

*Local Government Act 1989*

IN THE MATTER OF THE CITY OF HOBSONS BAY

and

IN THE MATTER OF APPLICATIONS FOR CONSTITUTION OF COUNCILLOR CONDUCT PANELS

Applicant (Respondent): Councillor Peter Hemphill

Respondent (Applicant): Councillor Tony Briffa

Council: Hobsons Bay City Council

Where held: The Offices of the Hobsons Bay City Council  
115 Civic Parade, Altona.

Date of Application: 16 June 2011

Date of Hearing: Thursday, 11 August 2011

Panel Members: Mr Peter Harris (Chairperson and Legal Member) and Mr John Bruce (Municipal Governance Member)

CCP Registrar: Mr Chris Eddy, and Mr Stephen Cooper (Acting CCP Registrar)

STATEMENT OF REASONS FOR THE DECISIONS OF THE PANEL

1. Before the Councillor Conduct Panel are an application by Cr Peter Hemphill seeking a finding of misconduct against Cr Tony Briffa, and an application by Cr Tony Briffa seeking a finding of misconduct against Cr Peter Hemphill.
  
2. Each application was the subject of an application by each respondent under s.81C of the *Local Government Act 1989* ("the Act") for summary dismissal on grounds that the application was frivolous and vexatious or misconceived and lacking in substance. A further ground advanced for summary dismissal was that the matters had not been subject to a prior process of dispute resolution or that no reason had been shown as to why such a process was not appropriate.

3. By its decision on 3 August 2011 The Panel dismissed Cr Briffa's s.81C application against Cr Hemphill for summary dismissal. In the same decision, the Panel upheld, in part, Cr Hemphill's application for summary dismissal against two of the grounds of complaint by Cr Briffa, but declined to dismiss the ground relating to an alleged breach of the Hobsons Bay Council's Information Security Policy.
  
4. In the result, all of Cr Hemphill's complaints against Cr Briffa needed to be considered at a substantive hearing by the Panel, as did Cr Briffa's complaint against Cr Hemphill for breach of the Information Security Policy.
  
5. Following a hearing held on 11 August 2011 the Panel determined to uphold Cr Hemphill's complaint against Cr Briffa, and to dismiss Cr Briffa's complaint against Cr Hemphill. The Panel's reasons for those decisions are discussed and explained below. Also set out at the end of these Reasons for Decision is the remedial action that the Panel requires be undertaken.<sup>1</sup>

#### **THE APPLICATION OF COUNCILLOR HEMPHILL**

6. **The Grounds and Circumstances of Cr Hemphill's Application were:**
  - 6.1. That Cr Tony Briffa breached the Hobsons Bay Councillors' Code of Conduct [which incorporates the terms of section 76BA of the *Local Government Act 1989*] by reason of his conduct in respect of Ms Maureen Short, a resident of the City of Hobsons Bay.
  
  - 6.2. The Application for a Councillor Conduct Panel arose out of emails circulated by Cr Briffa in connection with a meeting held on the evening of Wednesday, 23 March 2011 at the Grand Star Receptions, corner of Grieve Parade and Doherty Road, Altona North, where representatives of the Environment

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<sup>1</sup> The Panel notes para (b) of the definition of *misconduct* in s.81A of the *Local Government Act 1989* where it is stated that "the failure of a Councillor to comply with a direction of a Councillor Conduct Panel where the Panel has not made a finding of misconduct against the Councillor" and para (a) of the definition of *serious misconduct* in section 81A of that Act in which it is stated that: "the failure of a Councillor to comply with a direction of a Councillor Conduct Panel following a finding of misconduct made by the Councillor Conduct Panel in respect of the Councillor.

Protection Authority Victoria and Innova Soil Technology Limited had convened a meeting to gain further understanding of issues and concerns relating to an application by Innova to seek a “Works Approval” permit to establish a soil treatment plant at 541-583 Koroit Creek Road, Altona, in the Hobsons Bay municipal district. According to the EPA’s record of the meeting 16 residents were in attendance. At the meeting, and following, an issue arose by reason of a question or questions asked by Ms Short as to why Cr Briffa had not been in attendance at the meeting.<sup>2</sup>

6.3. Over 29 and 30 March 2011 Cr Briffa prepared and circulated emails (Cr Briffa’s emails) to a number of recipients, as follows -

6.3.1. An email dated 29 March 2011 at 11.07 AM addressed to Maureen Short and “cc-d” to eleven other persons, (being - Peter Dunster, Glenn O’Sullivan, Brendan Murphy, Ross McCann, Alan Findlay, Craig Bruckner, Bill Jaboer, Geoff Mitchelmore, Goya Dmytryshchak, Laura Keys, John Merritt), and “bcc-ed” to the sender and five other persons (being – Jason Price, Carol Winfield, Jenny Stoneman, George Said and Derek and Gloria Johns). This email expressed Cr Briffa’s disappointment that Ms Short had *“publicly attacked Geoff Mitchelmore and me at last Wednesday’s meeting”*, and further that *“I intend to go public about the conflicts of interest you and Bryan Goodwin have”*.

6.3.2. An email dated 29 March 2011 at 11.15 AM to Peter Dunster, “cc-ing” Geoff Mitchelmore, asking Peter Dunster to forward the previous email (at 11.07 AM) to *“Glenn Hansen. I have significant concerns regarding Maureen Short following her shameful conduct in a public meeting last week”*.

6.3.3. An email dated 30 March 2011 at 12.56 PM addressed to Ms Maureen Short and “cc-ed” to eleven persons (being the same recipients as the email of the previous day at 11.07 AM, although in a different order) stating, *inter alia*, *“I believe that they (Mobil) should terminate your*

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<sup>2</sup> An electronic copy of the INNOVA Soil Technology Ltd Works Approval Application WA66832 – 20B Conference Report has been provided to the Panel. The Attendance Register has been deleted from the Report for privacy reasons.

*employment immediately,”* and further asserting that Ms Short had made a submission in the Works Approval process.

6.3.4. An email dated 30 March 2011 at 14.35 PM addressed to Ms Maureen Short and “cc-d” to four persons, being Geoff Mitchelmore, John Merritt, Peter Dunster and Glenn O’Sullivan reasserting that Ms Short had “*put in a submission – an oral one*” and “*your words at that forum constituted a submission*”. The email goes on to assert that he, Cr Briffa, is “*not out of order*” (a response to Ms Short’s email of 30 March 2011 at 1.35 PM asking Cr Briffa not to send emails to her employment address – a request that Cr Briffa ignored) and that Ms Short’s action at the meeting on the 23 March 2011 had “*damaged your ability to continue your role as a Public Relations advisor at Mobil*”.

## **7. The Panel**

**7.1** A Councillor Conduct Panel was constituted by the Municipal Association of Victoria comprising Mr Peter Harris (Chair) and Mr John Bruce (Municipal Governance member), with initially Mr Chris Eddy and then Mr Stephen Cooper as the Councillor Conduct Panel Registrar.

## **8. The Hearing before the Panel**

8.1. Cr Briffa was not able to attend the hearing on Thursday, 11 August 2011 for personal reasons and asked the Panel to allow a “proxy” to represent his interests. Having regard to the exceptional circumstances, the Panel decided to allow the attendance of a ‘proxy’ for Cr Briffa.

8.2. The proxy appointed by Cr Briffa was Mr Brad Matheson, a former Mayor and Councillor of the Hobsons Bay City Council.

8.3. The Panel pursuant to Section 81I(2)(b) of the Act agreed to allow Mr Matheson to attend as Councillor Briffa’s representative for the purpose of raising issues which he considered the Panel should put to any witness, and making submissions on behalf of Cr Briffa.

8.4. Mr Matheson attended and participated in the hearing in the manner referred to at para. 8.3. In particular, the Panel allowed Mr Brad Matheson to ask

questions of Councillor Peter Hemphill and the witness, Ms Maureen Short, “through the Chair”. Mr Matheson was not allowed to cross-examine any witness.

8.5. The Panel also received substantial written evidence from both Cr Hemphill and Cr Briffa, and oral evidence from Cr Hemphill and Ms Maureen Short.

#### **THE EVIDENCE BEFORE THE PANEL**

9. The Chairman of the Panel explained to the parties the misconduct allegation in the context of the Act, the Hobsons Bay City Council’s Councillors’ Code of Conduct and the Panel’s powers.

10. Councillor Hemphill expressed concern that Cr Briffa had failed to comply with deadlines set by the Panel for exchange of documents. Mr Matheson stated that Cr Briffa had no additional information to give to the Panel and did not want to call any witnesses.

11. Councillor Hemphill stated that the issue before the Panel began at the public meeting held on the evening of Wednesday 23 March 2011. He understood that Ms Maureen Short had asked why Councillor Briffa was not at the meeting. Councillor Hemphill understood that Councillor Briffa had in the past “passionately” opposed the establishment of the Innova proposed soil treatment plant and considered it to be a “sensitive issue”.

12. At Cr Hemphill’s request the Panel heard evidence from Ms Maureen Elizabeth Short. Ms Short is employed by Mobil Refining Australia Pty Ltd as a part-time contractor to provide community relations support at the Altona Refinery.<sup>3</sup>

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<sup>3</sup> Letter from Mr Glenn Henson, Mobil, dated 17 May 2011

13. The Chairman directed Ms Short's attention to the meeting held on Wednesday, 23 March 2011<sup>4</sup>. Ms Short stated that she went to the meeting with her partner. Ms Short stated that she had not worked for Innova for about 18 months before the March 2011 meeting. She considered that the Innova application was an opportunity to "clean up the land". She also stated that she was disappointed at the small number of people in attendance at the meeting to discuss such an important proposal and that she expressed her surprise that Councillor Briffa was not in attendance as he had previously vigorously opposed the Innova application. Ms Short said that she had worked in the industry for a long time and did not want to leave a legacy after working for ExxonMobil.
14. The meeting's independent Chairperson, Ms Cath Botta, from the Regional Development Corporation, noted that both Cr Briffa and Mr Mitchelmore submitted apologies. Ms Short stated that after asking after Councillor Briffa and Mr Mitchelmore there was no further reference to either of them during the rest of the meeting.
15. Ms Short said that after she had noted the non-attendance of Cr Briffa and Mr Mitchelmore, other persons present at the meeting proceeded to interrupt her question to the EPA representatives and to verbally abuse her – one person stating that, if she had her way, she would "have the petrochemical industry up and down the whole of Pier Street".

<sup>4</sup> The proceedings of the meeting held on Wednesday, 23 March 2011 are summarised on the Environment Protection Authority (EPA) Victoria web site at <http://www.epa.vic.gov.au/compliance-enforcement/comments/docs/Innova/Innova-20B-conference-report.pdf>. The report makes no reference to the question asked by Ms Maureen Short as to why Councillor Briffa was not at the meeting. **20B Conference – Innova Soil Technology Ltd works approval application WA66832**

The Environment Protection Authority's "Activity Report for March 2011 – Client – Altona Complex Neighbourhood Consultative Group (ACNCG)" makes no reference to Ms Short's comments. The brief report follows:

The conference was held on 23 March and there were 16 attendees. The purpose of the conference was for EPA to gain a further understanding of the issues and concerns that have been raised through submissions, with a view to resolving these where possible. The community's main concerns were the health risk associated with transportation, wastes to be treated and Innova's operational history. Submissions closed on 30 March. The Conference Chair's report will be available on EPA's website.

16. Ms Short told the Panel that she left the meeting feeling confronted. She had attended as an interested community individual with the altruistic intention of contributing to a better future for Altona following the outcome from the Works Approval application.
17. As to Cr Briffa's emails of 29 and 30 March 2011 Ms Short said that she was shocked at the contents and deeply disturbed to see that the emails had been sent to her previous and current employers. She could offer no reason why Councillor Briffa had distributed the emails to so many people.
18. Asked by the Panel whether Ms Short had spoken to her employer about the emails, she said that she had spoken briefly to both Peter Dunster and Glenn Henson. She understood that the letter dated 17 May 2011 written by Glenn Henson, General Manager and Refining Director (Exxon Mobil), to Mr Bill Jaboor, Chief Executive Officer of Hobsons Bay City Council, was as a result of her conversations with Messrs Dunster and Henson and the emails they had each received.
19. Ms Short said that she felt there had been "an enormous (negative) ripple effect" affecting her following Councillor Briffa's emails and his Media Release dated 2 June 2011 issued by Cr Tony Briffa JP, Deputy Mayor of the City of Hobsons Bay, titled *Mobil Attack Councillor & Environmental Advocate*.
20. The Panel asked whether Ms Short had taken any steps to redress the situation. She stated that she went to the Council meeting held on 7June 2011 seeking redress. She submitted a question that she thought would be answered during Public Question Time. Her question was – "What is Council going to do to stop Cr Briffa's constant harassment and public defamation of me as a long-term resident of Altona?"
21. The Panel notes, having been provided with the question pro-forma, that the Council response states: "This matter was referred to earlier in the meeting and is the subject of a written submission by Ms Short + the Council will deal with that submission and advise Ms Short of the outcome in due course". In another hand is written: "This question has already been answered during the councillor question time". The Panel has been provided with a transcript of

part of the Meeting.<sup>5</sup> In summary, during the exchanges, Councillor Briffa asserted that he did not have a conflict of interest in relation to the question, even though it explicitly names him, and used his position as chairman of the meeting to terminate discussion and debate on the question. In regard to the same matter, Councillor Briffa as Chairman of the meeting used the Chair's casting vote to defeat a proposal to hear a motion that involved himself.

22. The Panel asked Ms Short why she had attended the meeting. She replied that it certainly wasn't self-indulgence and she asked Councillor Briffa after the meeting why he hadn't rung her to hear her version of what happened at the March meeting. She stated that the emails containing reference to her had had a "domino effect" and she had felt humiliated and bullied. It had appeared to her that Councillor Briffa had made up his mind in relation to her and he was not going to resile from the position he had adopted.
23. Mr Matheson noted Ms Short's public interest in the soil treatment plant proposed by Innova. He asked why Ms Short had raised the issue at a public meeting of the Council. Ms Short replied that she wanted an apology from Councillor Briffa and wanted to "kill the issue". The Panel Chairman commented that Ms Short may have provoked publicity but she stated that she believed "right or wrong that was the only redress I had".
24. Mr Matheson suggested that asking the question that Ms Short had asked at the Council meeting was provocative rather than seeking quiet resolution. Ms Short's response was that, "If I hadn't attended (the Council meeting) it wouldn't have been raised". Ms Short also said that she had worked for Innova "on and off" for about six months during the latter part of 2009 and that Cr Briffa's continuing pursuit of her was raising "(negative) perceptions in peoples' minds about her" and she wanted the issue to stop.
25. Councillor Hemphill asked Ms Short about the perception of a conflict of interest with her having been involved with Innova and also asked whether, as a Public Relations professional, did she sometimes find herself being asked

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<sup>5</sup> The Panel has also been provided with an audio DVD of the whole of the Council meeting and a transcript of the three relevant exchanges (from the meeting) between Councillor Peter Hemphill and Councillor Tony Briffa who was chairing the meeting. The exchanges occurred at the 14.50 – 18.05, 1 (hour) 21.00 – 1.26.00, and 1.38.40 – 1.48.40 times during the meeting.

by her employer to do things contrary to her beliefs. Ms Short responded that she does not support conflict and attended the meeting on Wednesday, 23 March as an interested community representative. Cr Hemphill asked whether by seeking redress from Councillor Briffa she thought she was perpetuating damage to herself. She replied that friends had raised the issue at meetings she had attended, such as at a kindergarten meeting two weeks prior to the Panel hearing, and others were forwarding her emails that Councillor Briffa had been sending to them following the Innova/EPA meeting. She stated that she had attended the 7 June Council meeting to bring "things" to a head and try to resolve the matter "once and for all".

26. Ms Short concluded her evidence by summarising her concerns. She stated that -

- the "spin off" from the meeting hasn't stopped.
- she is sick of defending herself.
- she finishes with Mobil in early September and shall rethink her future then.
- Public Relations is a specialised area and she acknowledges that she has a reputation to live up to and responsibility to her employer.
- she went to the March meeting to help clean up the Altona area.
- she never went to the March meeting representing either Mobil or Innova.
- she did have a phone call from Councillor Hemphill who enquired as to how she was feeling.

27. Ms Short said that she wanted an apology from Councillor Briffa and that he remove any reference to her from his web site.

#### **SUBMISSIONS OF THE PARTIES**

28. The Panel Chairman outlined the jurisdiction and powers of the Panel and sought advice from Councillor Hemphill and Mr Matheson as to what penalty or other outcome, if any, should be imposed on Councillor Briffa if the Panel found him in breach of the Act. Mr Matheson submitted the following –
- Asking for information to be removed from the web site may not be possible as it is now under the control of a community group (Hobsons Bay Residents' Association). He asserted that the information on the web site is simply a consequence of the “facts and foibles” of involvement with Local Government.
  - Look at constructive outcomes like bringing the parties together and having an independent mediator.
  - Admonition and public apologies will have no punitive effect. Such requirements are momentary and do not result in constructive behaviour change.
  - There are deficiencies in the Councillors' Code of Conduct. The dispute resolution process is deficient and an outcome of the Councillor Conduct Panel process should be to compel Applicants and Respondents to undertake a mediation process.
29. Councillor Hemphill asserted, in his oral submissions, that the *Councillors' Code of Conduct* is deficient. He was concerned that it did not adequately protect the interests of members of the community who were not Councillors but were affected by the conduct of Councillors. Councillor Hemphill further said –
- The Code should compel Councillors to go through a dispute resolution process rather than going straight to a Councillor Conduct Panel.
  - He suggested that Councillor Briffa's behaviour on at least two occasions had not been “fair dinkum” and he has absented himself from available dispute resolution processes.
  - The Mayor has not shown constructive leadership and has dismissed councillors' requests for his intervention. For instance, the Mayor's treatment of Councillor Grigorovitch had been less than exemplary. Councillor Hemphill suggested that the Mayor should undertake training in dispute resolution.

- In terms of an appropriate penalty, Councillor Hemphill suggested that Councillor Briffa should be required to make a public apology to Ms Maureen Short and either remove, or use his best endeavours and influence to remove, any references to Ms Short from the Hobsons Bay Residents Association (an Incorporated Association), or the Briffa ([www.briffa.org](http://www.briffa.org)) web site.
- It was clear to Councillor Hemphill that the conflict between Councillor Briffa and Ms Short was never going to be resolved through Council meeting processes. Ms Short has continued to be denigrated through the Internet and Social Media.
- Ms Short has been subjected to considerable stress from her taking a simple altruistic action, in attending the Innova/EPA March 2011 meeting. Unfortunately, he said, she has no legal standing before the Councillor Conduct Panel nor the internal processes available under the Department of Planning and Community Development.
- Councillor Tony Briffa has clearly breached the Hobsons Bay City Council *Councillors' Code of Conduct* and Section 76BA of the Act, and his broadcasting his emails to up to nineteen or twenty people was unnecessary.

30. Mr Matheson then went into his final submission:

- Mr Matheson maintained that Councillor Briffa's emails of 29 and 30 March 2011 are not intemperate and were only sent to the persons in the "cc" listing because Councillor Briffa thought or believed that may have been at the meeting or had an interest in the outcome.
- Mr Matheson stated that he believed that Ms Short had at least a "perceived" conflict of interest because of her previous employment with Innova. He believed that she took her partner, Kevin, to the Innova/EPA meeting in case other attendees saw her as an Innova "stooge". After all, she had worked with Innova as a Public Relations professional and lobbyist and she should have stated her interests at the start of the Innova/EPA meeting.

- Mr Matheson said that Councillor Briffa had submitted an apology to the organisers of the meeting because he had to attend other meetings. He certainly did not want to do anything to damage Ms Short's reputation.
- Mr Matheson maintained that it was naïve, if not provocative for Ms Short to have attended the Council Meeting on 7 June to attempt to ask questions and seek redress. He maintained that Councillor Briffa was not attacking her by refusing to answer questions. In fact she had cast the "spotlight" on herself.
- Mr Matheson submitted that Ms Short's concerns were of her own making and her attempt to ask the question at the 7 June Council Meeting was simply to take an "incendiary" question/approach.
- Mr Matheson argued that Cr Briffa's conduct did not amount to misconduct. He claimed that Cr Briffa's behaviour was open and transparent and that he genuinely believed that the people he sent his email to would have been interested in the meeting's outcomes.
- Mr Matheson stated that he believed that the language that Ms Maureen Short used in her Witness Statement "was a bit over the top." Councillor Briffa's emails had not been intemperate and he honestly believed what he said. He believed that Ms Short had been dishonest. Mr Matheson said that Councillor Briffa does not engage/prosecute the continuation of "fiery issues". Councillor Briffa's language may have exhibited frustration but it was certainly not an attack on the industry – neither ExxonMobil nor Innova. The petroleum refining industry had always been a "hobby horse" of Councillor Briffa's but he was not in the "game of adding fuel to the fire". When he had said in an email that "the gloves are off" that was referring to the issue between himself and Ms Short. In any event, Mr Matheson accepted that the Mobil Refinery is in Councillor Hemphill's ward, not Councillor Briffa's ward.
- Mr Matheson stated that Councillor Briffa was innocent of any wrong doing and nothing he had done required the giving of an apology. The issue had been blown out of all proportion and was not as serious as Ms Short was making it out to be. One obvious solution would be to bring the parties together to mediate and sort out their differences and issues.

- Mr Matheson maintained that Councillor Briffa had no power to close the Hobsons Bay Residents Association web site and in any event it is not the Councillor Conduct Panel's role to censor public debate. He proposed that there were "faults" in the Councillors' Code of Conduct that could be reviewed and he further asserted that Ms Maureen Short has inflamed the situation.
31. Mr Matheson said that he had known Ms Maureen Short for some time and expressed admiration and respect for her community involvement and activities. He suggested to Ms Short that she had not thought through the implications of attending the March Innova/EPA meeting and whether she may have had a *conflict of interest* and perhaps that was why she attended the meeting with her partner. He further suggested that because of her Public Relations roles with Innova and Mobil it may have been better not to have attended the Innova/EPA meeting – although he conceded that from his *point of view* he could see no conflict. He commented that Altona is a small community and even Ms Short, with the benefit of hindsight, may have thought that the meeting was not worth attending. In terms of Ms Short's attendance at the Innova/EPA meeting Mr Matheson questioned whether Ms Short had attended as an advocate for Innova or whether she attended as a supporter of cleaning up Altona. Mr Matheson further questioned why Ms Short had been so surprised at Councillor Tony Briffa's actions in broadcasting his email to so many people – as Councillor Briffa believed that these persons could have an interest in the meeting and Ms Short's attendance and involvement.
32. Councillor Hemphill commented that he was satisfied about Ms Maureen Short's reasons for taking up the issues and that she had denied ever having been coached in preparation for the Panel Hearing. It was apparent that other councillors were dismayed at Councillor Briffa's actions and that the Mayor had been reluctant to take action, suggesting instead that the matter go to mediation – something that was just never going to happen. Councillor Hemphill observed that Cr Briffa's usual course of behaviour was to require agreement or he'll "attack you or use his acolytes".

33. In response to Councillor Briffa's accusations that Councillor Hemphill had refused to support motions that he had brought to Council, Councillor Hemphill responded that he will only agree to consider matters at Council meetings if they are included in the Agenda and have been well researched by Council Officers. Councillor Hemphill suggested that Councillor Briffa had briefed the Local Press about matters that he was going to raise "at the last moment" at Council meetings because they (the Press) were able to report on those matters in editions that came out that night or the following morning.
34. Councillor Hemphill concluded his submissions in reply by saying that Councillor Briffa's emails were "over the top" as the Innova/EPA meeting was only a low level meeting. There was no reason to write and distribute the emails. He said he believed that the information about councillors and Ms Short on Councillor Briffa's personal web site ([www.briffa.org](http://www.briffa.org)) should be removed.
35. Reference was made by Cr Hemphill to what was described as Councillor Briffa's "shame file" which is to be found on the Web site of the Hobsons Bay Residents' Association Inc. ("the Association"). The Panel was informed that the Association's Web domain is registered to Cr Briffa, though it may be that Cr Briffa is the registrant contact and tech contact for the domain.

#### **THE PANEL'S CONSIDERATION OF COUNCILLOR HEMPHILL'S APPLICATION**

36. Councillor Briffa does not dispute that he sent the emails that have been referred to in these Reasons for Decision (referred to as Cr Briffa's emails). Accordingly, the Panel finds as a fact that the emails claimed by Cr Hemphill to have been sent by Cr Briffa were sent by him, and the content of the emails is accurately set out in the materials provided to the Panel.
37. Although it was not raised by Mr Matheson at the hearing, the Panel notes that at the Directions Hearing, and in the documentation submitted to the Panel by Cr Briffa, it was put that, in reality, the proceeding was about vindicating Ms Short, a person who had no standing to bring a complaint before the Panel. The Panel accepts that Ms Short has no legal standing, but the essential point is that the conduct alleged against Cr Briffa inevitably

brings Ms Short's situation into focus. The Act and the Code both pertain to the conduct of Councillors in connection with their local communities (for instance s.76BA) but also in connection with the rights of "other persons" as identified in para. 76BA(c) and the responsibilities with respect to the wider local community as is demonstrated by para.76BA(g).

- 38.Cr Hemphill does have standing to bring a complaint against Cr Briffa with respect to the subject-matter dealt with in his application. No evidence has been put before the Panel which leads to the conclusion that there was any improper or ulterior purpose in his doing so. As noted above, the Panel at an early stage found that there was a case to answer and rejected Cr Briffa's application for summary dismissal of Cr Hemphill's application.
- 39.In the course of the Panel hearing, no attack was made upon Ms Short's conduct at the public meeting, though her *reason* for attending was the subject of speculation, if not adverse comment, by Mr Matheson on behalf of Cr Briffa. Nor could there have been any attack on Ms Short's manner of participation in the meeting. Ms Short was entitled to attend the public meeting in her capacity as a resident of the City of Hobsons Bay. She was entitled at the meeting to ask questions of the EPA officers. She was entitled to ask, publicly, why Councillor Briffa and Mr Mitchelmore were not in attendance, particularly as Cr Briffa was well known as an advocate for the case in opposition to Innova's application. There is no evidence before the Panel to suggest that Ms Short behaved in any way inappropriately, or even intemperately, at the public meeting. The Panel accepts Ms Short's uncontradicted evidence that her own presence at the meeting became the subject of vituperative attack upon her from some of the residents present at the meeting.
- 40.Insofar as Mr Matheson, on behalf of Cr Briffa, submits that Ms Short had a conflict of interest in attending the meeting, the Panel is of the view that that submission – though very faintly put by Mr Matheson – is wholly devoid of substance. Ms Short had no conflict of interest and duty. She was not making any decision. She was a member of the public entitled to attend a meeting and engage in reasonable public debate. There is no evidence before the

Panel to suggest that she did otherwise. Her previous and current work in the petrochemical industry was, as appears, quite well known amongst certain of the attendees at the meeting. Despite Mr Matheson's suggestion that Ms Short attended the meeting as an advocate for Innova, there is no evidence to support the contention.

41. The documentary evidence available to the Panel does not disclose any conduct on the part of Ms Short at the meeting that could reasonably have provoked the response offered to her by Cr Briffa. The Panel is not able to speculate on what information was provided to Cr Briffa by persons in attendance and Cr Briffa has provided no evidence from his informants to the Panel that demonstrates any level of provocation by Ms Short that could reasonably have been the cause of his sending the emails. Even had he some reason to have been stung by Ms Short's conduct at the meeting – and the Panel finds on the evidence before it that he did not – that would not necessarily have explained, let alone justified, his conduct in sending the emails.
42. On behalf of Cr Briffa, Ms Matheson sought to explain Cr Briffa's distributing the emails to a wide range of people as being because Cr Briffa "thought" that these people may have been at the meeting. Cr Briffa relied upon an informant or informants at the meeting to convey to him what Ms Short was claimed to have stated. It would have been a simple matter for Cr Briffa to check with his informants about the identity of particular attendees, especially having regard to the very small number of people in attendance. The Panel rejects that explanation.
43. Mr Matheson also sought to justify the sending of the emails being as due to Cr Briffa's perception that Ms Short was a "stooge" for Innova. The fact that Ms Short last worked for Innova some time before the public meeting, is no basis for such an assertion. Nor was there anything in Ms Short's conduct at the meeting that would have reasonably led to that conclusion. What is more, even if she were present as an advocate for Innova, that was no reason to mount a personal attack upon her in emails, particularly emails as widely distributed as these, in the hope of discrediting her where there was nothing

to discredit. Despite Mr Matheson's assertion that Cr Briffa had done nothing to damage Ms Short's reputation, evidence to the contrary is before the Panel.

44. Mr Matheson also was critical of Ms Short for attending a Council meeting and submitting a question for Cr Briffa, stating that she was naïve in doing so. Even if that were correct, the fact that Ms Short took those steps could not, in retrospect, justify or support the sending of the emails and the content of those emails. It may be that, by attending the Council meeting and seeking to address a question to Cr Briffa, Ms Short may have created more distress for herself. But this is not a matter in which the Panel is called upon to make some sort of apportionment between the harm caused to Ms Short by the emails and her attendance at the meeting. The task of the Panel is confined to the conduct of Cr Briffa in sending the emails.
45. The Association has a legal existence separate from Cr Briffa. There is no evidence before the Panel as to what control or contribution, if any, Cr Briffa has in respect of the "Shame File", other than is noted in the preceding paragraph. The Panel does, however, record its concern that the maintenance of a "Shame File" may not have the effect of promoting harmonious and respectful working relationships between Councillors and so may detract from the good governance of the municipality. The Panel would be concerned that any Councillor might have assisted in the compilation and maintenance of such a "Shame File".

### **HAS COUNCILLOR BRIFFA BREACHED THE COUNCILLOR CODE OF CONDUCT?**

46. By operation of s.76C of the *Local Government Act 1989* a Councillor Code of Conduct must include the Councillor Conduct principles contained in sections 76B and 76BA of the Act.

Section 76B is as follows:

#### **76B Primary principle of Councillor conduct**

It is a primary principle of Councillor conduct that, in performing the role of a Councillor, a Councillor must –

- (a) act with integrity; and

- (b) impartially exercise his or her responsibilities in the interests of the local community; and
- (c) not improperly seek to confer an advantage or disadvantage on any person

Section 76BA is as follows:

#### **76BA General Councillor conduct principles**

In addition to acting in accordance with the primary principle of Councillor conduct specified in section 76B, in performing the role of a Councillor, a Councillor must –

- (a) avoid conflicts between his or her public duties as a Councillor and his or her personal interests and obligations;
- (b) act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to mislead or deceive a person;
- (c) treat all persons with respect and have due regard to the opinions, beliefs, rights and responsibilities of other Councillors, Council staff and other persons;
- (d) exercise reasonable care and diligence and submit himself or herself to the lawful scrutiny that is appropriate to his or her office;
- (e) endeavour to ensure that public resources are used prudently and solely in the public interest;
- (f) act lawfully and in accordance with the trust placed in him or her as an elected representative;
- (g) support and promote these principles by leadership and example and act in a way that secures and preserves public confidence in the office of Councillor.

47. The City of Hobsons Bay Councillors' Code of Conduct, in clause 3, "Values and Principles of Behaviour". The opening words of the clause are as follows: "Councillors agree to follow the values and principles of behaviour in their conduct with each other, the organisation, and the community." The Panel will not set out the whole of the clause, but note in particular the following provisions:

**Being respectful:** demonstrating respect for the office of Mayor and Deputy Mayor, Councillors, Chief Executive Officer and Council Staff, equality, being succinct, being prompt, allowing all to contribute, keeping our mind open to others' opinions, avoiding personal attacks and blame, when there is conflict – focusing on the 'issue' not the person, calling bad behaviour and supporting others who call it.

....

**Maintaining a Positive Culture:** Wherever possible protect the Council's reputation, be inclusive, share the load, cooperate, collaborate with and encourage others, allowing free flowing exploration of ideas and issues.

48. The Panel also draws attention to clause 7 of the Code, "Media Relations". Those provisions indicate the roles and responsibilities of the elected Councillors and council officers in issuing press releases. The Panel notes the opening words of clause 7.3 which states: "Media Releases are to quote the appropriate spokesperson/s as follows". In particular we note sub-clause 7.3.2 which identifies the spokespersons as "Councillor and Mayor", "when related to ward, cross directorate team (portfolio of interest) or committees of which they are the chair or delegate".
49. The Panel has concluded that Councillor Briffa has, by his conduct in sending the emails described earlier, breached the provisions incorporated in the Code by operation of s.76C of the Act.
- (a) Contrary to paragraph 76B(c) Councillor Briffa has improperly sought to confer a disadvantage upon Ms Maureen Short in three respects;
- (1) by copying Ms Short's employer into an email sent on 30 March 2011 which contained the observation that her conduct would have an adverse effect upon her employer and stating that "I believe they should terminate your employment". The Panel notes that this email provoked an entirely appropriate response from Mobil's General Manager and Refining Director which, in turn, as noted below, received an entirely inappropriate response from the Mayor;
- (2) by distributing or forwarding emails sent by him on 29 and 30 March 2011 to a wide range of persons with no apparent or legitimate interest in receiving the communication, in which it was suggested that Ms Short had behaved inappropriately at the Innova/EPA meeting and should be dismissed by her current employer and thereby potentially or actually harming her standing in the community and professionally;
- (3) in making threats to Ms Short in emails sent by him on 29 and 30 March 2011 about his intention to go public about her "significant bias"

and interests with the local petrochemical companies in respect of an allegation which states that “I believe you have deliberately mislead [sic] and deceived the EPA with your submissions”; and finally, in stating that, given Ms Short’s role at the EPA meeting, “Any goodwill gained from our meeting at Mobil the other week has been completely erased and the gloves are now off.”

- (b) The same facts demonstrate, in respect of Ms Short, that Cr Briffa has breached para. 76BA(c) of the Act (as incorporated in the Code) insofar as he has failed to treat Ms Short with respect and with due regard to her opinions and beliefs. That conduct also constitutes a breach of the obligation created under cl. 3 of the Code, the obligation to be respectful, to focus upon the ‘issue’ not the person.
- (c) The facts of this matter also demonstrate that Cr Briffa has breached para 76BA(g) of the Act (as incorporated in the Code) by failing to act in a manner that secures and preserves public confidence in the office of Councillor. The Panel concludes this to be the case because Councillor Briffa widely circulated his intemperate and offensive email to persons with no direct interest in any disagreement that Cr Briffa may have had with Ms Short. Further, the emails were sent to senior executives of major businesses that were either located in the City or had actual or potential business and other dealings with the community of Hobsons Bay. Intemperate behaviour of this kind could only serve to damage the level of public confidence in the Council. These facts also demonstrate a breach of cl. 3 of the Code, in particular the obligation to maintain a positive culture, to collaborate and encourage the free flow of ideas.

50. Councillor Briffa issued a Media Release on Hobsons Bay stationery, identifying himself as Deputy Mayor of the City of Hobsons Bay. In substance, that press release is Cr Briffa’s response to Mobil’s complaint about his conduct in respect of Ms Short. In his Media Release, Cr Briffa refers to Mobil’s complaint to the Council (the General Manager’s letter to the Hobsons Bay CEO) and describes it as “complete nonsense”. He further states: “I am very comfortable with all my comments” and suggests that what

really provoked Mobil's letter to the CEO as being his having put "details of [Mobil's] safety and environmental record on [his] website – www.briffa.org."

51. The Panel is satisfied that, in issuing this Press Release, Cr Briffa acted contrary to the Code with respect to the authorisation required for the publication of a Media Release. Mobil is not within his Ward. There is no evidence that the Mayor authorised the Media Release – had he done so, the Code requires that it also go out over his name. In substance and in reality, that media release was of a personal character – personal to Cr Briffa – and provoked by his dissatisfaction with the letter sent by the Mobil General Manager as a result of Cr Briffa copying Mobil into his email concerning Ms Short and the EPA meeting.
52. However, as the complaint by Cr. Hemphill does not allege this matter to be a breach of the Code and because Cr. Briffa has not specifically addressed it, the Panel will not take this matter into account in respect of any of the claims of misconduct. Nevertheless it is a matter upon which the Panel may seek to make a recommendation, given the scope of its obligations under the Act.
53. It is notable that, even to the time of the Panel hearing, Cr Briffa has taken no steps to apologise to Ms Short for his conduct. Indeed, his conduct subsequent to sending the emails has been focussed on justifying his behaviour. Nothing was said by Mr Matheson on Cr Briffa's behalf that demonstrates any degree of remorse. It is appropriate also for the Panel to note the letter dated 8 June 2011 sent by the Mayor, Cr Raffoul, to Mr Glenn Henson, General Manager & Refining Director at Mobil. That letter purports to justify Cr Briffa's actions. The Mayor, in that letter, refers to discussions that he has had with Cr Briffa. It is on that basis, presumably, that Cr Raffoul found that Mr Henson's "allegations" were "unfounded" and asserts that Ms Short "unfairly attacked" Cr Briffa at the meeting. It will be apparent that, in light of the evidence, the Panel's view of the Mayor's letter as regards the comments concerning Ms Short is that it is without factual foundation.
54. "Misconduct" is defined in 81A(a) of the Act as meaning: "conduct by a Councillor that is in breach of the Councillor Code of Conduct". The Panel is

satisfied that Cr Briffa has breached the City of Hobsons Bay Councillors' Code of Conduct in the manner described above, and has therefore engaged in misconduct as defined.

#### **COUNCILLOR BRIFFA'S APPLICATION CONCERNING COUNCILLOR HEMPHILL**

55. Councillor Briffa, in his response to Cr Hemphill's claim against him, made an application for a Councillor Conduct Panel to be constituted to deal with three complaints that he wished to make with respect to Cr Hemphill. Two of those complaints were summarily dismissed by the Panel on the papers (including the written submissions lodged by the parties). Those were the complaints that Cr Hemphill had breached the General Councillor Conduct Principles and breached the statement of Values and Principles of Behaviour. The Panel gave written reasons for the dismissal of those 3 August 2011.

56. The Panel did, however, accept that there may have been a *prima facie* case with respect to the third of Cr Briffa's allegations, namely that Councillor Hemphill had breached the Hobsons Bay City Council's Information Security Policy. The Panel proceeded to hear evidence and submissions as to this allegation on 11 August 2011 immediately following the hearing of Cr Hemphill's application with respect to Cr Briffa.

57. Cr Briffa relied upon clause 5.9 of the Information Security Policy, which he summarized as follows:

- Using access to the council email system with respect and courtesy for others, and in a responsible and professional manner;
- Not using the email system to send emails "that may be considered bullying or harassment in any way";
- Emails should be prepared in a professional manner, being polite and courteous.

58. In support of the claim, Cr Briffa annexed various documents. Annex 1 is a letter to the editor of a newspaper headed "Strange Bedfellows" and signed by Peter Hemphill. The newspaper to which it was addressed was not identified.

Annex 1 also contains 5 press clippings, all of which exhibit a journalist's "by-line" and several of which refer to statements attributed to Cr Hemphill. These do not make clear whether the statement was made during the course of a Council meeting, in a personal conversation between Cr Hemphill and the journalist or by email or other written communication from Cr Hemphill.

59. Annex 2 contains emails send by Cr Hemphill. The first is a message sent on 16 June 2011 with the Subject line "Good Knight" addressed to several people, two of whom are journalists, the balance being council officers and persons apparently having no direct connection with the Council. The second email is one which was sent on 20 May 2011, with the subject line "Motion sickness", addressed to several people, including two journalists, council officers and Councillors and persons having no apparent connection with the Council.

60. Cr Hemphill denied that he had at any time used a council or council-issued computer to prepare the letter or emails and denied that he had used the Council's internet facility to send them. These matters were specifically put to Cr Hemphill by Mr Matheson at the hearing. In the face of Cr Hemphill's denial, Mr Matheson did not produce any information (such as the result of a technical examination of Cr Hemphill's computer or an examination of the Council's server) nor did he seek an opportunity to do so.

61. The Panel notes that the Information Security Policy states:

All email messages that are created, sent or received using the Council's email service are the property of the Council. This includes the content of the email message.

It is a condition of use of the Council's network that users acknowledge that all emails sent and received are captured by an email archiving system and that emails may be accessed for compliance and/or investigation purposes under the authority of the Chief Executive Officer (or other authorised agency).

62. Councillor Briffa's case against Cr Hemphill in relation to the letter to the editor and the emails depends upon his demonstrating that Cr Hemphill used a Council computer and Council's internet facilities to draft and transmit the

letter and documents. There is no evidence before the Panel that supports that factual contention. In the absence of evidence, Cr Briffa's complaint against Cr Hemphill must be dismissed.

63. That being so, it is not necessary for the Panel to consider what then becomes the hypothetical question whether, if the emails had been sent using the Council's resources, they or any of them would have constituted a breach of the Council's Information Security Policy.

64. Accordingly, Cr Briffa's application against Cr Hemphill is dismissed.

#### **FURTHER OBSERVATIONS AND PROPOSALS FOR REMEDIAL ACTION**

65. The Panel considers that it is desirable to further promote Councillors' understanding of the concept of "good governance" and the content of the term "conflict of interest".

66. Of concern to the Panel is the use of the Hobsons Bay City Council "letterhead" on/for correspondence that has not been approved by nor is the consequence of a Council motion or resolution. The writing of letters expressing Councillors' personal views on Council-headed stationery (and the Panel includes letters, memoranda and media releases in this description) must, at all times, comply with all Council policies.

67. Councillors' understanding of the concept of **conflicts of interest** is extremely important if the standing of Local Government is to be maintained in the eyes of the community. It is even more important that the Chairman of a meeting must have a clear understanding of the concept and be willing to operate according to the precautionary principle and vacate the chair, particularly if a member of the community should ask a question referring to him or her during public "Question Time".

68. The Panel recommends that all Councillors of the Hobsons Bay City Council be briefed on their responsibilities and duties in regard to the conflict of interest provisions contained in the Act and the Hobsons Bay City Council *Councillors' Code of Conduct*.

69. The Panel also recommends that the Hobsons Bay City Council, in conjunction with Senior Management and a person appropriately qualified in governance matters review the Hobsons Bay City Council **Councillors' Code of Conduct** especially with regard to Councillors' relationships to each other, to members of the community and with regard to their use of Council resources (such as Council correspondence "letterhead") and the circumstances in which they may identify themselves as persons authorised to speak on behalf of the Council rather than in their personal capacity.

Dated: 25 August 2011

*P. J. Harris*

PETER HARRIS

Chairperson

*J. Bruce*

JOHN BRUCE

Member