the local government;*

(f) *to oversee the implementation of any action that the local government —*

(i) *is required to take by section 7.12A(3); and*

(ii) *has stated it has taken or intends to take in a report prepared under section 7.12A(4)(a); and*

- (iii) has accepted should be taken following receipt of a report of a review conducted under regulation 17(1); and*
- (iv) has accepted should be taken following receipt of a report of a review conducted under the Local Government (Financial Management) Regulations 1996 regulation 5(2)(c);*
- (g) to perform any other function conferred on the audit committee by these regulations or another written law.*

17. CEO to review certain systems and procedures

- (1) The CEO is to review the appropriateness and effectiveness of a local government's systems and procedures in relation to —*
 - (a) risk management; and*
 - (b) internal control; and*
 - (c) legislative compliance.*
- (2) The review may relate to any or all of the matters referred to in sub regulation (1)(a), (b) and (c), but each of those matters is to be the subject of a review not less than once in every 3 financial years.*
- (3) The CEO is to report to the audit committee the results of that review.*

23. The Audit Committee have further responsibilities in regard to review of the local government budget. Regulation 33A of the *Local Government (Financial Management) Regulation 1996* states:

33A. Review of budget

- (1) Between 1 January and 31 March in each financial year a local government is to carry out a review of its annual budget for that year.*
- (2A) The review of an annual budget for a financial year must —*
 - (a) consider the local government's financial performance in the period beginning on 1 July and ending no earlier than 31 December in that financial year; and*
 - (b) consider the local government's financial position as at the date of the review; and*
 - (c) review the outcomes for the end of that financial year that are forecast in the budget.*

- (2) *Within 30 days after a review of the annual budget of a local government is carried out it is to be submitted to the council.*
- (3) *A council is to consider a review submitted to it and is to determine* whether or not to adopt the review, any parts of the review or any recommendations made in the review.*

**Absolute majority required.*

(4) *Within 30 days after a council has made a determination, a copy of the review and determination is to be provided to the Department.*

2.4 Administration Requirements

- 24. The administration requirements for local governments are set out in the Act and the Local Government (Administration) Regulations 1996 (**Admin Regs**).
- 25. Regulation 11 of the Admin Regs states:

11. Minutes, content of (Act s. 5.25(1)(f))

The content of minutes of a meeting of a council or a committee is to include —

- (a) the names of the members present at the meeting; and*
- (b) where a member enters or leaves the meeting during the course of the meeting, the time of entry or departure, as the case requires, in the chronological sequence of the business of the meeting; and*
- (c) details of each motion moved at the meeting, the mover and the outcome of the motion; and*
- (d) details of each decision made at the meeting; and*
- (da) written reasons for each decision made at the meeting that is significantly different from the relevant written recommendation of a committee or an employee as defined in section 5.70 (but not a decision to only note the matter or to return the recommendation for further consideration); and*
- (e) a summary of each question raised by members of the public at the meeting and a summary of the response to the question; and*
- (f) in relation to each disclosure made under section 5.65 or 5.70 in relation to the meeting, where the extent of the interest has also been disclosed, the extent of the interest.*

2.5 Purchasing Requirements

29. Regulation 11 A of the Local Government (Functions and General) Regulation 1996 (**Functions & General Regs**) require local governments to implement purchasing policies:

11A. Purchasing policies for local governments

(1) *A local government is to prepare or adopt, and is to implement, a purchasing policy in relation to contracts for other persons to supply goods or services where the consideration under the contract is, or is expected to be, \$150 000 or less or worth \$150 000 or less.*

(2) *A purchasing policy is to make provision for and in respect of the policy to be followed by the local government for, and in respect of, entering into contracts referred to in sub regulation (1).*

(3) *A purchasing policy must make provision in respect of —*

(a) *the form of quotations acceptable; and*

(ba) *the minimum number of oral quotations and written quotations that must be obtained; and*

(b) *the recording and retention of written information, or documents, in respect of —*

(i) *all quotations received; and*

(ii) *all purchases made.*

30. Regulation 11 of the Functions & General Regs states:

11. When tenders have to be publicly invited

(1) *Tenders are to be publicly invited according to the requirements of this Division before a local government enters into a contract for another person to supply goods or services if the consideration under the contract is, or is expected to be, more, or worth more, than \$150 000 unless sub regulation (2) states otherwise.*

(2) *Tenders do not have to be publicly invited according to the requirements of this Division if —*

(a) *the supply of the goods or services is to be obtained from expenditure authorised in an emergency under section 6.8(1)(c) of the Act; or*

(b) *the supply of the goods or services is to be obtained through the WALGA Preferred Supplier Program; or*

(c) *within the last 6 months —*

(i) *the local government has, according to the requirements of this Division, publicly invited tenders for the supply of the goods or*

services but no tender was submitted that met the tender specifications or satisfied the value for money assessment; or

(ii) the local government has, under regulation 21(1), sought expressions of interest with respect to the supply of the goods or services but no person was, as a result, listed as an acceptable tenderer;

or

(d) the contract is to be entered into by auction after being expressly authorised by a resolution of the council of the local government; or

(e) the goods or services are to be supplied by or obtained through the government of the State or the Commonwealth or any of its agencies, or by a local government or a regional local government; or

(ea) the goods or services are to be supplied —

(i) in respect of an area of land that has been incorporated in a district as a result of an order made under section 2.1 of the Act changing the boundaries of the district; and

(ii) by a person who, on the commencement of the order referred to in subparagraph (i), has a contract to supply the same kind of goods or services to the local government of the district referred to in that subparagraph;

or

(f) the local government has good reason to believe that, because of the unique nature of the goods or services required or for any other reason, it is unlikely that there is more than one potential supplier; or

(g) the goods to be supplied under the contract are —

(i) petrol or oil; or

(ii) any other liquid, or any gas, used for internal combustion engines;

or

(h) the following apply —

3. Key Shire policies

31. The Shire, as a public authority, must be able to demonstrate to suppliers and the community that it conducts its procurement activities with a high standard of probity and accountability. As with all local government bodies there are policies that further clarify the role of administration.

3.1 Shire Delegation Schedule

32. The Act s5.42 allows for the Council to delegate functions and responsibilities to the CEO. The CEO can then delegate that responsibility to other persons within the administration. Section 5.43 of the Act provides for functions that cannot be delegated by the Council. The Delegation Schedule for the Shire is found on the website.

31. The Shire's Schedule of Delegations – CS1 Payments from Municipal Fund or Trust Fund provides:

This delegation authorises the CEO to exercise any of the local government's powers or the discharge of any of its duties in relation to exercise of its power in relation to:

- *the approval of accounts to ensure that before payment of an account a determination is made that the relevant debt was incurred by a person who was properly authorised to do so; and*
- *make payments from the municipal or trust fund*

in accordance with Regulation 11 "Payments, procedures for making" from the Local Government (Financial Management) Regulations 1996.

3.2 Shire Policy CS5 – Legal Representation and Costs Indemnification

32. The Legal Representation and Costs Indemnification Policy states as follows;

The intent of this delegation is for Council to delegate power to the CEO to:

(a) approve applications made by Council Members or Employees with respect to legal representation costs, limited to circumstances where a delay in the approval of an application will be detrimental to the legal rights of the applicant; and

(b) make payments from the Municipal Account to the value of \$10,000 for the provision of urgent legal service costs indemnification prior to an application being considered by Council.

3.3 Shire Policy CS6 – Issue or Writ, Summons or Other Process

33. The Issue of Writ, Summons or Other Process Policy states as follows:

This delegation authorises the CEO to exercise any of the local government's powers or the discharge of any of its duties in relation to the recovery of overdue unpaid rates as well as the costs of proceedings, if any, for that recovery, incurred in a court of competent jurisdiction. As

part of the legal recovery of rates and charges in court, documents such as summonses and warrants are required to be duly authorised

3.4 Shire Policy F3 – Purchasing Policy

34. The following table provides for the thresholds for purchases for the administration of Shire of Toodyay and ordering threshold that is delegated by the Council for the CEO.

Where the value of procurement (Excluding GST) for the value of the contract over the full contract period (including options to extend) is, or expected to be:

Amount of Purchase	Policy
Up to \$10,000	<i>Direct purchase from suppliers.</i>
\$10,001 - \$49,999	<i>Obtain at least two written quotations.</i>
\$50,000 – \$149,999	<i>Obtain at least three written quotations containing price and specification of goods and services (with procurement decision based on all value for money considerations). Formal Request for Quotation (RFQ) documents are to be issued by Business Units and a record of the details of written quotation received is to be made in accordance with the Purchasing Policy.</i>
\$150,000 and above	<i>Conduct a public tender process or apply Regulation 11(2) of the Local Government (Functions and General) Regulations 1996</i>

3.5 Shire Policy F12 – Disposal of Property Policy

35. The Policy sets the direction of disposal of all property including plant, vehicles, trade-ins, machinery, furniture, equipment, miscellaneous items, abandoned vehicles, building/construction materials, livestock and land or buildings.

Sale of Land

The direction provided by this policy applies to any sale of land or buildings owned by Council, and does not apply to sale of land for the recovery of unpaid rates.

The Council will approve the sale of Council land or buildings by:

- (a) Offering the property for sale by tender; or*
- (b) Appointment of a real estate agent to market the sale of the property by private treaty; or*
- (c) Appointment of a real estate agent to conduct a public auction; or*

(d) A combination of the above.

Prior to the disposal of the property, a reserve figure or disposal price for the property to be offered for sale shall be determined in consultation with the appointed agent (where appropriate).

The reserve price shall be no less than a sworn valuation obtained from a Licensed Valuer, obtained not more than 6 months prior to the proposed disposition.

The deposit required to be paid if the property is sold by public auction or private treaty is \$10,000, on the fall of the hammer at auction or on the date of the acceptance of an offer to purchase, with the balance payable at settlement.

36. There are also clear instructions as to how the Shire is to deal with other stakeholders regarding the sale of land.

Dealing with Stakeholders

Council properties may have other affected stakeholders or other persons who have an interest in the land. This may include:

(a) Current tenants;

(b) Potential future tenants where some substantive discussions have occurred; or

(c) Adjacent landowners.

Any discussions with stakeholder/s should be documented, and where appropriate confirmed in writing. If stakeholder/s indicate a genuine interest in purchasing the property, they should be encouraged to make a submission to that effect, or participate in a public process as the case may be.

3.5 Shire Policy O.2 – Volunteering Policy

37. The Shire has a volunteer policy that defines the rights and responsibilities of the Shire and of the volunteers. This also includes inappropriate behaviour and volunteer dismissal procedures, which includes the following;

The following procedure shall apply with respect to counselling and termination for unsatisfactory voluntary work performance:

1. On the first occasion, the volunteer shall be notified verbally of the reason, and a note made in the appropriate volunteer personnel file.

2. If the problem continues, the matter will be further discussed with the volunteer, and the volunteer will be advised in writing of the need to improve work performance and that a further period of review has been set.

3. *If the problem continues, the volunteer will be interviewed by the Volunteer Coordinator or Chief Executive Officer and a final written warning will be given.*

4. *In the event of the problem recurring after a final warning, the volunteer may be asked to cease volunteering for Shire of Toodyay.*

5. *If any volunteer behaves in a manner that is dangerous, harmful, contrary to Shire of Toodyay's policies, or otherwise inappropriate, dismissal may take place immediately.*

4.0 Inquiry Findings

4.1 Financial Management

Merrick Matter

38. On the 19 August 2004 Mr Graham Merrick was employed as the CEO of the Shire of Toodyay. Mr Merrick ceased his employment with the Shire on the 30 March 2010. It was discovered by the Shire that they inadvertently made an overpayment to Mr Merrick for the sum of approximately \$150,000. The CEO tabled a report to Council at the Ordinary Meeting 19 February 2013.

39. At the Ordinary Meeting of Council 19 February 2013, the Officer's comment stated:

"If Council was to choose to pursue legal action it is important to consider:

The likely community perceptions, particularly if the action was unsuccessful;

and

Council's costs, plus the potential of an award of costs against us, if the action fails.

40. The Officer's recommendation stated:

"It is recommended that Council:

*Acknowledge that there is **no reasonable prospect** (emphasis added) of successful recovery of funds from Mr Merrick in relation to his employment with the Shire of Toodyay;*

and

***Not commence any legal action** (emphasis added) for the recovery of any possible overpayment of entitlements during his employment with the Shire of Toodyay."*

41. The meeting was moved behind closed doors for discussion of a confidential matter as per LGA s5,23(2)(b), (c), (e)(ii) and (f)(i).

42. Council carried motion 8/0 the following:

Council Resolution 39/02/10

MOVED CR Dow

That Council:

*Acknowledge that there **may be a significant prospect of successful recovery of funds** from Mr Merrick in relation to his employment with the Shire of Toodyay; and*

Commence legal action for the recovery of any possible overpayment to Mr Merrick of entitlement during his employment with the Shire of Toodyay

MOTION CARRIED 8/0

43. There is a significant change from the Officers recommendation and no explanation in the minutes as to why Council went against the recommendation, contrary to the requirements of regulation 11(da) of the Admin Regs.
44. The Council authorised the CEO to commence legal proceedings against Mr Merrick on 19 February 2013. Representing the Shire for this matter was Civic Legal.
45. In November 2013 an estimation of cost was given to Council of approximately \$75,000 to \$80,000 for the Merrick case. The Purchasing Policy states that three (3) written quotes on a Formal Request for Quotation document (**RFQ**). There is no evidence of this action being taken.
46. There is no evidence of the CEO updating the Council of legal costs that been incurred in regard to the matter, which would have been prudent particularly at the time that the legal costs exceeded the sum that could potentially be recovered from Mr Merrick.
47. The CEO recommended that once proceedings started, the Shire not withdraw from the matter due to the Shire being liable for their own legal fees and Mr Merrick's legal fees.
48. The Merrick matter was settled for an undisclosed sum in February 2017 by which stage legal costs alone had escalated to \$547,923.27, with those monies being paid to Civic Legal, Rockwell Olivier (sister firm of Civic Legal) and Richard J Price (counsel), between 21 November 2013 and 28 February 2017.

Finding 01

The minutes of the Ordinary Council Meeting held on 19 February 2013 did not comply with regulation 11(da) of the Local Government (Administration) Regulations 1996, as they did not provide written reasons for a decision that is significantly different from the Chief Executive Officer's written recommendation in relation to the Merrick matter.

Finding 02

The CEO has failed to keep Council abreast of costs of litigation of the Merrick matter thus not enabling Council to make informed decisions regarding to matter.

Finding 03

Mr Scott, as CEO, failed to comply with Policy F3 by failing to obtain three (3) written quotes for the purchase of goods or services relating to the provision of legal services for the Merrick matter.

Finding 04

The Shire has failed to adopt a policy to give guidance and direction to the CEO on matters concerning litigation on behalf of the Council.

Henshaw Matter

49. On the 22 March 2018, parking infringement number P0925 was issued by the Shire of Toodyay Ranger to a vehicle owned by Mr Allan Henshaw (**Mr Henshaw**) for breaching Parking and Parking Facilities Local Law section 4.3(a) which states;

A person parking a vehicle on a carriageway shall park it-

- (a) *In the case of a two-way carriageway, so that it is as near as practicable to and parallel with, the left boundary of the carriageway and headed in the direction of the movement of traffic on the side of the thoroughfare on which the vehicle is parked and headed.*

50. On the same day a letter was written to the Shire by Mr Henshaw's daughter Ms Anne Anderson (**Ms Anderson**), explaining that she was in fact the driver of the vehicle at the time of the infringement. Ms Anderson stated in the letter that she wished to appeal the infringement and all future correspondence regarding the matter be sent to the United Kingdom (**UK**) address supplied.
51. A letter was sent to Mr Henshaw on 20 April 2018 by the Shire of Toodyay, stating the Parking Infringement P0925 would not be withdrawn. Mr Henshaw

responded on the 24 April 2018, stating he did not correspond with the Shire on the date specified in the letter.

52. A final demand for Parking Infringement P0925 was issued on 11 May 2018 to Mr Henshaw, even though the Shire had been advised by Ms Anderson that she, and not Mr Henshaw, was the driver of the vehicle. At this point Mr Henshaw elected to have the matter dealt with by a court. Mr Henshaw corresponded to inquire if the Shire was pursuing the matter. On the 22 September 2018 Ms Anderson received a Court Hearing Notice for 26 November 2018 to appear at the Northam Magistrates Court.
53. Mr Henshaw represented Ms Anderson at the Court Hearing where Ms Anderson pleaded guilty to the offence and was given the opportunity to pay the original \$60 infringement. The legal representative of the Shire gave an undertaking that the final demand that was addressed to Mr Henshaw would not be pursued.
54. The legal representation costs of taking this matter to Northam Magistrates Court for the Shire was \$5381.
55. Mr Henshaw alleges that the CEO used excessive enforcement powers concerning a parking Infringement Notice. The complainant had no choice other than to have the matter heard in the Northam Magistrates Court, as he was not the person who was responsible for contravening the Parking and Parking Facilities Local Law.
56. The Magistrate imposed a \$60.00 fine to Ms Anderson and during the course of an exchange between the Magistrate and counsel for the Shire (during which the Magistrate expressed some concern that a fine would be imposed on Ms Anderson, but that a final demand had been issued to Mr Henshaw in respect of the same conduct), the Shire acknowledged that the final demand issued to Mr Henshaw would not be pursued.
57. In public questions in Ordinary Council Meeting held on the 18 December 2018, after the Court Hearing, Mr Henshaw queried who was responsible for the totally unnecessary legal expenditure. The CEO stated:

The responsible person would be you (Mr Henshaw). You signed a declaration on 18 May 2018 requesting the matter be heard in court. The appropriate action for us was to prosecute. Having considered the infringement and determined that a waiver was inappropriate as parking in that way was dangerous, I had no alternative but to pursue it. The simplest response was for someone to have paid the \$60

infringement rather than risk a \$1,000 fine in court. If we simply ignore it every time someone refuses to pay no-one would ever pay an infringement and enforcement action would be pointless.

58. This statement indicates the CEO has failed to acknowledge the outcome of the Court Hearing, and failed to recognise the Shire's error in issuing an infringement notice to Mr Henshaw rather than Ms Anderson.

Finding 05

The CEO has failed to ensure that the resources of the local government are effectively and efficiently managed, by pursuing a \$60 parking infringement at the cost of \$5381 in circumstances where the infringement notice had been issued to the wrong person.

Finding 06

The CEO did not adequately discharge the responsibility he had under the s5.41(d) of the Local Government Act 1995 for the management of the day to day operations of the local government by managing legal costs, which were excessive given the nature of the matter.

Warragenny Holdings Pty Ltd

59. On 29 December 2009, a significant bush fire swept through Toodyay and a company named Warragenny Holdings Pty Ltd assisted with bushfire recovery. The financial beneficiary of Warragenny Holdings Pty Ltd (**Warragenny**) is Mr Charles Malcolm Wroth who was at the time a Councillor for the Shire.
60. Warragenny invoiced the Shire \$13,000 plus GST for delivering gravel to assist with the fire recovery action, and the invoice was paid in full by the Shire. Some months later allegations were made by the Shire that Warragenny had not delivered the gravel.
61. The CEO made a formal complaint to the Crime and Corruption Commission (CCC). On the 17 November 2014 the CCC advised the CEO that they had no jurisdiction over the matter and forwarded the matter to the WA Police.
62. The WA police were unable to establish if the gravel in question had not been delivered, thus no criminal offence could be substantiated, and the WA Police closed the file.
63. The Shire commenced civil legal proceedings against Warragenny by filing a writ in the Supreme Court on 24 March 2014. A Statement of Claim was filed on 16 April 2015. The Council was briefed by their legal representative regarding the case on the 8 March 2016 Ordinary Council Meeting.

64. The CEO was made aware on 1 December 2016 that legal costs of the Supreme Court action had exceeded \$36,000. It was quoted by the legal representative to cost between \$8,800 and \$15,000 to take the matter to trial depending on the experience of counsel.
65. A Special Council Meeting was called on 1 June 2017, at which a motion was passed to accept the Deed of Settlement and Release for the Warragenny claim.
66. The Deed of Settlement and Release was executed on 26 July 2017. Under the terms of the Deed, the Claimant (Shire of Toodyay) received \$5500 from the Defendant (Warragenny Holdings Pty Ltd). The ultimate cost of the legal proceedings against Warragenny was \$82,470. It is likely that administrative evidence gathering costs would have further increased the actual cost of the case to the Shire.
67. During a record of interview from Mr Brian Rayner, who was a Councillor at the time, he advised that he could not recall the CEO making council aware of both the correspondence from the CCC and the shire's legal representative.

Finding 07

The CEO has failed to discharge his duty as per regulation 5(2)(a) Financial Management Regs in regard to ensuring that the resources of the local government are effectively and efficiently managed in relation to litigation of the Warragenny Holding Pty Ltd matter.

Finding 08

The CEO has failed to keep Council abreast of continuing costs of litigation of the Warragenny matter thus not enabling Council to make informed decisions regarding to matter.

Rates

68. On 13 October 2016 the Department advised the Shire that the UV-based differential general rating it had devised for the location of Morangup was unlawful and would need to be quashed by the State Administrative Tribunal (**SAT**). The rating was unlawful because a UV differential rating cannot be imposed on land because of its location, and under section 6.33(1) of the Act can only be imposed according to any, or a combination of the following characteristics:
 - a. the purpose for which the land is zoned;
 - b. a purpose for which the land is held or used as determined by the local government;

- c. whether or not the land is vacant land; or
 - d. any other characteristic or combination of characteristics prescribed.
69. The Shire applied to SAT to quash the rates and SAT subsequently quashed the rates on 12 December 2016¹. The Shire then revised its rating for the affected properties, consulted with affected landowners, and adopted its modified budget to reflect the change.
70. The 2016/2017 budget was handed down in accordance with legislative and statutory requirements.
71. The Shire admits that mistakes were made in respect of the rate setting. These mistakes came about through a lack of understanding of the correct setting of rates for UV rated land and differential rating. The Shire took responsibility for the matter and resolved it using the appropriate process.
72. Relevant legislation pertaining to rating is complex. The Act recognises this by providing a process to deal with incorrect application of a rate. The Shire's mistake in this respect is not an unusual one nor has it been unique to the Shire.
73. In respect to the CEO's length of service within the Local Government sector it seems incongruent that he would not be aware of the legalities of rate setting.

Finding 09

The CEO has failed to ensure that efficient systems and procedures are to be established by the CEO of the local government for the proper collection of all money owing to the local government in regard to rates setting.

Finding 10

The CEO did not have adequate oversight of the of the day to day operations of the local government, and this failure by the CEO has caused, or contributed to the potential unnecessary costs to the Shire of Toodyay.

Audit Committee

74. The Audit Committee convened on the 30 November 2017 after Council elections on 21 October 2017. The Audit Committee as per Council Resolution 170/10/17 are;
- Councillor Welburn, Council Member
 - Councillor Craddock, Council Member
 - Councillor Granger, Council Member
-

Councillor Bell, Council Member
Councillor Rayner, Council Member
Councillor Dow, Council Member
Mrs M O'Sullivan, Community Member
Councillor Chitty, Council Member

75. Audit Committee Resolution 07/11/17 was as follows;

The Audit Committee:

- 1. Elects Cr Welburn as Presiding Member; and*
- 2. Elects that a Deputy Presiding Member be nominated at a meeting where the elected Chairperson is an apology.*

76. Ms E Ruthven, Mrs J Robertson and Mrs B Dadd become the three Community Members for the Audit Committee at the 15 March 2018 meeting.

77. The Audit Committee meeting held on 17 December 2018 was convened at 9.05am by Cr Rayner, due to the approved leave of absence of Cr Welburn.

78. As there was no deputy presiding members elected for the Audit Committee, and as a result of resolution 07/11/17 and section 5.14 of the Act, a deputy presiding member should have been chosen by the members of the Audit Committee at the 17 December 2018 meeting, for that meeting.

79. On the 17 December 2017 an Audit Committee was held. At this meeting Shire Present Rayner chaired this meeting as the unelected chairperson which is in breach of section 5.14 of the Act.

80. There had been no training provided to the members of the Audit Committee in regard to their roles, responsibilities and procedures.

Finding 11

The Audit Committee appears not to have complied with section 5.14 of the Act by not choosing one of themselves to preside at the 17 December 2018 meeting in the absence of the presiding member, Cr Welburn.

Budget Review 2018/2019

81. A review of the Shire budget was conducted on 26 March 2019 at an ordinary council meeting. In accordance with regulation 33A of the Financial Managements Regs, the Shire is to submit the reviewed budget to the Department within 30 days of being reviewed.

82. The Local Government did not provide their budget review (2018/2019) to the Department in accordance with regulation 33A, within the time specified in that regulation or at all.
83. Under regulation 5(1)(g) of the Financial Management Regs, it is the responsibility of the CEO to establish efficient systems and procedures for, amongst other things, to assist in the preparation of budgets, budget reviews, accounts and reports required by the Act or the Financial Management Regs.

Finding 12

The Shire of Toodyay has breached of r33A(4) of *the Local Government (Financial Management) Regulation 1996* by not submitting the Shire of Toodyay Budget Review to the Department of Local Government Sport and Cultural Industries for the 2018-19 financial year.

Finding 13

The CEO has breached of r5(g) of *the Local Government (Financial Management) Regulation 1996* by not submitting the Shire of Toodyay Budget Review to the Department of Local Government Sport and Cultural Industries.

[Office of Auditor General Report](#)

84. The office of the Auditor General (**OAG**) tabled a report in Parliament on 9 April 2019 in relation to a “Records Management in Local Government” audit that was performed on four (4) local governments which included the Shire of Toodyay. In accordance with section 7.12A(4)(a) of the LG Act the local government must prepare a report addressing any matters identified as significant by the auditor in the audit report, and stating what action the local government has taken or intends to take with respect to each of those matters, and give a copy of that report to the Minister within 3 months after the audit report is received by the local government.
85. The Audit Committee considered the report of the Auditor General on 6 June 2019, and the following motion was carried 4/0:

The Audit Committee recommends to Council the following: That Council:

- 1. Receives the Records Management Performance Audit Action Plan/Report based on significant audit findings; and*
- 2. Recommends to the Council: “That Council receive the Records Management Performance Audit Action Plan/Report.”*
- 3. Note that the issues concerning Records Management and Information Technology are being actioned by Management.*

86. On the 25 June 2019 the Audit Committee recommendation was put to Council at an OCM. At the OCM the Audit Committee Recommendation Officer Report was deferred to the 23 July 2019 meeting. A revised Record Keeping Policy document was presented and adopted by Council.

87. The CEO wrote to the Minister for Local Government on 1 July 2019 stating;

In accordance with Clause 4 (a) of Section 7.12A (Duties of local government with respect to Audits) the Office of the Auditor General required us to prepare a report addressing any matters identified as significant by the Auditor in the audit report, and state what action the local government has taken or intends to take with respect to the matters raised in the report.

And further

Further, in terms of our Record Keeping Policy, at the Ordinary Council Meeting held on 25 June 2019, Council resolved to adopt the draft Record Keeping Policy presented to Council. An extract of that meeting, including the adopted policy is enclosed for your reference.

88. The Audit Committee recommendation was adopted in the 23 July 2019 Council meeting.

89. It was alleged to the authorised officers that the CEO misled the Minister in relation to section 7.12A(4)(a) of the Act and regulation 16 *Local Government (Audit) Regulation 1996 (Audit Regs)*, by representing compliance in the letter dated 1 July 2019. It is alleged that council had not considered or adopted any recommendation on the matter from the audit committee at the time it was dispatched to the minister.

90. A per Audit Reg 16(f)(ii) which states

16. Functions of audit committee

An audit committee has the following functions —

(f) to oversee the implementation of any action that the local government —

(i) is required to take by section 7.12A(3); and

(ii) has stated it has taken or intends to take in a report prepared under section 7.12A(4)(a); and

(iii) has accepted should be taken following receipt of a report of a review conducted under regulation 17(1); and

(iv) has accepted should be taken following receipt of a report of a review conducted under the Local Government (Financial Management) Regulations 1996 regulation 5(2)(c);

91. In the opinion of the authorised officers, the letter written by the CEO was in fact correct and was publicly available on the local government's website on the 11 July 2019, which was 14 days from the time of the local government giving the report to the Minister.
92. Under the requirements of 7.12(A) of the Local Government (Audit Regulations) it is the audit committee's responsibility to deal with the OAG report not council, hence no breach has occurred regarding this matter.

Mitigation Activity Fund Grant

93. On the 20 September 2019 the CEO, on behalf of the Shire submitted an application form to the Mitigation Activity Fund – Royalties for Regions to Department of Fire and Emergency Services (**DFES**). The application was for financial assistance to improve fire management capacity and overall resilience of communities by using funds for on-ground works to mitigate fire risks on state owned land that is managed by the Shire.
94. On 15 November 2019 the Shire was notified that they were successful in receiving a total sum of \$1,092,800 (exclusive of GST) for 131 mitigation activities, to be completed by 15 June 2020.
95. On 15 November 2019, purchase order 28964 was raised by the Bushfire Risk Mitigation Coordinator and signed by the CEO in the name of Fire Mitigation Services for the full amount of the grant, including GST, being \$1,202,080.
96. DFES advanced the first 50% of the total grant, and the remaining sum is refunded to the Shire upon invoice to DFES by the end of June 2020. All works are to be completed by mid-June 2020.
97. Within the purchase order item description is scribed as;

“AUTHORISE the CEO to utilize the State Government common use agreement, by the Department of FIRE and Emergency Services approved CONTRACTOR LIST, to Source a suitable contractor to implement the treatments as detailed within the BRMP” end quote
98. Fire Mitigation Services (FMS) are approved by DFES for provision of hire services for mitigation works, excluding prescribed burning, on Unallocated Crown Land and Unmanaged Reserves. This contractor is not on the Common Use Agreement (CUA) list. The Shire relied upon regulation 11(2)(e) of the Functions & General Regs to directly approve the use of FMS without public invitation for tenders under regulation 11(1) of the Functions & General Regs. However, this exception from the requirement to publicly invite tenders applies

only to goods or services which are to be supplied by or obtained through the government of the State or the Commonwealth or any of its agencies, or by a local government or regional local government. In this case, the services were not supplied by or obtained through the government of the State.

Finding 14

The CEO has failed to ensure that the Shire adhered to Local Government (Functions and General) Regulation 1996 r11 by neglecting to invite tenders before awarding the contract to Fire Mitigations Services.

4.2 Administration Matters

Anzac Avenue

99. A report was submitted by Works Advisory Committee and presented for the 26 July 2016 Ordinary Council Meeting to consider a budget allocation for removal of trees on the corner of Anzac Avenue and Clinton Street Toodyay to facilitate the use of the road by heavy haulage operators as the route is a designated by Main Roads Western Australia as a Heavy Haulage route.
100. Allegations have been made regarding the failure of Councillor Judith Dow (Cr Dow) and then Shire President David Dow (SP Dow) to declare a financial interest at the 26 July 2016 Ordinary Council Meeting (OCM) in relation to Item 13.2.1 Anzac Park -Proposed Tree Removal Report.
101. This Item was further discussed at the OCMs held on 23 August 2016, 25 October 2016 (at which Cr Dow and SP Dow declared proximity interest), 22 November 2016 and 28 February 2017 (at which Cr Dow and SP Dow declared proximity interest). At the OCM held on 25 October 2016 and 28 February 2017, Council passed a motion that Cr Dow and SP Dow be allowed to participate in the debate.
102. The basis of claims the former Shire President and Cr Dow had an interest in the matter is that their residence is on part of the current heavy haulage route. However, their residence is not near the location of the trees.
103. As noted previously, the purpose of the agenda item was principally to deal with the removal of trees, however the need to remove the trees was linked to a possible future heavy haulage route.
104. Measured against the criteria in section 5.60A of the Act, the suggestion that the Shire President and Cr Dow stood to obtain a demonstrable financial gain, loss, benefit or detriment over the matter as it was presented to (and subsequently resolved by) Council is remote and speculative.

105. The decision of the Council in relation to matter of removal of the trees, if dealt with in a particular way, would not result in a financial gain, loss, benefit or detriment for either SP Dow or Cr Dow. Further, the tree location does not meet the criteria under s. 5.60B of the LG Act for a proximity interest to exist, and whilst the council members concerned reside on the current designated heavy haulage route, it is remote and speculative to suggest the Shire President and/or Cr Dow were impacted financially by the Council decision or the manner in which the item was dealt with.
106. There were no breaches of local government legislation regarding this matter.

Lot 3001 Duke Street, Toodyay

107. A report was put to Council on 26 July 2016 in regard to 6 (Lot 3001) Duke Street Toodyay and the realisation of a council asset. The premises in question is located in the "Old Goal Precinct" and consists of an old one room school on a residential 1200m² block. It is noted in the report from the Heritage Society there was some heritage significance to the building but it was not heritage listed or listed on the Municipal Inventory. The building had been relocated previously. As the asset is of little historical value the council was free to dispose of the asset as it saw fit in line with current council policies.
108. The Council passed a motion to authorise the disposal of the property, subject to:
- a. A photographic record being taken prior to proceeding;
 - b. The building being offered for sale separate from the land; and
 - c. Once the land is cleared and vacant it be offered for sale.
109. The fact that the premises in question is within a heritage precinct, is irrelevant in terms of disposing of the premises. The Shire identified it as an asset to be disposed of in accordance with its asset rationalisation strategy.
110. Local Planning Policy 20 is a guideline for development within the central Toodyay heritage area. It lists premises within that area and their heritage significance. The objectives of the document are;
- To improve quality of development within the Central Toodyay Heritage Area.
 - To improve the streetscape within the Central Toodyay Heritage Area.
 - To ensure that development within the Central Toodyay Heritage Area occurs in a manner that complements the existing heritage buildings within Central Toodyay.
 - To retain and enhance the heritage qualities within Central Toodyay.
 - To facilitate quality development within the Shire of Toodyay.

111. The other shire policy that is relevant to this subject is F12 Disposal of Property. The policy document, which is current as of September 2012, outlines the necessary steps to dispose of land which includes dealing with stakeholders.

Council properties may have other affected stakeholders or other persons who have an interest in the land. This may include:

- (a) Current tenants;*
- (b) Potential future tenants where some substantive discussions have occurred; or*
- (c) Adjacent landowners.*

Any discussions with stakeholder/s should be documented, and where appropriate confirmed in writing. If stakeholder/s indicate a genuine interest in purchasing the property, they should be encouraged to make a submission to that effect or participate in a public process as the case may be.

112. The Council has neglected to contact adjacent landowners and have only considered current tenants in this case. Thus, the Council have failed to adhere to their own Disposal of Property policy.

Finding 15

The Council has failed to adhere to the F12 Disposal of Property policy by neglecting to contact all effected stakeholders as nominated in the policy.

Butterly Cottages

113. The Shire undertook the construction of independent living units in conjunction with Butterly Cottages Association (Inc) at 4 Anzac Avenue Toodyay. The tender was separated into two parts comprising Site Works and Construction of Units.
114. Ringa Civil was awarded the tender No. 03/2016 Independent Living Units – Site Works at the Ordinary Council Meeting on 24 January 2017. The location of the construction was at Lot 3 and 4 Anzac Avenue, Toodyay. The location of the construction is within the Central Toodyay Heritage Area, to which Local Planning Policy 20 (LLP20) applies.
115. The *Local Planning Policy 20* for the Shire of Toodyay states the following –
- 3.4.17** *The acceptable materials for new commercial buildings and additions, retaining walls, extensions or modifications to existing commercial buildings include the following:*

a) Walls

- Use of limestone materials in retaining walls will not be permitted.

and

3.4.27. Fences and gates associated with residential development shall be consistent with the following requirements:

d) Limestone fencing is not permitted in the Central Toodyay Heritage Area;

and

4.4.26. Fences and gates associated with commercial development shall be consistent with the following requirements:

k) Limestone fencing is not permitted in the Central Toodyay Heritage Area;

116. It is clear that the Local Planning Policy prohibits the use of limestone fencing in the Central Heritage Area Precinct. The Shire invoked a clause in the policy to enable the limestone wall to be erected. The clause is 2.4.4 of the *Local Planning Policy 20* which States:

2.4.4. The Council may vary the requirements of this Local Planning Policy, where it is considered that full compliance with the policy is impractical or may result in reasonably demonstrable detriment to the applicant or such variation is warranted in the circumstances of the case.

117. In the interests of good governance and transparency, the variance from the Shire's own policy needs to be explained and documented. The Authorised Persons have not obtained any documentary evidence justifying variance from the requirements of the Local Planning Policy.

Finding 16

The Council has failed to adhere to the Local Planning Policy 20 by not justifying why full compliance was impractical, or may result in reasonably demonstrated detriment, or why variation was warranted in the circumstances of the case.

O'Reilly Cottages

118. Mrs O'Reilly's Cottage, also known as Demasson's Store, was originally built in 1872. The building is on the Shire of Toodyay Municipal Inventory and has a considerable level of significance to the history of the district. The place has aesthetic value as a good example of the period and contributes to the streetscape of Toodyay. The Toodyay Roads Board bought the house around 1889 and it was tenanted by a number of different people including Dr O'Reilly who used it as a doctor's residence and surgery, hence the name.

119. The premises became vacant in 2014 and the shire advertised and received an offer to lease the building which later changed to lease or purchase. During the process of negotiating the lease agreement, damage occurred to the building as a result of a storm. As per F.12 Disposal of Property policy the Shire had the responsibility to repair the property. Due to the unique nature of the building, the repair was a lengthy and expensive process.
120. The Shire obtained a valuation of the property and received an offer to purchase the property at the same amount as the valuation. The authorised persons have not identified any evidence to suggest that there was any unauthorised disclosure of the valuation.
121. The building was sold in accordance with Local Planning Policy 20 document which is relevant to the building. The Council has dealt with the matter in accordance with the relevant legislation and Council Policy.

Buchanan Matter

122. Mr Buchanan purchased land in a new subdivision in the Shire in 2006, for the purpose of building a residence in Jubilee Street, Toodyay. He approached the shire to obtain all the relevant information for the owner to make an application to obtain an owner - building licence.
123. The Shire required the installation of a sewage system known as an Alternate Treatment Unit (ATU) as there was no reticulated sewage service to that area, reflecting a requirement of the Western Australian Planning Commission (**WAPC**). These instructions formed part of the approval process for a building licence. Mr Buchanan was advised he was required to install an ATU on advice from the WAPC in a letter dated 7 December 2006 from the Shire.
124. As instructed, Mr Buchanan purchased an ATU that was approved by WA Waste Water Management which he considered met the expectations of the shire based on the information provided. The Shire initially advised Mr Buchanan the ATU unit he had purchased would not be approved but upon providing evidence that it was approved by WA Waste Water Management, the Shire decided to change the status of the ATU to approved.
125. Mr Buchanan's next-door neighbour, was required to install an ATU unit as well in order to obtain a building licence.
126. In 2012 the Shire granted approval for the complainant's neighbour to install a conventional septic system for heavy soils and did not require the complainant's neighbour to install a ATU unit as required in the complainant's case.
127. Mr Buchanan subsequently raised concerns with the Shire about a suspect fluid that appeared to be sewage that was leaking onto his land from the neighbouring property. Mr Buchanan removed some of the fluid from the

affected area to obtain a sample on 26/2/2016 and sent it to a NATA Accredited Lab for analysis. The results of the testing were submitted to the Shire and as a result they conducted a dye test from the neighbours leach drain which had negative results. The shire considered the seeping water to be as a result of a wet winter and high-water table.

128. Due to continuing water discharge from the area and the foul odour Mr Buchanan again contacted the shire in November 2018. Officers from the shire attended the property a second time and agreed that a further investigation was required due to on-going leakage. As a result, environmental health officer attended and made an assessment on the leakage issue.
129. The conclusion was the complainant's neighbour was ordered to install an extra leach drain to attempt to remedy the issue that the complainant had identified 3 years earlier as leaking sewage.

Finding 17

The Shire has provided incorrect advice allowing the use of a conventional septic system, when an Alternative Treatment Unit wastewater system was required.

Finding 18

The Shire was inconsistent in its approach in this case, in relation to the planning and building conditions to be adhered to with respect to the subdivision of land.

4.3 Other Matters

Gough Matter

135. This matter involves the seizure of two dogs from Mr Gough who resides at Dumbarton in the shire of Toodyay.
136. On 2 June 2017 the two dogs were allegedly involved in an incident where injured sheep were observed by an adjoining property owner who claimed to have sighted the dogs from an approximate distance of 200m. It appeared that two dogs were unrestrained and surrounded an injured sheep. The complainant claimed the dogs appeared to be biting the sheep (classed as an attack). The dogs were seized by Toodyay – ranger division on 2 June 2017 from the property of Mr Gough.
137. The property was inspected by Ranger Papps on the 12 June 2017 for appropriate fencing and the house was inspected to ascertain if it was suitable to contain the dogs. It was found to be suitable and the fencing was adequate.

138. Two Infringements were issued to Mr Gough under 33A(3) of the Dog Act 1976 (Dog Act). Two infringement notices were delivered to Mr Gough on 12 June 2017 with a letter from the CEO stating "this is a final warning". Infringements were paid within the due date by Mr Gough.
139. A meeting took place with Shire representatives and nearby neighbours of Mr Gough on the day of the dogs' return, who voiced that they were extremely displeased with the dogs returning to the area. Even though there had been no reported incidents of the dogs in question being loose or chasing livestock since March 2015, it was stated that they had been active in the area.
140. On 12 July 2017 a warrant was executed under the Dog Act and the second seizure of the dogs took place while Mr Gough was not home at the time. Mr Gough received paperwork in the form of a warrant, on 12 July 2017, which was attached to his main gate. A separate letter dated 18 July 2017 was sent in the mail by the Shire CEO to Mr Gough.
141. The letter contained the following information - The CEO quotes:
Apart from the eyewitness there is no direct evidence from examining and observing your dogs to verify the attack.
142. A subsequent email from the CEO was sent to Mr Gough on the 18 July 2017 which states:
Both dogs were involved in an attack that resulted in the death of one sheep and injury to another.
By a reliable eye witness
This is the third attack.
"As you are aware, the Shire has seized two dogs under warrant for their involvement in an attack on a flock of sheep that resulted in the death of one animal and significant injury to another"
"The attack occurring, and your dog's involvement has been proven to my satisfaction".
"I reiterate we have very compelling evidence that these dogs were responsible"
143. The dogs were in the shire's custody for a period of 13 Months. Mr Gough disagreed with the process and the subsequent action taken by the Shire and the Court process followed.
144. The magistrate advised that the Shire was acting duplicitously by taking this matter to court. The Magistrate ruled that the matter had been dealt with and settled on 7 July 2017 when the two infringements were paid. The Shire withdrew the case. The magistrate has described the matter as "concerning and problematic".

145. The legal cost borne by the Shire was \$36,500.

146. It appears that the CEO, acting on behalf of the Shire, pursued the seizure of the dogs after infringements notices had already been paid.

147. On record of interview the CEO said:

'absence of evidence is not evidence of absence', and 'the matter was handled appropriately.'

Finding 19

The CEO has failed to ensure that the resources of the local government are effectively and efficiently managed, by pursuing an unwarranted prosecution at the cost of \$36,500 in circumstances where the infringement notice had already been paid.

Finding 20

The CEO did not adequately discharge the responsibility he had under the s5.41(d) of the Local Government Act 1995 for the management of the day to day operations of the local government by managing legal costs, which were excessive given the nature of the matter.

Wakeman Matter

148. Mr Wakeman purchased the property located at Coondle in February 2011 on the alleged advice from the Shire that he was permitted to keep two horses on the property.

149. In January 2014 Mr Wakeman received a letter from the Shire advising that under the local planning scheme he would need to apply for planning approval, because he was keeping two horses on the property, which constituted a "rural pursuit" land use.

150. A retrospective planning approval application was submitted in February 2014 which included a Management Plan as required. Notwithstanding that the Shire's planning officer recommended that retrospective planning approval be granted, the Council of the Shire refused the application because it did not comply with Local Planning Scheme 20.

151. The shire's Local Planning Scheme 20 it states:

(b) Livestock may be held on lots west of White Gum Ridge in areas already cleared of natural vegetation at the time of subdivision and wherein slopes are 10% or less. The holding of livestock is permitted for domestic purposes only. That is, stock may be held for the use and enjoyment of landowners, or

for the purposes of keeping of growth of grassland (and therefore fire hazard) in check. Commercial stockholding based activities constitute a rural pursuit and not permitted.

152. Mr Wakeman's point was the livestock would keep the growth of grassland to a minimum to avert a fire hazard.

153. Of vital note was the field officer's recommendation on this matter, which reflected in the shire minutes dated 25 March 2014 and states:

Clearly there is a desire within a proportion of the community to come to this area and partake in rural pursuits. By the same token there is a portion that wants to live in the area without the burden of livestock. Thus the emphasis a land owner places on either the 'rural' or 'residential' component of rural residential will always be at odds with those who do otherwise. This division is clearly evident in the immediate community around Laterite Way.

The report further states

The current process of determining stocking rates is flawed. The simplified equation is: Soil Type + Gradient + Area of cleared land = The number of animals permitted

And recommended

It is therefore considered that given the issues identified with the existing assessment of stocking rates process, that this proposal be judged on its merits. The proposal is well supported by a strong equestrian management background.

As this is a retrospective planning application, the condition of the horses was noted to be very good and the argument to have two horses as they are social animals also is well supported. Therefore with consideration to all the factors raised in this report it is recommended that this proposal be approved.

154. This information was put to the council – who eventually voted 9/0 because it did not comply with Local Planning Scheme 20. No other explanation was given. The planning approval was rejected by the shire.

155. Mr Wakeman took the matter taken to State Administrative Tribunal (SAT). SAT reviewed the merits of the matter and decided to affirm the decision of the Shire.

156. Mr Wakeman asked for a mediation meeting with the CEO and was rejected. It is also noted that there was strong opposition to the approval of the application from one nearby resident.

157. Mr Wakeman was later convicted and incurred \$9,300 fine for failing to adhere to shire requirements.

158. Mr Wakeman lodged another application with the Shire of Toodyay, dated 25 March 2019 for the keeping of two horses on his property.

159. This application was approved, with numerous conditions attached.

160. It seemed the same process had taken place as with first application, however the second application led to a different outcome. The Shire's opposition to the first application for retrospective planning approval cost the Shire \$30,688 in legal expenses.

Finding 21

The Shire has shown to have inconsistent dealings in relation to a planning application over a period of five years with no change in Shire planning or policies during that time, and at a significant cost to the applicant and rate payers.

Graham Matter

164. Ms Graham alleges that she was unfairly dismissed from a volunteering role at the shire. Ms Graham was volunteering at the Toodyay Museum in August 2018.

165. Upon starting at the Museum, Ms Graham is quoted as saying: *“When I started as a volunteer for the shire, I was not given any training or induction of any sort”*.

166. On 20 August 2018, Ms Graham was accused by the museum curator of stealing historical photos.

167. As a result of this, Ms Graham was advised by email that her services were no longer required. The letter was sent by the CEO and at no time was Ms Graham advised of any evidence to validate the claim that she allegedly stole photos.

168. The CEO admitted that a process is in place to induct new volunteers, however he was not convinced this always occurred and admitted has not occurred on some occasions. A process was put in place after this event to ensure a proper pathway should a similar matter be raised again.

Finding 22

The Shire has failed to adhere to their own O.2 Volunteer Policy by ensuring to provision of orientation/induction as per item 7.7 Induction of the Volunteer Policy by the Shire of Toodyay was provided to Ms Graham.

Finding 23

The Shire has failed to adhere to their own O.2 Volunteer Policy item 13 of Inappropriate Behaviour and Volunteer Dismissal, specifically affording the volunteer with procedural fairness and following the procedure for termination of a volunteer's services.

Granger Matter

169. Ms Granger lodged a complaint with the Department concerning dysfunction within the shire of Toodyay. Ms Granger was elected to the Toodyay Council, Central Ward on 21 October 2017, and resigned 13 March 2018.
170. The information that was supplied by Ms Granger was varied but the majority involves the interaction between herself and the CEO. Ms Granger's perception of the culture of the Council was *"a working environment created by the CEO and other members of Council highly demoralising at best or toxic at worst"*
171. The tone of some emails is condescending by the CEO towards Mrs Granger when she has queried topics that were before Council or the processes the Shire uses.
172. The function of the CEO as per 5.41(b) of the LG Act is to provide advice and information to enable Councillors to make informed decisions of business that is before Council. When the CEO refuses or delays that information unnecessarily it inhibits to fully considered decision being made by Council.
173. One of Ms Granger grievances was on the 6 November 2017, she requested an update from CEO concerning the progress of the proposed aquatic facility. The CEO advised that he would report on this matter at the Council Forum on 14 November 2017, which he failed to do. However, at some stage the CEO did suggest to Ms Granger could search the Shire Portal for historical information.
174. The CEO put up a submission for the sporting precinct which included details of the aquatic facility at the 28 November 2017 ordinary meeting. Although not on the date stated, it was within a reasonable timeframe and relevant to the time the Council had to consider the submission.
175. Ms Granger put forward a motion on the 23 January 2018 OCM regarding "Managing the Performance of the CEO". When the meeting went "behind closed doors" the CEO proceeded to verbally berate Ms Granger in a hostile manner to which she felt was highly inappropriate and was embarrassed. At no point in time during the time of the CEO talking did the Presiding Member bring the CEO to order.

176. There are indications the relationship between the Council and CEO was not functioning as per the requirements of the LG Act which should be one of employer and employee. There are sections of the community which were unhappy with the lack of transparency and accountability of the Shire of Toodyay. Due to the lack of positive action by the Council in relation to the CEO, the discontent within the community has culminated in the need for an inquiry.

Finding 24

The CEO has breached Code of Conduct 3.5 Avoid Derogatory Statements by failing to communicate in a professional manner which may cause any reasonable person unwarranted offence or embarrassment.

CEO Conflict of Interest Matter

177. It is noted by the Authorised Persons that the Shire has used thirteen separate legal firms over the period of the CEO employment with the Shire. Of the thirteen legal firms, there was one firm which seemed more prevalent than the others. Upon further assessment it was noted of the \$1,890,819 spent on legal firms during that time, 39% was with Civic Legal.
178. When investigating the matter further it was found the CEO's son is Special Counsel for Civic Legal. When the CEO was questioned in regarding his son working with Civic Legal, he stated that he had spoken to the Shire President about it and the CEO didn't consider it to be an issue. At no time was this conflict of interest matter documented or put to the Council.
179. Although this conflict of interest was not documented or brought to the attention of the Council, is not an offence against the Act. However it is unethical and not behaviour that should be expected of a CEO.

Finding 25

The CEO has acted in an unethical manner by not disclosing to the Council that his son is working with the legal firm that the Shire has frequently engaged to provide legal services.

Recommendations

It is recommended that:

1. The Shire undertake a Governance Review as approved by the Director General within 6 months of this report becoming final and the review is to be made available to the Director General.
2. The Elected Members undertake training as determined appropriate by the Director General within 6 months of this report becoming final. That training is to include but not limited to;
 - Governance
 - Accountability
 - Roles and responsibility of both elected members and administration
 - Financial matters
 - Tendering and procurement
 - Meeting management
3. Following completion of the training referred to in Recommendation 2, the CEO is to deliver to the Director General a comprehensive report:
 - a. demonstrating the knowledge and understanding gained by the Elected Members from the training; and
 - b. identifying members who have attended the training and any reasons for non-attendance; and
 - c. outlining the steps taken by the Shire to implement such knowledge and understanding.
4. Conduct a review of the CEO's performance by an independent consultant on an annual basis for the duration of the contract.
5. Council review the Litigation Policy to reflect the scope and authority of the CEO regarding any litigation on behalf of the Shire.

Schedule of Findings

Finding 01

The minutes of the Ordinary Council Meeting held on 19 February 2013 did not comply with regulation 11(da) of the Local Government (Administration) Regulations 1996, as they did not provide written reasons for a decision that is significantly different from the Chief Executive Officer's written recommendation in relation to the Merrick matter.

Finding 02

The CEO has failed to keep Council abreast of costs of litigation of the Merrick matter thus not enabling Council to make informed decisions regarding to matter.

Finding 03

Mr Scott, as CEO, failed to comply with Policy F3 by failing to obtain three (3) written quotes for the purchase of goods or services relating to the provision of legal services for the Merrick matter.

Finding 04

The Shire has failed to adopt a policy to give guidance and direction to the CEO on matters concerning litigation on behalf of the Council.

Findings 05

The CEO has failed to ensure that the resources of the local government are effectively and efficiently managed, by pursuing a \$60 parking infringement at the cost of \$5381 in circumstances where the infringement notice had been issued to the wrong person.

Finding 06

The CEO did not adequately discharge the responsibility he had under the s5.41(d) of the Local Government Act 1995 for the management of the day to day operations of the local government by managing legal costs, which were excessive given the nature of the matter.

Findings 07

The CEO has failed to discharge his duty as per regulation 5(2)(a) Financial Management Regs in regard to ensuring that the resources of the local government are effectively and efficiently managed in relation to litigation of the Warragenny Holding Pty Ltd matter.

Finding 08

The CEO has failed to keep Council abreast of continuing costs of litigation of the Warragenny matter thus not enabling Council to make informed decisions regarding to matter.

Finding 09

The CEO has failed to ensure that efficient systems and procedures are to be established by the CEO of the local government for the proper collection of all money owing to the local government in regard to rates setting.

Finding 10

The CEO did not have adequate oversight of the day to day operations of the local government, and this failure by the CEO has caused, or contributed to the potential unnecessary costs to the Shire of Toodyay.

Finding 11

The Audit Committee appears not to have complied with section 5.14 of the Act by not choosing one of themselves to preside at the 17 December 2018 meeting in the absence of the presiding member, Cr Welburn.

Finding 12

The Shire of Toodyay has breached of r33A(4) of the Local Government (Financial Management) Regulation 1996 by not submitting the Shire of Toodyay Budget Review to the Department of Local Government Sport and Cultural Industries for the 2018-19 financial year.

Finding 13

The CEO has breached of r5(g) of the Local Government (Financial Management) Regulation 1996 by not submitting the Shire of Toodyay Budget Review to the Department of Local Government Sport and Cultural Industries.

Finding 14

The CEO has failed to ensure that the Shire adhered to Local Government (Functions and General) Regulation 1996 r11 by neglecting to invite tenders before awarding the contract to Fire Mitigations Services.

Finding 15

The Council has failed to adhere to the F12 Disposal of Property policy by neglecting to contact all effected stakeholders as nominated in the policy.

Finding 16

The Council has failed to adhere to the Local Planning Policy 20 by not justifying why full compliance was impractical, or may result in reasonably demonstrated detriment, or why variation was warranted in the circumstances of the case.

Finding 17

The Shire has provided incorrect advice allowing the use of a conventional septic system, when an Alternative Treatment Unit wastewater system was required.

Finding 18

The Shire was inconsistent in its approach in this case, in relation to the planning and building conditions to be adhered to with respect to the subdivision of land.

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