
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : TOWN OF CAMBRIDGE -v- THE HON DAVID
TEMPLEMAN MLA, MINISTER FOR LOCAL
GOVERNMENT; HERITAGE; CULTURE AND
THE ARTS [2020] WASC 350

CORAM : TOTTLE J

HEARD : 31 JULY 2020

DELIVERED : 2 OCTOBER 2020

FILE NO/S : CIV 1673 of 2020

BETWEEN : TOWN OF CAMBRIDGE
Applicant

AND

THE HONOURABLE DAVID TEMPLEMAN MLA,
MINISTER FOR LOCAL GOVERNMENT;
HERITAGE; CULTURE AND THE ARTS
Respondent

ATTORNEY GENERAL FOR WESTERN
AUSTRALIA
Intervener

Catchwords:

Administrative law - Judicial review - Writ of prohibition - *Local Government Act 1995* (WA), s 8.15C - Proposed decision of Minister to exercise preemptory power to suspend council - Whether Minister's discretion capable of being exercised on the basis of material available - Whether Minister's decision legally

unreasonable - Where jurisdictional error established in the proposed application of statutory power - Writ of prohibition to issue

Statutory interpretation - *Local Government Act 1995* (WA), s 8.15C - Preconditions to the exercise of power to peremptorily suspend council - Width of matters that Minister may consider in forming view to exercise discretion - Where statutory provision must be construed in context of remedial purpose

Legislation:

Local Government (Rules of Conduct) Regulations 2007 (WA), reg 9, reg 10
Local Government Act 1995 (WA), s 2.6, s 2.7, s 2.8, s 2.10, s 3.1, s 3.4, s 3.18, s 5.2, s 5.36, s 5.38, s 5.41, s 8.4, s 8.5, s 8.6, s 8.12, s 8.15B, s 8.15C, s 8.15E, s 8.19, s 8.22, s 8.25, s 8.24, s 8.30

Result:

Application granted
Writ of prohibition to issue

Category: B

Representation:

Counsel:

Applicant : Ms P E Cahill SC & Mr C M Beetham
Respondent : Mr A J Sefton & Ms J E Shaw
Intervener : Mr A J Sefton & Ms J E Shaw

Solicitors:

Applicant : Squire Patton Boggs
Respondent : State Solicitor's Office
Intervener : State Solicitor's Office

Case(s) referred to in decision(s):

Brennan v New South Wales Land and Housing Corporation [2011] NSWCA 298; (2011) 83 NSWLR 23
George v Rockett [1990] HCA 26; (1990) 170 CLR 104

Mandurah Enterprises Pty Ltd v Western Australian Planning Commission
[2008] WASCA 211; (2008) 38 WAR 276

Minister for Immigration and Border Protection v Singh [2014] FCAFC 1;
(2014) 231 FCR 437

Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11;
(2016) 237 FCR 1

Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR
332

Minister for Immigration and Ethnic Affairs v Liang [1996] HCA 6; (1996) 185
CLR 259

R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring
Company Pty Ltd [1953] HCA 22; (1953) 88 CLR 100

R v Connell; Ex parte Hetton Bellbird Collieries Ltd [1944] HCA 42; (1944) 69
CLR 407

Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002]
WASCA 231; (2002) 25 WAR 511

Thompson v The Council of the Municipality of Randwick [1950] HCA
33;(1950) 81 CLR 87

Thompson v The Council of the Municipality of Randwick [1953] HCA 75;
(1953) 90 CLR 449

TOTTLE J:

Introduction

1 This application for judicial review arises from a dispute between two levels of government within Western Australia concerning the circumstances in which the Minister for Local Government; Heritage; Culture and the Arts may intervene in the affairs of local government on a peremptory basis under s 8.15C of the *Local Government Act 1995* (WA) (the LG Act).

2 The Minister has served notice on the Council of the Town of Cambridge (the Town) (a local government established under the LG Act) requiring it to show cause why the Minister should not make an order suspending the Council and requiring the members of the Council to undertake governance training in the responsibilities and functions of a council (the Show Cause Notice).

3 The Town contends that there is no basis upon which the Minister could conclude that it is inappropriate for the Council to continue to act as the governing body of the Town without intervention in the form of the orders specified in the Show Cause Notice and has applied to the court for a writ of prohibition, prohibiting the Minister from making such orders.

4 The Minister has not taken an active role in the proceedings (other than for the limited purpose of putting evidence of the decision-making processes before the court). In the absence of a contradictor the Attorney General for Western Australia was granted leave to intervene.

5 The Minister has provided an undertaking not to take action on the basis of the Show Cause Notice until delivery of judgment in respect of the Town's application.

6 As I will explain the Town is entitled to the relief it seeks.

The statutory framework

7 The LG Act establishes and regulates local government in Western Australia.

8 Part 2 of the LG Act regulates the constitution of local government. Division 1 of Pt 2 is concerned with the geographical divisions of the State for the purposes of local government. Division 2

is concerned with creation of local government entities and with how they are to be run. Section 2.6 provides for local governments to be run by elected councils. It states:

2.6. Local governments to be run by elected councils

- (1) Each local government is to have an elected council as its governing body.
- (2) The offices on the council of the local government of a city or town are those of the mayor, the deputy mayor and the councillors.
- (3) The offices on the council of the local government of a shire are those of the president, the deputy president and the councillors.
- (4) The Governor may, by order, appoint a person to be the commissioner of a local government until the offices of members of the council are filled for the first time and the council holds its first meeting.

9 Section 2.7 sets out the role of the council. It states:

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.

10 Section 2.8 sets out the role of the mayor or president of a local government. It states:

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.

11 Section 2.10 sets out the role of councillors. It states:

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.

12 Under the LG Act councillors do not have any role in the administration of local government. That councillors do not have such a role is emphasised by reg 9 of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* (the LG Regulations) which states:

9 Prohibition against involvement in administration:

- (1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.

- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.

13 Divisions 3 to 6 of Pt 2 of the LG Act regulate the creation and membership of elected councils, the qualifications of elected members and the terms of their office. Division 7 of Pt 2 provides for the appointment of a commissioner to a local government who is to exercise the powers and discharge the duties of a council of the local government and its mayor or president. An order suspending a council is to include an order appointing a person as a commissioner while the council is suspended.¹

14 Part 3 of the LG Act regulates the functions of local government. The general functions of local government are set out in s 3.1. It states:

3.1. General function

- (1) The general function of a local government is to provide for the good government of persons in its district.
- (2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.
- (3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.

15 The general functions of local government include legislative and executive functions.² Division 2 of Pt 3 of the LG Act governs the legislative functions of local government and Div 3 of Pt 3 governs the executive functions of local government. Section 3.18 states:

3.18. Performing executive functions

- (1) A local government is to administer its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.
- (2) In performing its executive functions, a local government may provide services and facilities.

¹ LG Act s 8.30.

² LG Act s 3.4.

- (3) A local government is to satisfy itself that services and facilities that it provides -
 - (a) integrate and coordinate, so far as practicable, with any provided by the Commonwealth, the State or any public body; and
 - (b) do not duplicate, to an extent that the local government considers inappropriate, services or facilities provided by the Commonwealth, the State or any other body or person, whether public or private; and
 - (c) are managed efficiently and effectively.

16 Division 3 of Pt 3 also sets out the duties to be observed by a local government when performing its executive functions and sets out various powers conferred on local government to enable it to perform its executive functions.

17 Part 4 of the LG Act regulates elections of members of local governments.

18 Part 5 of the LG Act regulates the administration of local government. It is the responsibility of the council of a local government to ensure that there is an appropriate structure for administering the local government.³ Divisions 2 and 3 of Pt 5 contain various provisions relating to the administration of councils, council meetings, electors' meetings and the administrative matters relating to mayors and presidents of local government.

19 Division 4 of Pt 5 of the LG Act is concerned with local government employees. Section 5.36 provides that a local government is to employ a person to be the CEO of the local government and such other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed. If employed for a term of more than one year the local government (not specifically the council) must review the performance of the CEO on an annual basis.⁴ Section 5.41 specifies the functions of the CEO:

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

³ LG Act s 5.2.

⁴ LG Act s 5.38.

- (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.

20 Part 8 of the LG Act regulates how the affairs and performance of local government are scrutinised. In summary:

- (a) Division 1 provides for an inquiry to be undertaken by the Departmental CEO or persons authorised by the Departmental CEO.
- (b) Division 1A provides for peremptory intervention by the Minister. Subdivision 1 is concerned with the power of the Minister to order the suspension of a council, or to require a council to take some remedial action. Subdivision 2 is concerned with the Minister's power to suspend a council member or to require a council member to undertake remedial action.
- (c) Division 2 provides for the appointment of an Inquiry Panel with authority to inquire into and report on any aspect of a local government.

21 This case is concerned with the exercise of the Minister's powers under Div 1A. Before referring to the provisions of Div 1A in more detail it is helpful to refer to some aspects of the inquiries for which Div 1 and Div 2 provides.

22 An authorisation to conduct an inquiry under Div 1 may be general or specific.⁵ Extensive powers are conferred on the authorised person for the purpose of conducting an inquiry.⁶ The authorised person is to compile a report on the outcome of the inquiry and the report is to be provided to the Departmental CEO and to the Minister. Unless directed otherwise by the Minister, the Departmental CEO is to provide the report to the local government and, if the council is suspended to the council and to any council member who is suspended. Within 35 days the local government is to give the Minister written advice setting out the things it has done or proposes to do to give effect to the recommendations of the authorised person. Any suspended council member or member of a suspended council may within 35 days of receipt of the report give the Minister written advice setting out the member's comments on the recommendations in the report. The Minister has the power to order the local government or any council members or any local government employees to give effect to one or more of the recommendations in the report. Division 1 does not contain any power to suspend a council or a member of a council while an inquiry is being conducted.

23 A Div 2 Inquiry is conducted by an Inquiry Panel appointed by the Minister. An Inquiry Panel has the powers of a Royal Commission. Under s 8.19 the Minister is empowered to suspend a council before or after appointing an Inquiry Panel if the Minister thinks that the seriousness or duration of a suspected failure of the council to ensure that the local government performs its functions properly, or such other factors as the Minister considers relevant make it inappropriate for the council to continue to act, or to continue to act, as the governing body of the local government, or if the Minister thinks that the conduct of the inquiry would be likely to be seriously prejudiced if the council were to act, or continue to act, as the governing body of the local government.⁷ The Minister has a similar power to suspend a council member while an inquiry is held though the power to suspend a council member may only be exercised if the Minister has first given the member a show cause notice.

⁵ LG Act s 8.4 - 8.12.

⁶ LG Act s 8.5, 8.6.

⁷ Section 8.19.

24 The Inquiry Panel must deliver a report with recommendations, those recommendations can include a recommendation to dismiss the council.⁸ There is no corresponding provision under Div 1. The provisions of Div 2 relating to the giving of the Inquiry Panel's report to the local government (and any suspended councillors) and the obligation on the local government to respond are broadly to the same effect as the provisions of Div 1. It is the Governor who is empowered to dismiss a council or a member of a council, on the recommendation of the Minister.⁹ The Minister may make such a recommendation if, and only if, the Inquiry Panel has recommended that the council be dismissed.¹⁰

25 Division 1A was inserted into the Act by amendment in 2012. It mirrors the suspension power in s 8.19 though it applies whether or not there is or has been an authorised inquiry. It empowers the Minister to peremptorily suspend a council of a local government. The critical provisions for the purpose of this application are:

8.15B. Notice that council may be peremptorily suspended or required to undertake remedial action

- (1) Before the Minister makes an order under section 8.15C(2), the Minister is to give a notice (a *show cause notice*) in writing to the local government of the intention to do one or both of the following -
 - (a) suspend the council of the local government;
 - (b) require the council, or one or more of the members of the council, to undertake such remedial action as is specified in the notice.
- (2) Within 21 days of receiving a show cause notice, or such longer period as the Minister allows, the local government is to give the Minister a written response to the notice.

8.15C. Minister may order that council be peremptorily suspended or required to undertake remedial action

- (1) This section applies if the Minister thinks that -
 - (a) the seriousness or duration of a suspected failure of the council of a local government to ensure that the local government performs its functions properly; or

⁸ Section 8.22.

⁹ Section 8.25.

¹⁰ Section 8.24(3).

- (b) such other factors as the Minister considers relevant,

make it inappropriate for the council to act, or to continue to act, without intervention under this section, as the governing body of the local government, whether or not there has been an inquiry under Division 1.

- (2) The Minister may -
 - (a) after receiving the local government's response under section 8.15B(2); or
 - (b) after the time allowed by or under section 8.15B(2) runs out, if no response has been received by then,

by order, do one or more of the following -

- (c) suspend the council;
 - (d) require the council, or one or more of the members of the council, to undertake such remedial action as is specified in the order within the time specified in the order.
- (3) An order under this section suspending a council ceases to have effect when -
 - (a) an Inquiry Panel is appointed to conduct an inquiry and make a report about the local government; or
 - (b) the council is reinstated by the Minister under section 8.28(3); or
 - (c) the period of 6 months from when the order was made ends,

whichever happens soonest.

26 The power to suspend a council member or require a council member to undertake remedial action is as follows:

8.15E. Minister may suspend council member or require member to undertake remedial action

- (1) If satisfied that it is appropriate to intervene under this section, the Minister may, by order, do either or both of the following -
 - (a) suspend a council member;

- (b) require a council member to undertake any remedial action specified in the order within the time specified in the order.
- (2) The Minister can only be satisfied that it is appropriate to intervene under this section if one or more of the following factors exist -
 - (a) the member has been charged with a disqualification offence;
 - (b) the Departmental CEO has, under Part 5 Division 9, made an allegation to the State Administrative Tribunal that the member has committed a serious breach or a recurrent breach, as those terms are defined in section 5.102A;
 - (c) the circumstances set out in subsection (3) have occurred.
- (3) The circumstances referred to in subsection (2)(c) are that -
 - (a) the Departmental CEO has advised the Minister in writing that the Departmental CEO suspects on reasonable grounds that at least one of the following apply -
 - (i) the member has failed, or is failing, to perform the member's role, functions or duties under this Act;
 - (ii) the member's conduct has adversely affected, or is adversely affecting, the ability of another person to perform their role, functions or duties under this Act;
 - (iii) the member's conduct has adversely affected, or is adversely affecting, the ability of the local government to comply with the principles that apply to it under section 5.40; and
 - (b) the Minister is satisfied that the seriousness or duration of the suspected failure or conduct requires intervention under this section.

- (4) An order made under subsection (1) must specify -
- (a) each paragraph of subsection (2) that sets out a factor on which the order is based; and
 - (b) if subsection (2)(c) is a factor on which the order is based -

each subparagraph of subsection (3)(a) that sets out a type of failure or conduct about which the Minister has received advice from the Departmental CEO.

- (5) Before making an order under subsection (1) the Minister must -
- (a) give to the member written notice of the proposed order that provides a description of the facts of -
 - (i) each factor on which it is proposed that the order be based; and
 - (ii) if relevant, each type of failure or conduct on which it is proposed that the order be based; and
 - (b) give the member the opportunity to show cause in writing, within 21 days of receiving the notice or such longer period as the Minister allows, as to why the Minister should not make the proposed order; and
 - (c) take into consideration the member's response, if any.

Factual overview

27 The following overview is derived from the affidavits filed by the parties.¹¹

28 The Council has eight elected members including the Mayor, Ms Keri Shannon. The Town has 198 full-time equivalent employees, four of which are 'senior employees' for the purposes of the LG Act.¹² The Town's Chief Executive Officer is Mr John Giorgi.

¹¹ The Town read three affidavits sworn by Mr John Giorgi on 15 June 2020, 25 June 2020 and 20 July 2020 and an affidavit sworn by Ms Isabella Mosole on 25 June 2020. The Intervener read two affidavits filed and served by the Minister - one sworn by Mr Ronald Murphy on 1 July 2020 and the other sworn by Mr Michael McIlwaine on 17 July 2020.

¹² LG Act s 5.37 provides that employees may be designated 'senior employees' and if so designated special provisions govern their employment.

29 By a written authority issued on 18 April 2018 an inquiry was commenced under Div 1 of Pt 8 of the LG Act (the Inquiry) in respect of the Town, Mr Ronald Murphy and Ms Jennifer Thomas were appointed to conduct the Inquiry. The nature of the Inquiry was described in the written authority of 18 April 2018 as follows:¹³

... to ascertain whether the Town council and administration are functioning in the best interest of the community and into the operations and affairs of the Town, in relation to the adequacy of Council's policies and procedures, land acquisition and any other issues that are determined to be around of relevance to the above.

30 In the course of the Inquiry the Town provided the Department with details of steps it contended it had taken to improve various governance arrangements and processes. These details were provided under cover of letters to the Department from the Town's lawyers sent on 1 August 2018, 11 December 2018, 10 April 2019 and 2 July 2019.¹⁴

31 Between 1 January 2019 and 11 November 2019 the Department received one 'formal' complaint in relation to the Town. The formal complaint was received in April 2019. Mr Murphy deposed that the Department received a 'large number' of 'informal complaints' being complaints made outside the formal complaints process. He deposed the informal complaints predominantly concerned issues of 'meeting management' such as, 'allegations of the CEO not responding to questions from members of the public'.

32 In the period between September and November 2019 officers within the Department gave consideration to the possibility of the Inquiry being withdrawn. Mr Murphy explained this possibility was considered for 'a range of reasons' including that the Department had limited resources, the Inquiry had been 'idle for some time',¹⁵ and because, at least according to the Town's lawyers, the Town had already taken or contemplated a range of actions to improve its governance. The possibility of some form of action being taken in relation to the Mayor was canvassed between officers of the Department although the evidence did not disclose the basis for the possible action or the nature of the action that was being contemplated.

¹³ Attachment JG2 to the Affidavit of John Giorgi sworn 15 June 2020.

¹⁴ Attachments JG4, JG5, JG6, JG7 to the Affidavit of John Giorgi sworn 15 June 2020.

¹⁵ Affidavit of Ronald Murphy sworn 1 July 2020, par 32.

33 The Director General wanted to ensure that a 'firm approach' was adopted and that the Town carried out a further governance review with input from the Department on its scope. The Director General was concerned because he was aware of 'more recent issues being raised about the [Town] that should potentially be included within the scope of any governance review'. The Department also wanted to independently verify whether the actions and progress said to have been taken or proposed to be taken by the Town as described in its solicitors' letters had been implemented.

34 On 6 November 2019 the Director General of the Department sent a letter to Mr Giorgi, the material parts of which read as follows:¹⁶

I write regarding the Department's Authorised Inquiry into the Town and the changing circumstances becoming apparent, as the Town implements some governance improvements and changes.

As the Inquiry has been progressing, a number of updates from the Town's solicitors have been provided detailing improvements with various governance arrangements and processes.

In the interests of accountability and transparency, and to illustrate the positive change to organisational culture and practice I seek the Legal Professional Privilege be removed from the information provided to the department by the Town's solicitors in correspondence dated 01 August 2018, 1 December 2018, 10 April 2019 and 02 July 2019.

I request the Town place that information on their website as soon as possible to allow members of the public to view this information and identify those positive organisational changes.

I also request the Town undergo a Governance Review with agreement between the Town and the Department on the scope of works. The cost of the review would be borne by the Town with the final report being supplied to the Department.

With accountability and transparency ongoing and a Governance Review to support the changes made by the Town, the Department would be satisfied the Town is governing and operating towards the best interests of the community and will withdraw the Authorised Inquiry.

Meanwhile, the Department will continue to monitor the Town and other investigations may continue through normal investigative process.

¹⁶ Attachment JG8 to the Affidavit of John Giorgi sworn 15 June 2020.

35 I infer from the Director General's reference to a desire to 'illustrate the positive change to organisational culture and practice' in his letter of 6 November 2019 and from the Department's conditional preparedness to 'withdraw the Authorised Inquiry' that, within the Department, it was thought that there had been a 'positive change to the organisational culture and practice' within the Town and, subject to the steps outlined in the letter of 6 November 2019 being taken, there was no reason for the Inquiry to continue.

36 On 29 November 2019 Mr Giorgi sent a letter to the Director General of the Department in which he recorded that the Town agreed in principle that the information contained in its solicitors' letters to the Department should be published on its website, subject to editing the information to remove confidential matters. The Town proposed to publish a consolidated letter and provided the Department with a draft consolidated letter for consideration and a draft media release. In his letter of 29 November 2019, Mr Giorgi stated the Town did not agree with the suggestion that it should undertake a further Governance Review. On this topic Mr Giorgi wrote:

The Council does not agree with the suggestion that it should undertake a further Governance Review:

- 1 Noting the correspondence from the Town's solicitors, explaining all of the matters and actions that have been undertaken in the last two years to address accountability and transparency issues.
- 2 Noting the attached checklist (refer Attachment 3), which is also proposed to be published on the Town's website contemporaneously, explaining this in detail.
- 3 Noting that this Inquiry will have been conducted for almost 2 years, at considerable expense to the financial resources of the Town (in maintaining the internal Inquiry Team, researching and responding to voluminous Direction Notices); and at significant personal cost to the Elected Members and staff who had to deal with the public scrutiny of this matter.
- 4 Noting that no Inquiry Report will be issued.

With respect, the Council is firmly of the view that it is now time for this matter to conclude, and wishes to reach an agreement with the Department to achieve this outcome.

37 The draft consolidated letter prepared by the Town's solicitors summarised the actions taken by the applicant since April 2018 to improve its operations and affairs. Those actions included amendments to policy and process in relation to town planning matters, obtaining legal advice about if and when the council might take its own legal advice, the adoption of a new Council Policy dealing with requests from elected members 'Elected Member Requests', the adoption of a new Code of Conduct, the adoption of new probity procedures for dealing with developers, the separating of regulatory and planning controls in relation to land dealings, and the provision of training for elected members. The draft letter also recorded that as part of the Town's Organisational Review and Change Management process, it would conduct an organisation wide governance review/audit in 2021 which it considered would inform the Council as to progress of improvements and changes which had been implemented since the Inquiry was called.

38 The Town's response to the Director General's letter of 6 November 2019, as conveyed by Mr Giorgi's letter of 29 November 2019, was not acceptable to the Department. Mr Murphy explained that the key issue was the Town's refusal to carry out a further governance review but he deposed also that he was also not satisfied with the content of the draft joint media release or the proposed consolidated letter from the Town's solicitors. Mr Murphy deposed that he did not think that there was any point in liaising further with the Town in relation to those matters if it was not prepared to undertake the governance review. Mr Murphy explained that he was concerned that the governance review ought to occur because it would independently verify whether the Town had fully addressed the issues identified in a 2017 governance review and implemented all the actions identified in its solicitors' letters.

39 The Director General and Mr Murphy agreed that the Inquiry into the Town should be expedited and prioritised over other authorised inquiries being undertaken into other local governments. On 3 December 2019 the Director General appointed an additional five persons to inquire into and to report on the Town. The terms of reference of the Inquiry were not changed.

TOTTLE J

40 On 10 December 2019 the Director General of the Department sent a letter to Mr Giorgi in reply to his letter of 29 November 2019. The Director General recorded that he was not satisfied with the Town's proposal for concluding the Inquiry and that the Inquiry into the Town would continue until further notice.

41 On 13 December 2019 Mr Giorgi spoke by telephone with Mr Murphy. Mr Murphy gave an account of this telephone conversation in an email he sent to the Director General on 17 December 2019. Mr Murphy wrote:¹⁷

I received a phone call from John Giorgi on Friday regarding your response to the Town's letter. He believes he can still get agreement from councillors to accept our original letter and therefore the AI could be withdrawn. He cited a number of reasons the vote went the way it did (6 - 3) stating it was a rushed meeting called by the Mayor at the last minute and 3 of the 6 councillors who voted against the proposal had not read his report recommending the terms be accepted.

I advised him we would not be straying from our original letter to him and the issue, if we agreed, would be the timeframe. Given the next programmed meeting is a SCM on 21 January 2020 if required. The next programmed OCM is on 25 February 2020 and we would be in the final phases of the authorised inquiry by then so if he believes he can push this through it would need to be done as a priority before we waste a considerable amount of resources on this matter or place it on hold again until the end of February.

I will need to advise him of the Department's decision.

42 The Director General responded to Mr Murphy's email as follows:¹⁸

No had enough of their delaying tactics and disrespect.

43 On 20 December 2019 Mr Giorgi sent a letter to the Director General of the Department in which he set out the terms of a motion passed by the Council. One aspect of that motion was that Mr Giorgi be authorised to write to the Department asking it to particularise the concerns which 'would justify the continuation of the Authorised Inquiry'. It appears, however, that Mr Giorgi did not, in fact, write to the Department asking it to 'particularise their concerns which would justify the continuation of the Inquiry' though it was plain from Mr Giorgi's letter itself that the Town sought those particulars.

¹⁷ Attachment RM6 to the Affidavit of Ronal Murphy sworn 1 July 2020.

¹⁸ Attachment RM6 to the Affidavit of Ronal Murphy sworn 1 July 2020.

44 In January, February and March 2020 the persons authorised to conduct the Inquiry interviewed the Mayor, four other councillors, Mr Giorgi and six other Town employees. Informal complaints were received from a variety of sources in relation to the operation and affairs of the Town as well as two further formal complaints in March 2020.

45 On 26 February 2020 Mr Giorgi wrote to the Minister raising concerns on behalf of the Town that the Inquiry was continuing and requested a meeting with the Minister. In the letter Mr Giorgi provided a detailed exposition of the Town's position on various issues relating to the Inquiry. In relation to the important issue of the governance review Mr Giorgi explained that the Town had been provided with no detail of what the proposed Governance Review might address, what the scope might be and what the potential cost implications were. Mr Giorgi stated that the Council was not in a position to agree to a 'potentially open ended and un-costed additional review process without more detail on content and purpose'. Mr Giorgi concluded his letter with the following observations:¹⁹

Council is also concerned the [Department] appears reluctant to engage fully with the Town and has taken an adversarial stance. With an impasse reached based on what appears to be a serious misunderstanding of intentions, Council is seeking your intervention to help mediate a conclusion and a fair outcome to all parties and more specifically to help the Town address;

- (a) Input as to the intended scope and content of the Governance Review;
- (b) Response to the content and format of the Town's consolidated correspondence;
- (c) Input to the draft Joint Media Statement provided;
- (d) Comment on other suggested information prepared for the website as supplied;
- (e) Advice concerning future of information collected during the Inquiry process.

With regard to the Governance Review sought by the Director-General it is advised that Council at the 25 February 2020 meeting resolved to initiate the Governance Review requested, even though it is still unclear as to what areas of the Town's operations might warrant such a review.

¹⁹ Attachment JG13 to the Affidavit of John Giorgi sworn 15 June 2020.

The council hope your direct involvement may now assist with this item.

Both the Town and the [Department] have spent considerable time and costs over the last 2 years on what appears to be an Inquiry made redundant and the Town would now welcome the opportunity to meet with you to discuss Council's views and concerns. Council is hopeful that with your assistance the [Department] will help us address all the queries and complete the withdrawal of the Inquiry.

I would also conclude by asking that the Minister to please consider the significant debilitating impact of this long-running Inquiry has, and now continues to have, on the morale and well-being of both Town of Cambridge Elected Members and employees. All have worked tirelessly to address governance and operational shortcomings in the notice indicating that withdrawal was a formality appeared to vindicate those actions.

We look forward to receiving your response and meeting with you to finalise this matter. Should you have any queries in the meantime please do not hesitate contact myself or the Mayor Keri Shannon directly at the Town.

46 On 26 March 2020 of the Minister replied to Mr Giorgi's letter of 26 February 2020 and stated that as the investigation into the Town was still active it would be inappropriate for him to meet with Mr Giorgi or the Council or to make any comment while the investigation was ongoing. The Minister stated that he could advise that the Director General would respond to the Council's concerns directly.

47 On 22 April 2020 the Director General sent a letter to Mr Giorgi in which he referred to Mr Giorgi's letter to the Minister dated 26 February 2020 and stated that as the Inquiry was nearing completion it would be inappropriate for him to comment on the matter or any other matters associated with the Inquiry.

48 Mr Murphy deposed that as the Inquiry progressed in 2020 and the draft report was being written 'it became evident to me that there may be grounds to issue a show cause notice under section 8.15B of the [LG Act]'.²⁰ A briefing note was prepared for the Minister on 18 May 2020. A more detailed briefing note was prepared on 20 May 2020²¹ and the Minister was provided with an oral briefing. The briefing notes recommended that the Minister issue a show cause notice. The Minister approved the recommendation.

²⁰ Attachment RM7 to the Affidavit of Ronald Murphy sworn 1 July 2020.

²¹ Attachment RM8 to the Affidavit of Ronald Murphy sworn 1 July 2020.

49 On 26 May 2020 the Mayor, a number of councillors and Mr Giorgi met with the Minister and the Director General of the Department. At the meeting the Minister provided the Mayor with the 'Show Cause Notice'. I set out the material parts of the show cause notice later in these reasons. In summary, in the show cause notice the Minister identified three factors which had caused him to think that it was inappropriate for the Council to continue to act as the governing body without intervention. Those matters were:

- (a) A suspicion that the Council had failed to ensure that the Council members both understood and observed their statutory roles and did not undertake administrative and operational functions.
- (b) A suspicion that the Council had failed to ensure that the working environment and working relationships were such that the Town's employees were able to carry out their functions without inappropriate involvement or interference by councillors.
- (c) A suspicion that the Council had failed to ensure that the workplace culture at the Town is free from intimidation and undue pressure on employees.

50 On 8 June 2020 Mr Giorgi wrote to the Minister and sought particulars of the allegations made in the Show Cause Notice and an extension of time within which to respond. Both requests were refused.

51 On 19 June 2020 the Town responded to the Show Cause Notice.

52 On 8 July 2020 the Draft Report of the Inquiry was sent to Mr Giorgi.

53 On 14 July 2020, by letter from the Minister's solicitors to the Town's solicitors, further particulars of the matters alleged in the Show Cause Notice were provided. On 17 July 2020 the Town requested further time to respond to the particulars provided under cover of the Minister's solicitors' letter of 14 July 2020 and an extension of time was provided by the Minister's solicitors.

The grounds of the application

54 The grounds upon which the application for judicial review was pressed were as follows:²²

- (1) In the circumstances deposed to in the affidavits of John Giorgi sworn 15 June 2020, 25 June 2020 and 20 July 2020, and the affidavit of Ronald Murphy sworn 1 July 2020, any exercise by the respondent of the power in s 8.15C(2) of the *Local Government Act 1995* in connection with the applicant, its council or its council members would not be an exercise of the power for a proper purpose.
- (2) ...²³
- (3) An order made by the respondent pursuant to s 8.15C(2) of the *Local Government Act 1995* would be beyond power because:
 - (a) the respondent must form the beliefs or opinions, or reach the conclusions, identified in s 8.15C (1) of the *Local Government Act 1995* as a precondition to the exercise of the power under s 8.15C (2);
 - (b) on the basis of the subject matter of the Notice to Show Cause issued by the respondent dated 26 May 2020 (Notice) (as supplemented by the letter from the State's Solicitor's Office to the solicitors for the applicant dated 14 July 2020, being annexure JG-30 one to the Affidavit of Jon Giorgi sworn 20 July 2020 (14 July letter)), and/or annexures RM7 and RM8 to the affidavit of Ronald Murphy sworn 1 July 2020, the respondent could not form the beliefs or opinions, or reach the conclusion is, identified in s 8.15C (1) of the *Local Government Act 1995* with respect to the applicant's council.
- (4) Having regard to the subject matter of the Notice (as supplemented by the 14 July 2020 Letter), and/or annexures RM7 and RM8 to the affidavit of what Ronald Murphy sworn 1 July 2020, the making by the respondent of an order with respect to the applicant's Council pursuant to s 8.15C(2) of the *Local Government Act 1995* would be legally unreasonable.

²² The application relied on at the hearing was the Town's further amended application for judicial review filed on 20 July 2020.

²³ The application pleaded a procedural fairness ground as ground 2 but that fell away.

The factors causing the Minister to think it is inappropriate for the Council to continue to act without intervention

Involvement in administrative and operational activities

55 Relevantly the Show Cause Notice stated:²⁴

1. I suspect that the Council has failed to ensure that Council members have an understanding of and observe their respective roles, such that the Town's employees rather than Council members undertake administrative and operational functions. In particular:

(a) at meetings held on 7 February 2018, 15 May 2018, 28 August 2018 and 9 April 2020, Council:

- i. passed motions appointing specific lawyers or law firms to act for or provide advice to the Town;
- ii. did not observe any procurement processes or purchasing policy when engaging legal services; and
- iii. authorised the Mayor to provide instructions directly to lawyers;

(b) at a meeting held on 9 April 2020, Council passed a motion authorising Councillor Timmermanis, on behalf of the Council, to 'assist the CEO in relation to the Employee Arrangements in response to COVID-19', including but not limited to:

- i. attending all meetings with unions and staff unable to be redeployed; and
- ii. attending meetings of the COVID Taskforce; and

(c) ...²⁵

56 The briefing notes prepared for the Minister do not contain any material not referred to in the Show Cause Notice save that the three motions passed in 2018 authorised advice to be obtained in respect of four matters.

²⁴ Attachment JG16 to the Affidavit of John Giorgi sworn 15 June 2020.

²⁵ It was agreed that the matter specified in subparagraph 1(c) of the Show Cause Notice did not in fact occur. In the Intervener's written submissions it was stated that it could be inferred that the Minister does not propose to rely on the matter referred to in subparagraph (c). Thus, it is unnecessary to refer to it.

57 In the particulars provided by the Minister's solicitors the basis upon which it was contended that the matters identified in par 1 of the Show Cause Notice warranted the suspension of the Council was expressed as follows:

Under section 2.7 of the LG Act, the role of the council of a local government is to govern the local government's affairs, and be responsible for the performance of the local government's functions. Those functions include ensuring that there is an appropriate structure for administering the local government (section 5.2 of the LG Act) and employing a person to be the CEO and reviewing the performance of the CEO (sections 5.36 and 5.38 of the LG Act). A local government's ability to perform its functions is likely to be impaired if there is not a satisfactory working relationship between Council members and employees, *and an understanding of, and observance of, their respective roles by Council members and employees.* (emphasis supplied)

58 The Minister's solicitors provided further particulars of the manner in which the Council had involved itself in administration. The gravamen of the particulars was that obtaining legal advice forms part of the CEO's functions under s 5.41 of the LG Act and does not form part of the role of the Mayor under s 2.8 or the role of councillors under s 2.10.

59 The Minister's solicitors acknowledged that in 2018 the Council had received legal to the effect that there were limited circumstances in which a council could engage lawyers to provide it with advice but maintained in the ordinary course legal advice should be obtained by the CEO on instruction from the council. The Minister's solicitors stated that the motions of 28 August 2018 and 9 April 2020 were passed after the Council had received the legal advice in 2018 about the limited circumstances in which advice could be obtained and after Mr Giorgi had been appointed to act as the CEO of the Town. The Minister's solicitors stated that the motions of 28 August 2018 and 9 April 2020 indicated a continued involvement by the Council and the Mayor in a function ordinarily performed by the CEO. They stated this was a factor giving rise to the suspicion referred to by the Minister in the Show Cause Notice. The Minister's solicitors acknowledged that the Town's procurement policy did not apply to the Council. They contended the failure of the Council to adhere to any procurement process consistent with the Town's policy when engaging lawyers by was a factor giving rise to the Minister's suspicion.

Working environment and working relationships

60 Relevantly the Show Cause Notice stated:

2. I suspect that the Council has failed to ensure that the working environment and relationship between Council, the CEO and the employees of the Town enables the CEO and employees to carry out their functions without inappropriate involvement or interference by councillors. In particular:
 - (a) employees of the Town have reported that the volume of requests for information from Council members to the Town's employees has impeded the capacity of those employees to properly perform their functions;
 - (b) employees of the Town have reported that pressure has been placed on employees not to discuss potential or current applications for planning approval with proponents; and
 - (c) employees of the Town have reported that they are not able to properly perform their functions and provide professional advice in relation to the assessment of planning applications because of interference by the Mayor.

61 The briefing notes did not contain any material not contained in the Show Cause Notice or the particulars provided by the Minister's solicitors.

62 In the particulars provided by the Minister's solicitors the basis upon which it was contended that the matters identified in par 2 of the Show Cause Notice warranted the suspension of the Council was expressed as follows:

In relation to paragraph 2 of the Notice, ensuring that the working environment and relationship between the Council and to the Town's administration enables the CEO and employees to perform their functions forms part of the general function of the council to govern the affairs of the Town and exercise responsibility for the performance of the local government's functions; specifically ensuring, by means of appropriate oversight and governance that:

- (a) the CEO exercises its functions under section 5.41 of the LG Act to:
 - (i) ensure that advice and information is available to the Council so that informed decisions can be made;

- (ii) manage the day-to-day operations of the local government; and
 - (iii) be responsible for the employment, management supervision, direction and dismissal of other employees; and
- (b) employees exercise their functions in the administration of the local government subject to the management supervision and direction of the CEO.

63 The following further details emerged from the particulars provided by the Minister's solicitors:

- (a) The concern about the volume of requests from elected members focussed on the use of a system for the transmission of requests by elected members for information from Town employees using a register known as the Elected Member Requests Register (EMR Register). The concern appears to have been expressed by one of the Town's four senior employees.
- (b) Between July 2008 and June 2019, 937 emails were sent to the EMR Register. 58% of those emails were from the Mayor. Between July and mid-March 2020, 300 emails were sent to the EMR Register. 51% of those emails were from the Mayor.
- (c) 'Three different employees' had reported that the Mayor regularly emails or approaches administration staff to request they provide information or undertake tasks without using the EMR Register process and without advising Mr Giorgi in his capacity as CEO. Seven examples of such emails sent by the Mayor in January and February 2020 were provided.
- (d) A senior employee of the Town had alleged the Mayor requires staff to keep a log of contacts between planning officers and developers and uses the log to criticise staff and accuse them of collusion if they discuss proposals with developers. An example of this alleged conduct was included in the particulars. This involved the Mayor allegedly questioning the impartiality of a report provided to the Council by planning officers of the Town in relation to a particular development application.

- (e) A senior employee had made general allegations that: the Mayor continually sought to show that planning officers had made mistakes if they provided advice that the Mayor did not agree with; the Mayor had illogical views regarding planning matters based on her personal preferences and that as a consequence the Town's planning officers were fearful of making recommendations to the Council; and, that when seeking advice on planning from officers, the Mayor speaks to different planning officers within the Town's administration until she obtains the response that she wants. It was also alleged that at a Joint Development Assessment Panel meeting Mayor was unhappy with a planning officers answer to a question from the panel and had asked the Director of Planning and Development and the CEO to intervene.

Workplace culture and undue pressure on employees

64 The material parts of the Show Cause Notice were as follows:

3. I suspect that the Council has failed to ensure that the workplace culture at the Town is free from intimidation of employees and undue pressure on employees. In particular:
- (a) employees of the Town have reported criticism and belittling of employees by the Mayor;
 - (b) the conduct of the Mayor towards the Town's employees led to the CEO telling the Mayor that if her conduct continued, he would report it to WorkSafe;
 - (c) directors and managers of the Town have reported that the CEO told them that if they provided information to the inquiry authorised by the CEO of the Department of Local Government, Sport and Cultural Industries under Division 1 of Part 8 of the Act 'for the wrong reasons' then these people may 'suffer the consequences';
 - (d) the working environment at the Town has negatively affected the Town's ability to recruit employees, including employees to fill senior executive positions and backfill positions when employees are on leave or acting opportunities are available; and
 - (e) employees of the Town have reported a perception that their employment will be jeopardised if they make mistakes, provide advice to the Council which does not accord with the views of Council members, or make decisions that Council members disagree with.

65 The briefing notes contained more details of the Mayor's conduct and that of Mr Giorgi but I am satisfied that par 3 of the Show Cause Notice accurately distils the contents of the briefing notes.

66 In the particulars provided by the Minister's solicitors the basis upon which it was contended that the matters identified in par 3 of the Show Cause Notice warranted the suspension of the Council was expressed as follows:

In relation to paragraph 3 of the Notice, ensuring that the workplace culture is free from intimidation of employees and undue pressure on employees forms part of the general function of the council to govern the affairs of the Town and exercise responsibility for the performance of the local government's functions; specifically ensuring, by means of appropriate oversight and governance, that:

- (a) the CEO exercises his functions and responsibilities with respect to the working environment at the Town, including by adherence to the principle in section 5.40(e) of the LG Act that employees are provided with safe and healthy working conditions in accordance with the *Occupational Safety and Health Act 1984*; and
- (b) the CEO, Mayor and individual councillors exercise their functions and roles in a manner that is free from intimidation of employees and undue pressure on employees.

67 Further particulars of the Minister's suspicions in relation to the Town's workplace culture were provided by the Minister's solicitors. Two examples of conduct which was alleged to involve the denigration by the Mayor of Town's employees were provided. One example concerned a statement made in a Council meeting in 2018 regarding an employee who had left the Town's employment. The other example was a Facebook post published in May 2020. The date and circumstances in which the statements attributed to Mr Giorgi as referred to in pars 3(b) and (c) of the Show Cause Notice were provided. Reference was made to unattributed 'reports' of difficulties in recruiting employees to fill vacancies. A number of examples of conduct said to have given rise to the perception referred to in par 3(e) of the notice were provided. With one clear exception allegedly involving Councillor Bradley and one possible exception in which reference was made to 'elected members' generally, all were examples of the Mayor's conduct.

A summary of the Town's case

68 The Town contended that the purpose of s 8.15C was to remedy a failure of governance by the Council or a failure by the Council that affects the performance of the local government's functions.²⁶ It argued that in considering the performance of a local government's functions for the purposes of s 8.15C a distinction is to be drawn between the statutory functions of a local government and the internal management and administration which supports the execution of those functions.

69 The Town contended that the LG Act implied two broad limits on the exercise of the power under s 8 15C(2). First, that the power is to be exercised peremptorily implies there must be some reason why the council, either presently or imminently should not govern at all in the case of a proposed suspension or without undertaking remedial action. Second, that the council is elected through a democratic process implies that the need for immediate intervention must be of a particularly serious character.

70 Further, the Town argued that s 8.15C is not intended to be a source of power to be exercised in response to alleged deficiencies in the conduct of a single council member. The Town contended that power resides in s 8.15E

71 The Town contended that the proper inference to be drawn from the evidence was that the Minister's foreshadowed decision to suspend the Council is not for the purpose of addressing circumstances of such a serious and urgent nature that they compel or support the conclusion that the Council should not presently act as the governing body of the Town. It argued that the Minister's purpose was to address issues in the administration of the Town, issues concerning the management of employees, and to address allegations about the Mayor and the CEO, without taking the step of prosecuting a complaint before the Local Government Standards Panel or dealing with it properly through an inquiry process under Div 1 or Div 2 of Pt 8 of the LG Act. The Town argued the absence of circumstances of a serious or urgent nature was to be inferred from the following:

- (a) The Authorised Inquiry has been on foot for over two years.

²⁶ ts 28.

- (b) The subject matter of the factors relied upon in the Show Cause Notice has been addressed by the Town in an iterative, proactive way in the period spanning the Inquiry as summarised in the Town's solicitors draft letter of 26 November 2019.
- (c) Until the issue of the Show Cause Notice there had been no indication from the Department, or any authorised person involved in the Inquiry or the Minister, that suspension of the Council was warranted or desirable.
- (d) The only formal complaints made about the Town to the Department in 2019 and 2020 were one in April 2019 and two in March 2020.
- (e) Nothing was communicated to the Town and no corrective action was requested of the Town following the March 2020 complaints.
- (f) The allegations about involvement in administrative or operational tasks do not identify any issue of concern in terms of the governance or administration of the Town, or any serious issue recently arising, that require a peremptory suspension of the Council.
- (g) The allegations about working environment, working relationships and workplace culture reflect adverse comments made by no later than March 2020 by a small number of employees of the Town primarily about the conduct of the Mayor.
- (h) The Minister did not attempt to take any peremptory action in relation to the Council between March 2020 and 26 May 2020.
- (i) The concerns have been raised between December 2019 and March 2020 are from limited sources and relate primarily to the Mayor.
- (j) The Town is proposing, and the Minister is aware the Town is proposing, to undertake an organisation wide governance review/audit in 2021.

72 The Town contended that the Minister could not conclude that the criteria in s 8.15C(1) are capable of being satisfied on the basis of the material available to him from the briefing notes, the Show Cause Notice, the particulars provided by the Minister's solicitors and the Town's response to the Show Cause Notice.²⁷

73 The Town contended the allegations about the involvement in administrative and operational matters cannot sustain the conclusion that it is inappropriate for the Council to continue to act without intervention because: the motion passed on 9 April 2020 has been revoked and the Minister was informed of this in the Town's response to the Show Cause Notice; the 2018 motions are not recent; the Minister has recognised that there are circumstances in which the Council is permitted to seek its own advice and the Minister has recognised that Council members can be involved in administrative activities lawfully if authorised by the Council or the CEO.

74 The Town contended the allegations about the working environment and working relationships cannot sustain the conclusion that it is inappropriate for the Council to continue to act without intervention because there is no requirement under the LG Act for the Council and the administration of the local government to have a relationship. The Town pointed to the existence of the statutory obligation on the CEO to manage the day to day operations of local government and its employees. The Town emphasised that the suspicions of the Minister are premised on reports of between one and three employees of the Town, expressed largely in terms of generalities and perceptions about the conduct of the Mayor. In oral submissions senior counsel stressed the lack of 'probative evidence' supporting the suspicions of the Minister.

75 The Town contended the allegations about the workplace culture and undue pressure on employees cannot sustain the conclusion that it is inappropriate for the Council to continue to act without intervention because, essentially, the matters identified by the Minister relate solely to the conduct of the Mayor, or Mr Giorgi as CEO, and not to all Council members. The Town says none of the matters identified are indicative of a failure of a function of the Town or the Council.

²⁷ Attachment JG20 to the affidavit of John Giorgi sworn 25 June 2020.

76 The Town contended that the foreshadowed exercise of power by the Minister is legally unreasonable in the sense that it would be an exercise of power affected by jurisdictional error. The jurisdictional error being the conclusion to be formed by the Minister before the statutory discretion is enlivened could not be formed on the basis of the materials placed before the Minister.

77 The Town contended also that the foreshadowed exercise of power by the Minister is legally unreasonable in an 'outcome focused' sense because the foreshadowed decision is, having regard to the terms, scope and purpose of the statutory source of power, lacking in evident or intelligible justification and common sense. Further it would be a disproportionate exercise of the power.

78 The Town argued that the Minister's concerns are principally about the conduct of the Mayor and to a lesser degree, the CEO. The foreshadowed exercise of the power under s 8.15C by the Minister seeks to shift responsibility for that alleged conduct to the Council and this is not supported by the provisions of the LG Act. Council members are elected by their constituents and have only the functions conferred on them by the LG Act. The Town argued none of the statutory functions nor any of the statutory rules of conduct require or authorise the Council to manage, alter or restrain the conduct of its members, nor is it evident have practically might do so.

79 The Town argued that the Council's only responsibilities in respect of the CEO are as to his engagement and, where appropriate, its termination. The Town contended that while a local government must review the performance of the CEO if the CEO's employment is for a term of more than one year, the review process is not one of the Council's express functions. The Town also pointed out that it is only the Mayor who is authorised under the LG Act to liaise with the CEO about the performance of the Town's functions. The Town argued that the Minister has not identified any function of the Town as a local government that has failed to be performed properly or has been compromised. An exercise of the power in s 8.15C(2) in response to perceived deficiencies in the conduct of the CEO is in that circumstance unreasonable.

A summary of the intervener's submissions

80 The intervener identified the proper purpose of the s 8.15C is that of seeking to ensure that local government functions are being properly performed.²⁸

81 In relation to the Town's improper purpose ground the intervener's contentions may be summarised as follows:

- (a) The Town has failed to identify the Minister's subjective purpose in the foreshadowed exercise of the power in question as the authorities require it to do.
- (b) A party contending that a decision-maker is acting for an improper purpose has a high hurdle to overcome.
- (c) The matters from which the Town seeks to draw an inference about the Minister's intentions largely concern the conduct of the Department and the conduct of those authorised to conduct the Inquiry and not the Minister.
- (d) The Town's submissions stray impermissibly into an assessment of the merits of the proposed action.
- (e) The terms of the Show Cause Notice itself and briefing notes prepared for the Minister by the Department were directed to the statutory criteria and evidence that the Minister is considering exercising the power for the proper purpose.

82 In answering the Town's contentions in relation to the alleged involvement of the Council in administrative and operational tasks, the intervener pointed to the distinct but complementary roles of the Council on the one hand and its administration on the other. The intervener contended that a suspected failure of the Council to ensure that Council members have an understanding of, and observe, their respective roles so that the Town's employees rather than Council members undertake administrative and operational roles is self-evidently a sufficient basis to suspect that the Council has failed to ensure that the Town performs its functions properly

²⁸ ts 87.

83 The intervener contested the proposition that there was no requirement under the LG Act for a council and the administration of a local government to have a relationship. The intervener contended that self-evidently there must be a satisfactory working relationship between a council and the administration in order for the local government functions to be performed properly. In this respect the intervener pointed to the Code of Conduct for Council Members, Committee Members and Employees²⁹ adopted by the Town on 29 August 2019 to which reference had been made in the Town's solicitors' correspondence with the Department. The intervener argued the Code evidenced the importance of good working relationship between a council and those employed by a local government. The intervener drew attention to the fact that it was a specific function of the council to ensure that there is an appropriate structure for administering the local government.³⁰

84 The intervener argued that it was open to the Minister to suspect that the volume of requests for information from council members has impeded the capacity of Town employees to perform their functions properly and that it was open to the Minister to suspect that the Mayor's conduct had impacted negatively on the proper performance of the Town's administrative functions with respect to the assessment of planning applications.

85 The intervener contended that on the basis of the matters referred to in the Show Cause Notice it was open to the Minister to form the suspicion that the council had failed to ensure that the workplace culture was free from intimidation of employees and that employees were not under undue pressure and had failed to ensure that the local government performed its functions properly. The intervener pointed to the importance of Town employees being able to provide frank and fearless advice to the Council, to the importance of Town employees complying with their obligations to cooperate with the Inquiry, and to the importance of recruiting employees and generally complying with the obligation to treat employees fairly and consistently and to ensure that there was no unlawful discrimination.

86 The intervener contended also that it was the Council's responsibility to exercise oversight over the CEO. The proper performance by the CEO was critical to ensuring that the Town performed its functions properly.

²⁹ Attachment JG22 to the Affidavit of John Giorgi sworn 25 June 2020.

³⁰ LG Act s 5.2.

87 In response to the Town's contention that s 8.15C is not intended to be a source of power to be exercised in response to alleged deficiencies in the conduct of a single council member as that power resides in s 8.15E the intervener contended there is a significant degree of overlap between s 8.15E and s 8.15C and argued that the overlap is apparent from the wording of s 8.15E(3)(a)(ii), (3)(a)(iii) and 3(b) and s 8.15C(1)(a) on the other, particularly given that the term 'person' in s 8.15E(3)(a)(ii) should be read as including the local government itself.

88 The intervener responded to the unreasonableness ground by relying on the submissions made in relation to each of the other grounds. In addition, the intervener argued that the Minister's suspicion is that the Council has failed to ensure that the Town's functions are being performed properly and the fact that the proximate cause of some of the matters giving rise to the suspicion concern the conduct of one or more persons - the Mayor and the CEO - does not make it unreasonable for the Minister to act.

Consideration

Observations on s 8.15C of the LG Act

89 First, the peremptory exercise of the power to order the suspension of a council deprives the local community of the benefit of participation of its elected representatives in local government - one of the central principles of the system of local government recognised and given effect to by the provisions of the LG Act. This forms part of the statutory context from which it may be assumed the legislature intended that the Minister would only intervene peremptorily in the affairs of a local government if the circumstances giving rise to the consideration of the use of the power to intervene were serious.

90 Second, the pre-condition to be satisfied before the Minister's discretion to intervene under s 8.15C is enlivened is stringent. The Minister must think it is inappropriate for the council to act, or continue to act (in effect the council is no longer fit or suitable to act) as the governing body of the local government without intervention. Further, concluding that it is inappropriate for a council to act or continue to act carries with it the conclusion that *immediate* intervention is required.

91 Third, s 8.15C directs attention to the role of the council as the *governing body* of the local government and the suitability of the council to perform that role. The Minister is permitted to have regard to a very wide range of factors for the purposes of considering whether it is inappropriate for the council to act or continue to act. Those factors must relate to, in the sense of having a rational connection with, the role entrusted to a council under the LG Act - the government of the local government's affairs and responsibility for the performance of the local government's functions. As is apparent from a review of the statutory framework undertaken earlier a council discharges its role by formulating policy and overseeing the performance of a local government's functions. The day to day management of a local government is entrusted to the CEO. Deficiencies in the day to day management of a local government will not provide an adequate foundation for a conclusion that it is inappropriate for the council to act or continue to act as the governing body unless those day to day management deficiencies can be traced back to some failing or suspected failing in the operation of the council in its capacity as the governing body.

92 Fourth, the importance of identifying a failing or suspected failing in the operation of a council in its capacity as a governing body lies also in the remedial nature of s 8.15C. The remedial purpose of the section is apparent from the reference in s 8.15C(2) to undertaking remedial action. If a failing or suspected failing on the part of a council acting in its capacity as the governing body is not identified by the Minister with some specificity then it is not possible for the Minister to form a rational judgment as to the form of the required intervention.

93 Fifth, as noted, s 8.15C is concerned with the existence of circumstances that lead the Minister to think that it is inappropriate for the council to continue to act as the *governing body* of the local government. The provision is directed to the suitability of the council as a collective body to discharge its statutory role. Section 8.15E is directed to addressing the consequences that might follow from a reasonable suspicion on the part of the Departmental CEO that a specific member of a council is conducting themselves in one or more of the ways described in s 8.15E(3). It is plain from the focus of these provisions that the legislature contemplated that conduct of specific councillors would be addressed by the exercise of the power under s 8.15E. In my view, however, the existence of s 8.15E does not preclude the Minister from having regard to the conduct of a single member of the council if the Minister considers the conduct of the

single member is relevant to whether it is inappropriate for the council to act or continue to act as the governing body of the local government. In the ordinary course of local government it is not unreasonable to think that it would be unusual for the conduct of a single member of a council to be such as to cause the Minister to conclude that it was inappropriate for the council to act as the governing body. A cogent connection between the conduct of the single member and its effect on the council's role as the governing body would be required before the discretion to make an order suspending the entire council was enlivened.

Legal principles relevant to the application

94 There was no dispute between the parties about the relevant legal principles. In the following paragraphs I summarise those principles.

Writ of Prohibition

95 The present case arises in the somewhat unusual circumstances that the Town seeks judicial review in respect of a proposed decision. It is well established that this court can issue the prerogative writ of prohibition to prohibit the exercise of power pre-emptively or in anticipation of a decision in circumstances where there is a real likelihood that the Minister will act in accordance with views disclosed in advance of the proposed decision and those views reveal jurisdictional error.³¹

96 The jurisdiction to make such an order is confirmed by the judgment of Dixon CJ, Williams, Webb and Fullagar JJ in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty Ltd*,³² where their Honours observed:³³

There can be no foundation for a writ of prohibition unless and until it appears, whether from the course of the inquiry or from the preliminary statement of the matters to which the inquiry is directed, that there can be no basis for the exercise of the power conferred by s 23(1) or that an erroneous test of the liability of the employer to the cancellation or suspension of his registration will be applied or that some abuse of authority is likely. In any such case a writ of prohibition may lie but it must be a writ restraining the ordering of cancellation or suspension. If

³¹ *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASC 231; (2002) 25 WAR 511 [33] (Parker J, Malcolm CJ & Anderson J agreeing).

³² *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100.

³³ *Ex parte Melbourne Stevedoring Company*, 117 - 118.

on the facts no basis could exist for exercising the power it would be a proper exercise of this Court's jurisdiction to award a writ of prohibition prohibiting unconditionally or peremptorily the cancellation or suspension threatened.

...

Now it might be said that until an order for cancellation or suspension of the registration of an employer has been actually made the Court ought not to consider whether the basis for making such an order is so wanting that the power has not arisen or whether to exercise the power means the application of an erroneous test or some other abuse, and that accordingly the Court should withhold the writ until the result of the inquiry is known. There are two observations to make upon such a view of the matter. The first is that it must be borne in mind that, subject to certain limitations not here material, while prohibition is not a writ of course, it is a writ which goes as of right when the prosecutor is directly affected by the course pursued by a tribunal to which the writ lies and the prosecutor shows satisfactorily that the tribunal is about to act to his detriment in excess of its authority.

97 The plurality of the High Court, however, noted that the court must be very cautious when assessing a peremptory remedy not to stray into a review of the potential merits of the decision contemplated. Their Honours stated:³⁴

But the chief point of difficulty in the case lies in the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the tribunal and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends. It is not enough if the board or the delegate of the board, properly interpreting pars. (a) and (b) of s. 23 (1) and applying the correct test, nevertheless satisfies itself or himself on inadequate material that facts exist which in truth would fulfil the conditions which one or other or both of those paragraphs prescribe. The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.

³⁴ *Ex parte Melbourne Stevedoring Company*, 119 - 120.

Improper purpose

98 A decision made pursuant to a statutory power will be invalid for improper purpose if it is established that it was made for a purpose beyond the scope of the relevant Act.³⁵

99 When improper purpose is alleged, it is first necessary to identify the statutory or authorised purposes for which the relevant discretionary power has been given and it is then necessary to identify the purpose in fact of the relevant decision-maker.³⁶

100 It is the subjective purpose of the decision-maker that is relevant, though the subjective purpose may be inferred from objective matters including the nature of the decision, the circumstances in which it was made and its effect.³⁷ The focus is on the conduct of the decision-maker.

101 There may be circumstances in which a statutory power is exercised for mixed purposes, some proper and some not. Where the substantial purpose is an improper one, the exercise of power is invalid.³⁸

Satisfaction of a pre-condition to the exercise of discretion

102 The conclusion the Minister is required to form, that it is inappropriate for the council to act etc, is a broad jurisdictional fact. On an application for judicial review this court is entitled to determine for itself whether the opinion is capable of being formed by a reasonable person who correctly understands the meaning of the law under which they act.³⁹

103 In *R v Connell; ex parte Hetton Bellbird Collieries*, a case also concerning writs of prohibition, Latham CJ observed:⁴⁰

It is therefore well settled that if a statute provides that a power maybe exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form.

³⁵ *Thompson v The Council of the Municipality of Randwick* [1950] HCA 33; (1950) 81 CLR 87, 106 - 107 (Williams, Webb & Kitto JJ).

³⁶ *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2008] WASCA 211; (2008) 38 WAR 276, [64] (McLure JA, Buss JA & Murray AJA agreeing).

³⁷ *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [67].

³⁸ *Thompson v The Council of the Municipality of Randwick* [1953] HCA 75; (1953) 90 CLR 449, 106 - 107.

³⁹ *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407.

⁴⁰ *Ex parte Hetton Bellbird Collieries Ltd*, (432).

Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorised to deal. It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

104 In *Brennan v New South Wales Land and Housing Corporation*,⁴¹ Basten JA summarised the development of the relevant principles as follows:

As recently noted by Gummow ACJ and Kiefel J, 'the principles applicable where the jurisdictional fact is a state of satisfaction or opinion are traced back to the use by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407 of the terms 'arbitrary, capricious, irrational' as well as 'not bona fide' to stigmatise the formation of an opinion upon which a statutory power was enlivened': *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [23]. Their Honours continued:

Subsequently, for the Supreme Court of Canada, Iacobucci J spoke of decision making upon an assumption which had no basis in the evidentiary material or which was contrary to the overwhelming weight of that material, and also of decisions based upon a contradiction in the processes by which conclusions were reached or upon the drawing of inferences which were not properly open. [*Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 776 – 777].

In that case Crennan and Bell JJ referred to 'findings or inferences of fact which were not supported by some probative material or logical grounds', as a basis of jurisdictional error: at [103] referring to *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [147] (Gummow J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 77 ALJR 1165 at [4] (Gleeson CJ, noting one of the grounds of challenge); and see *Minister for Immigration and Multicultural and*

⁴¹ *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 298; (2011) 83 NSWLR 23 [89] - [91].

Indigenous Affairs v SGLB [2004] HCA 32; 78 ALJR 992 at [37] – [38] (Gummow and Hayne JJ). However, their Honours also referred to a line of authority, which included *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118, where Gibbs J referred to the elements derived from *Hetton Bellbird* and added the possibility of manifest or *Wednesbury* unreasonableness constituting a sufficient ground for jurisdictional error: at [122]; see also *Abebe v Commonwealth* [1999] HCA 14; 197 CLR 510 at [116] (Gaudron J).

After consideration of the various discussions of similar issues in Australian authority, their Honours held at [130]:

In the context of the Tribunal's decision here, 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65 [of the Migration Act], is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

The established principle with respect to the high bar for intervention required by reference to manifest unreasonableness was affirmed in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48 ; 85 ALJR 306.

As this court has noted in the past, there is a link between illogicality and the 'no evidence' principle: see *Amaba Pty Ltd v Booth* [2010] NSWCA 344 at [23]:

Implicit in the statement that there is no evidence to 'support' a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of 'relevance', on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding': *Evidence Act 1995* (NSW),

s 55(1). As explained by Gleeson CJ, Heydon and Crennan JJ in *Washer v Western Australia* [2007] HCA 48; 234 CLR 492 at [5]:

The word 'rationally' is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.

Legal unreasonableness

105 The following summary is derived from the judgment of the High Court in *Minister for Immigration and Citizenship v Li*,⁴² and the discussion and analysis of that judgment by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*⁴³ and *Minister for Immigration and Border Protection v Stretton*.⁴⁴

- (a) Legal reasonableness or an absence of legal unreasonableness is an essential element in the lawfulness of decision-making. This is because Parliament is taken to have intended that a statutory power will be exercised reasonably.⁴⁵
- (b) It must be remembered that Parliament has conferred the power on the decision maker and the court's function is a supervisory one as to legality. Thus judicial restraint is required. The concept of legal unreasonableness does not provide a vehicle for the court to remake the decision according to its view as to reasonableness and by implication finding a contrary view unreasonable.⁴⁶
- (c) The concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or precise textual formulary.⁴⁷ A more sophisticated approach is required - one that focusses on the question of whether an administrative

⁴² *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332.

⁴³ *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437; [43] - [52] (Allsop CJ, Robertson & Mortimer JJ).

⁴⁴ *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1; (Allsop CJ, Griffiths & Wigney JJ).

⁴⁵ *Minister for Immigration and Citizenship v Li* [26] and [29] (French CJ) and [63] (Hayne, Kiefel & Bell JJ) and [88], (Gageler J).

⁴⁶ *Minister for Immigration and Border Protection v Stretton* [8] (Allsop CJ) citing *Minister for Immigration and Citizenship v Li* at [30], [66] and [105].

⁴⁷ *Minister for Immigration and Border Protection v Stretton* [10] (Allsop CJ).

decision is one which is within the authority of the decision-maker. This requires close attention to be given to the relevant features of the particular statutory framework within which the authority arises.⁴⁸ Vitiating unreasonableness may be characterised in more than one way to be susceptible to judicial review.⁴⁹

- (d) There are two species of legal unreasonableness. First, there are those cases in which the reviewing court identifies an underlying jurisdictional error in the decision-making process, and second, there are those cases in which legal unreasonableness may be 'outcome focussed'.⁵⁰ An outcome focussed conclusion of legal unreasonableness may be an inference drawn because the court cannot identify how the decision was arrived at, in which case the exercise of power may be seen by the supervising court as lacking 'an evident and intelligible justification'.⁵¹ It has the character of being 'arbitrary, capricious or without common sense'. Outcome focussed unreasonableness occurs in an 'area of decisional freedom'.⁵²
- (e) The disproportionate exercise of administrative discretion may be unreasonable simply on the basis that it exceeds what on any view is necessary for the purpose it serves.⁵³
- (f) Legal unreasonableness is 'invariably fact dependent' and requires a careful evaluation of the evidence.⁵⁴

The nature of administrative decision-making

106 I have referred earlier to the emphasis placed by the Town's senior counsel on the lack of 'probative evidence'. It must be remembered, however, the Minister is making an administrative decision and the process of administrative decision-making differs from the decision-making processes of courts and quasi-judicial tribunals. Caution must be exercised in borrowing terms such as 'evidence' from the discourse of litigation and importing them into a discussion of

⁴⁸ *Minister for Immigration and Border Protection v Stretton* [62] (Griffiths J).

⁴⁹ *Minister for Immigration and Citizenship v Li* [26] (French CJ); 72 (Hayne, Kiefel & Bell JJ).

⁵⁰ *Minister for Immigration and Border Protection v Stretton* [61(c)] (Griffiths J) citing *Minister for Immigration and Citizenship v Li* [66] Hayne, Kiefel and Bell JJ, and at [105] per Gageler J.

⁵¹ *Minister for Immigration and Citizenship v Li* [76] (Hayne, Kiefel & Bell JJ).

⁵² *Minister for Immigration and Citizenship v Li* [28] (French CJ).

⁵³ *Minister for Immigration and Citizenship v Li* [30] (French CJ); [73]-[74] (Hayne, Kiefel & Bell JJ).

⁵⁴ *Minister for Immigration and Border Protection v Singh* [44].

administrative decision-making.⁵⁵ A Minister called upon to exercise the power under s 8.15C may be required to act urgently and on the basis of information that may be incomplete. The material before the Minister may amount to no more than allegations. And, of course, s 8.15C expressly contemplates that the Minister may act on the basis of suspicions. Credible allegations, which would not of themselves amount to 'probative evidence' may be sufficient to give rise to a suspicion, that is, something more than a mere idle wondering whether a matter exists or not but rather a positive feeling of actual apprehension or mistrust, 'a real apprehension though with insufficient warrant for a positive conclusion'.⁵⁶ The material considered by the Minister must, however, be sufficient in its cogency for the Minister to reach the positive conclusion (as opposed to merely suspect) that it is inappropriate for the council to act or continue to act as the governing body of the local government.

Observations on the factors identified by the Minister

107 In my approach to the analysis of the factors identified by the Minister in the Show Cause Notice I have been conscious of the need for judicial restraint and, as has been emphasised repeatedly in the authorities, this court's function is a supervisory one concerned with legality.

108 The existence of the Inquiry, the imminence of publication of the draft report when the Show Cause Notice was served and the subsequent provision of the draft report to those concerned forms part of the backdrop to the matters considered below.

109 The Minister's conclusion that it is inappropriate for the Council to continue to act without intervention is based on factors identified in the Show Cause Notice taken in combination. Ultimately, that is the way in which they must be considered. For the purposes of analysis I will begin by considering each factor identified in the Show Cause Notice in turn.

Involvement in administrative and operational functions

110 The Minister's suspicion that the Council has failed to ensure council members understand and observe their roles is significant because the matters identified by the Minister, the passing of motions at

⁵⁵ *Minister for Immigration and Ethnic Affairs v Liang* [1996] HCA 6; (1996) 185 CLR 259, (282) (Brennan CJ, Toohey, McHugh and Gummow JJ).

⁵⁶ *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104, 111 - 113.

council meetings, involve the conduct of the Council collectively acting as the governing body - unlike the other two factors which primarily relate to the conduct of the Mayor.

The 2018 motions

111 There are a number of observations to be made about the 2018 motions and the Minister's reliance on them.

112 First, the 2018 motions have no ongoing operational significance. They are of historic interest only. This gives rise to the question: in what way are the 2018 motions capable of informing the conclusion to be formed in May 2020 that it is inappropriate for the Council to continue to act as the governing body without intervention. An answer to this question does not readily emerge from the materials before the Minister. I will consider the answer proposed by the Minister's solicitors to the effect that the motions taken with the April 2020 Motion indicated continued involvement by the Council and the Mayor in a function ordinarily performed by the CEO later.

113 Second, the 2018 motions were isolated examples of the Council seeking legal advice. It may be accepted as the Minister's solicitors contended in the particulars they provided that obtaining legal advice is ordinarily a function undertaken by the CEO of a local government. There was no material before the Minister, however, to suggest that legal advice is not ordinarily obtained on the Town's behalf by the CEO.

114 Third, the 2018 motions were not only isolated examples of the Council seeking legal advice but with one exception, in respect of which advice was sought on a planning matter, the circumstances in which the advice was sought were unusual in the sense that they were not matters on which the Town would seek advice in the ordinary course of its administration and operation. The Council sought advice from solicitors and senior counsel on whether it could seek legal advice. And, the Council sought legal advice in respect of the termination of the employment of the Town's then CEO.

115 Fourth, one of the reasons the Council sought legal advice about the circumstances in which it might seek legal advice is because some members of the council were concerned that reg 9 of the LG Regulations could not be relied upon as a source of authority for

seeking advice.⁵⁷ The effect of the advice from senior counsel, at least as summarised by the Town's solicitors, was that reliance on reg 9 'was valid in the circumstances'.⁵⁸ While there may be disagreement about the appropriateness of placing reliance on this provision and there may be differing views on the ambit of its operation, the fact the councillors were concerned to obtain advice suggests an awareness on their part of the limits on the statutory role to be undertaken by them and a concern to observe those limits. It may also be observed that it appeared to be accepted by the Department that s 5.45 of the LG Act permitted a local government to perform its functions by acting through a person other than the CEO. I note, however, the issue of concern to the Minister appears primarily to be the propriety of the Council acting as it did having regard to the statutory demarcation between the respective roles of the Council and the Town's administration rather than the more technical legal issue of authority.

116 Fifth, the 2018 motions were known to the Department because they were referred to directly or indirectly in the Town's solicitors' letters to the Department of 1 August 2018 (pars 1.6 and 1.7) and 11 December 2018.⁵⁹ It may be inferred that Mr Murphy and Ms Thomas did not consider that these motions meant that it was inappropriate for the Council to continue to act as the governing body of the Town. The inference arises from two matters. First, knowing that the 2018 motions had been passed and acted upon, and knowing the circumstances in which that had occurred, by November 2019 Mr Murphy and other officers of the Department had reached the view that positive changes to the organisational culture and practice had been achieved within the Town and, subject to the conditions to which I have referred earlier, the Department would be satisfied that the Town was governing and operating towards the best interests of the community and would withdraw the Authorised Inquiry. Secondly, Mr Murphy's evidence was to the effect that when conducting an authorised inquiry the possibility that issues identified in the course of the inquiry may warrant the Minister taking action under s 8.15C of the LG Act is always in the back of his mind. He deposed that although he considered that question in May 2018, it only became evident to him that there may be grounds for the Minister to issue a show cause notice

⁵⁷ Squire Patton Boggs' letter dated 1 August 2018 at [1.7], attachment JG4 to the Affidavit of John Giorgi sworn 15 June 2020.

⁵⁸ Squire Patton Boggs' letter dated 1 August 2018, attachment JG4 to the Affidavit of John Giorgi sworn 15 June 2020.

⁵⁹ Squire Patton Boggs' letter dated 11 December 2018, attachment JG5 to the Affidavit of John Giorgi sworn 15 June 2020.

under s 8.15B of the LG Act as the draft report was being written in 2020. That the Department did not consider that the 2018 motions constituted grounds for peremptory intervention by the Minister sharpens the focus on what it is about those motions that informs the conclusion that is *now* inappropriate for the Council to continue to act without intervention.

117 Sixth, there is no material before the Minister that suggests that the obtaining of legal advice by the Council had any adverse impact on the performance by the Town of any local government functions. Put another way, there is no material before the Minister that would support the conclusion that the Council's conduct in obtaining the legal advice detracted from the performance of any of the Town's executive functions.

April 2020 motion

118 The April 2020 motion was part of the Town's response to the COVID-19 pandemic. It had a number of elements to it. Relevantly, it authorised the appointment of a particular lawyer at a law firm to act on behalf of the Council and to provide advice to the Council in relation to major changes to the Town's operations and business resulting from the COVID-19 pandemic. The motion authorised the Mayor on behalf of the Council, 'pursuant to Regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007*' to provide instructions to the lawyer.

119 Secondly, the motion authorised Councillor Timmermanis (again 'pursuant to Regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007*') to assist the CEO, Mr Giorgi, in relation to employee arrangements in response to COVID-19 including, but not limited to attending meetings with unions, attending meetings with staff and attending meetings of the COVID Taskforce. Again, it may be observed that the Council's invocation of reg 9 of the LG Regulations suggests that councillors were aware of the prohibition on councillors undertaking a task that contributes to local government unless authorised to do so and they were not acting without an appreciation of the limits of the Council's role. And, as I have noted earlier, there may be a real question over whether reg 9 of the LG Regulations may be invoked by the Council as it did but the Council's reliance on reg 9 reflected a recognition that the Council was involving itself in a matter that would ordinarily be dealt with by the Town's administration.

120 The circumstances in which the April 2020 motion was passed place it in a category of its own. There was no material placed before

the Minister that would negate the inference arising from an objective assessment of the unique circumstances of the COVID-19 pandemic that the motion was passed with the best interests of the Town in mind.

121 There is no material before the Minister that suggests that the obtaining of legal advice by the Council or Councillor Timmermans' involvement in administrative matters had any adverse impact on the performance by the Town of any local government functions.

122 In his letter to the Minister dated 19 June 2020 Mr Giorgi foreshadowed that the April 2020 motion would be revoked. It was not in dispute that the motion had been revoked and the Minister had been informed of the revocation. The intervener contended the revocation was not relevant because it went to the merits of the final decision to be made by the Minister when he had heard further from the Town. I do not accept this contention. The Minister has stated in the Show Cause Notice that he intends to intervene by suspending the Council. The passing of the April 2020 motion was a matter which contributed to the Minister's decision to intervene. The fact the Minister has been informed of the revocation of the motion is relevant to whether there remains a basis upon which it is open to the Minister to conclude that it is inappropriate for the Council to continue to act and the Council should be suspended.

123 The April 2020 motion was passed in circumstances that were not only temporally removed but also factually very different from the 2018 motions. As I have said, the circumstances in which the April 2020 motion was passed were unique. I do not accept that it is possible to characterise the 2018 motions and the 2020 as part of a process of 'continued involvement' by the Council in administrative matters. The elapse of time between the motions, the very different circumstances in which the motions were passed and the absence of any material that suggests that the obtaining of legal advice on behalf of the Town or the Council is not ordinarily obtained by the CEO lead me to conclude that such a characterisation is not open.

124 I am not persuaded that the 2018 motions and the April 2020 motion establish an intelligible basis upon which a suspicion that the Council has failed to ensure that the Council members have an understanding of and observe their respective roles. Assuming, however, in the Minister's favour that the motions are sufficient to ground such a suspicion, the observations I have made in relation to the 2018 and April 2020 motions and the activities undertaken under the authority of those motions lead me to conclude that whether considered

separately or in combination they are not matters from which the Minister may reasonably conclude that it is inappropriate for the Council to continue to act as the governing body of the Town without intervention. Nor does the conduct of the Council present any reason why immediate intervention in the form of suspension is required.

125 Further, in circumstances in which there is no material to suggest that the performance of the functions of the Town have been adversely affected by the conduct of the Council and the only recent motion has been revoked the proposed intervention in the form of the immediate suspension of the Council is so disproportionate to the limited nature of the Council's suspected failure that it is not a form of intervention that a Minister acting reasonably would order.

126 To avoid any misunderstandings about what may be drawn from the reasoning in the preceding paragraphs and, in particular, my observations about the Council's reliance on reg 9 of the LG Regulations, my observations are not to be understood as an implied approval of the Council's reliance on this regulation. Other than to observe that there can be no doubt that the statutory scheme contemplates that the Council and individual councillors should not involve themselves in administrative and operational tasks, I make no observations on the ambit of the operation of reg 9 of the LG Regulations.

Working environment and relationships

127 The factors giving rise to the Minister's suspicion that the Council has failed to ensure the working environment and relationships are such that the Town's CEO and employees are able to carry out their functions without inappropriate involvement by, or interference from, councillors fall into two distinct categories. The first relates to the use of the EMR Register and, while primarily directed to the use by the Mayor of the EMR Register, relates to other councillors as well. The second is concerned solely with the Mayor and the degree to which it is alleged she involves herself in the operational aspects of planning. A further distinction is that the use of the EMR Register involves questions of the operation of a policy adopted by the Council.

The use of the EMR Register

128 Relevantly:

- (a) The EMR Register was established in July 2018 as part of a policy that provided guidance for the orderly dealing with elected member requests.⁶⁰ Among other matters the policy provided for requests to be actioned within 10 working days, and if a request requires a diversion of significant resources (more than one day's research), or where the matter is not included in the Town's current budget, the request is not to be actioned without the CEO's approval.⁶¹ It may be inferred that the policy was adopted by the Council to ensure a good working relationship between the Council and the Town's administration.
- (b) As clarified by the particulars provided by the Minister's solicitors, the concern about the volume of requests for information made through the EMR Register was expressed by one of the Town's 198 full-time equivalent employees though the employee who expressed the concern is a senior employee.⁶²
- (c) In round numbers in the 2018/2019 year there were on average four emails sent to the EMR Register each working day. Of those, two to three were from the Mayor.
- (d) Again in round numbers in the nine months or so between July 2019 and March 2020 there were between one and two emails each working day, and just over half of those were sent by the Mayor.

129 Thus the material before the Minister comprises information about the volume of requests and the view of a senior employee that the system adopted by the policy is being overused by elected members (in particular by the Mayor) with the result that in that employee's view, employees are impeded in performing their functions. There is, however, no material that points to any adverse affect on the performance of the Town's functions as a result of these matters.

130 In my view neither the information before the Minister about the volume of requests made through the EMR Register, nor the senior employee's view provides a rational basis for the suspicion held by the Minister that the Council has failed to ensure the working environment and working relationships are such that employees are able to carry out their functions without inappropriate involvement or interference.

⁶⁰ Squire Patton Boggs' letter dated 1 August 2018, attachment JG4 to the Affidavit of John Giorgi sworn 15 June 2020.

⁶¹ The policy is attachment JG21 to the Affidavit of John Giorgi sworn 25 June 2020.

⁶² Attachment JG31 to the Affidavit of John Giorgi sworn 20 July 2020.

Without detracting from the general import of that conclusion, it is difficult to conceive any basis for concluding that the use of a structured and orderly system for the provision of information by the Town's administration to councillors could be characterised as '*inappropriate* involvement or interference' with the work of the Town's employees.

- 131 It follows that in my view the concerns about the EMR Register do not form a rational basis for the Minister to conclude that it is inappropriate for the Council to continue to act as the governing body of the Town without intervention. It may be that the policy for the provision of dealing with requests from elected members needs to be reviewed but that is not a basis for concluding that it is inappropriate for the Council to continue to act as the Town's governing body.

The Mayor's involvement in planning matters

- 132 The material placed before the Minister and to which reference is made in the Show Cause Notice and in the particulars provided by the Minister's solicitors provide support for the *allegation* that the Mayor has involved herself in planning matters in a manner that is perceived to impede the capacity of planning officers to carry out their functions. I have placed emphasis on the word 'allegation' because whether there is substance in the accounts given about the Mayor's conduct is a matter that has not been determined. Resolving this application for judicial review does not involve a determination of the allegations against the Mayor.

- 133 There is no clear articulation in the materials before the Minister of a connection between the allegations about the Mayor's conduct and the suspicion that there has been some failure by the Council to ensure the working environment. This is a significant because, as formulated in the Show Cause Notice, the factors giving rise to the Minister's suspicion appears, in effect, to attribute to the Council responsibilities it does not have.

134 It is the function of the CEO and not the Council to manage the Town's day to day operations and to be responsible for the employment, management, supervision and direction of the Town's employees. The Council is responsible for the performance of the Town's functions that include the general function of providing for the good government of persons within its district. I accept the good government of the district is likely to be impeded if there is a poor working environment and if there is a poor relationship between the Council and the Town's employees. So analysed it may be said that the working environment and working relationships fall within the Council's overall responsibility for the functions of local government. Council's responsibilities are high level responsibilities exemplified by the Council's responsibilities to ensure an appropriate administrative structure is in place,⁶³ to develop policy and to oversee the discharge of the Town's functions. It is not part of the Council's role to monitor and review the conduct of the Mayor. It has neither the authority nor the resources to do so.

135 The particulars provided by the Minister's solicitors refer in general terms to the Council's oversight and governance responsibilities in respect of the CEO and employees but they do not identify with any specificity in what way it is suspected the Council has failed in these respects or how it may be inferred from the allegations about the Mayor's conduct that there has been such a failure. These are not matters that are 'self-evident' and given the seriousness of the step of suspending the Council it cannot be assumed that the Minister has directed his mind to the question of the manner in which the Council has failed and whether the foreshadowed intervention is appropriate to address those failure.

136 It does not appear from the materials that there has been meaningful engagement with two fundamental questions. The first question is how the conduct that has been identified forms a basis for a suspicion of a failure by the Council as the Town's governing body. The second question is why the (unspecified) suspected failure is sufficient to justify the immediate suspension of the Council when the objective circumstances provide, at their very highest, exiguous support for such a serious step.

⁶³ LG Act s 5.2.

137 I do not consider that the allegations about the Mayor's conduct provide a basis to suspect that the Council has failed to ensure the working environment and working relationships are such that employees are able to carry out their functions without inappropriate involvement or interference. I do not consider that the concerns about the Mayor's conduct form a rational basis for concluding that it is inappropriate for the Council to continue to act as the governing body of the Town without intervention.

138 Further, s 8.15E provides the Minister with the power to order the suspension of a council member or require a council member to undertake remedial action. It is the Mayor's alleged intervention in planning matters with which the Minister is concerned. As explained, there is no material from which it may be inferred that the Mayor's conduct affects the performance of the Council's role as the governing body of the Town. As recorded earlier, I accept the possibility that the conduct of one councillor may give rise to the conclusion that it is inappropriate for a council to continue to act as the governing body of a local government. In the circumstances of this case, however, suspending the Council is a form of intervention that is disproportionate to the Mayor's alleged inappropriate involvement or interference in planning matters. Section 8.15E empowers the Minister to take action in relation to the Mayor if he is satisfied of the matters specified in s 8.15E(2).

139 In the preceding paragraphs, for the reasons stated earlier, I have considered the concerns expressed about the use of the EMR Register and the Mayor's conduct separately. Considering the cumulative effect of the materials relating to these concerns does not, however, lead me to a different conclusion from those I have expressed in the context of my separate consideration of each concern.

Workplace culture and intimidation

140 The factors giving rise to the Minister's suspicion that the Council has failed to ensure the culture at the Town is free from intimidation or employees and undue pressure on employees involve the Mayor and Mr Giorgi in his capacity as CEO, an episode involving an interaction between Councillor Bradley and Mr Giorgi, and possibly another episode involving other elected members.

141 The Council has adopted a policy that proscribes harassment and requires the Town's councillors and employees to ensure compliance with proper and reasonable administrative practices.⁶⁴

142 The observations already made about the Council's limited role in managing working relationships applies with greater force to the Council's suspected failings in respect of workplace culture and undue pressure. These are matters that fall squarely within the CEO's statutory functions. Again, the difficulty is that the materials placed before the Minister do not identify how it is suspected that the Council has failed to ensure an outcome for which, in an operational sense, it is not responsible and where there is no express identification of a specific suspected failure of governance or oversight and nor is it possible to draw an inference of such a failure from the materials provided.

143 The material before the Minister is not sufficient to ground a suspicion that there has been a failure by the Council to conduct itself in a way that ensures the workplace is free from intimidation and undue pressure on employees and further, the allegations recorded in the materials about the conduct of the Mayor and Mr Giorgi are not a sufficient foundation for the conclusion that it is inappropriate for the Council to continue to act as the Town's governing body.

144 Further, given that the substantive concerns arise out of the alleged conduct of the Mayor and Mr Giorgi, with no identified connection to any failure by the Council in its capacity as the governing body of the Town the suspension of the Council is a disproportionate and thus unreasonable exercise of power.

Factors in combination

145 In the preceding paragraphs I have considered each factor identified in the Show Cause Notice separately. It was the cumulative effect of the three factors that led the Minister to conclude that it was inappropriate for the Council to continue to act without intervention. I have recorded my views that none of the factors considered individually are sufficient to sustain the Minister's conclusion. When I consider the factors cumulatively I reach the same conclusion that is that, taken together, they are not capable of sustaining the Minister's conclusion that it is inappropriate for the Council to continue to act without intervention.

⁶⁴ Code of Conduct for Council Members, Committee Members and Employees cll 10.3, 10.8 - attachment JG22 to the affidavit of John Giorgi sworn 25 June 2020.

Conclusions

146 It follows from the observations I have made that I am satisfied
that the Minister's discretion to make an order under s 8.15C(2) has not
been enlivened because the jurisdictional fact upon which the existence
of the discretion depends is not capable of being established on the
basis of the materials placed before the Minister. The consequence of
this conclusion is that the Town has made out grounds three and four.

147 Separately I have reached the conclusion that the exercise of the
power under s 8.15C(2) to suspend the Council is a disproportionate
response to the factors identified by the Minister in the Show Cause
Notice with the consequence that the foreshadowed decision would be
legally unreasonable.

148 In the light of the conclusions I have reached in relation to the
Town's other grounds, it is unnecessary for me to deal with the
improper purpose ground.

149 The Town is entitled to the substantive relief it seeks and I will
hear from the Town and the intervener as to the orders to be made to
give effect to these reasons.