IN AN INTERNAL ARBITRATION PROCESS FOR WHITTLESEA CITY COUNCIL UNDER SECTION 143 OF THE *LOCAL GOVERNMENT ACT* 2020

LGA IAP REF:	IAP 2025-2, IAP 2025-4, IAP 2025-5 and IAP 2025-7
APPLICANT (IN IAP 2025-2):	Whittlesea City Council under sub-s 143(2)(a) – Cr Blair Colwell (representative)
APPLICANT (IN IAP 2025-4):	Cr Lawrie Cox under sub-s 143(2)(b)
APPLICANT (IN IAP 2025-5):	Cr Blair Colwell under sub-s 143(2)(b)
APPLICANT (IN IAP 2025-7):	Cr David Lenberg under sub-s 143(2)(b)
RESPONDENT:	Cr Aidan McLindon
BEFORE:	Arbiter J Silver
HEARING DATE:	24 March 2025 at South Morang
ARBITATION SUSPENDED:	16 April 2025 to 16 October 2025 under sub-s 37(2)(b) of the *Local Government Act* 2020
REASONS DATE:	8 December 2025

FINDINGS:

Liability

1. Application IAP 2025-7 is dismissed.

2. In Application IAP 2025-2, I find as follows:

   (a) Allegation 2 is proven.

   (b) Allegations 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are dismissed.

3. In Application IAP 2025-4 and IAP 2025-5, I find as follows:

   (a) Allegation A is proven.

   (b) Allegation B is dismissed.

4. Under sub-section 147(1) of the *Local Government Act* 2020, I find that Cr Aidan McLindon has engaged in misconduct.

Sanctions

5. Under sub-s 147(2)(a) of the *Local Government Act* 2020, at the next Council Meeting after these reasons are tabled, I direct Cr McLindon to make the following apology, which shall be made in the open component of the meeting:

> On Sky News on 26 January 2025, I made a statement that Councillors in Victoria have "*just got enough time to read what's put in front of them*" and to rubber-stamp it. I accept that this comment would be understood as reflecting on how Whittlesea City Council operates. I did not intend to suggest that this was my personal experience as a Whittlesea Councillor, or that Council staff were not giving me enough time to consider Council papers. I wish to apologise to Council staff for my remarks, and hope that apology will be accepted.

6. Under sub-s 147(2)(e) of the *Local Government Act* 2020, I direct Cr McLindon to undertake a course of training and counselling to be delivered by a suitably qualified trainer (external to Whittlesea City Council), who shall be nominated by the Mayor (now Cr Cox). The course shall involve 5 hours of training across 4-5 in-person, one-on-one sessions, and shall be designed to assist Cr McLindon develop practical strategies to improve diary and time management. The training shall conclude no later than April 2026, and the trainer shall provide a written report to the Mayor detailing areas of progress and areas for improvement, and recommend any further assistance the trainer considers would assist Cr McLindon.

7. Under sub-s 148(2)(g) of the *Local Government Act* 2020, I direct that Cr McLindon is not eligible to hold either the office of Mayor or Deputy Mayor for the period ending 12 months from the provision of a copy of these reasons to Council under sub-s 147(3) of the Act.

STATEMENT OF REASONS (LIABILITY AND SANCTION)

Overview

1. On 4 February 2025, Whittlesea City Council resolved to apply for internal arbitration against its then-Mayor, Cr Aiden McLindon.

2. An application was finalised the next day, as provided for under sub-s 143(2)(a) of the *Local Government Act* 2020 ('**the Act**'). The application was signed by all Councillors, other than Cr McLindon.

3. On 18 February 2025, the Principal Councillor Conduct Registrar appointed me to hear that application, by-then numbered IAP 2025-2.

4. On 19 February 2025, additional applications were made against Cr McLindon by Cr Lawrie Cox (IAP 2025-4) and Cr Blair Colwell (IAP 2025-5) (also Council's representative in IAP 2025-2), and on 17 March 2025 (a week before the hearing) by Cr David Lenberg (IAP 2025-7).

5. Each additional application was referred to me by the Principal Councillor Conduct Registrar under sub-s 144(1B)(c) of the Act, on the basis that the matter the subject of the application was being dealt with by an arbiter already appointed.

6. Following my indication that, if Cr Lenberg wished to press his application, I would need to adjourn the other applications, he withdrew IAP 2025-7 on 19 March 2025, which I will dismiss as a matter of formality.

7. In the month or so leading up to the hearing of the applications, I issued several sets of written directions (on 21 February, 25 February, 28 February, 2 March, 7 March, 11 March, 14 March, and 20 March 2025, some on the papers, some following hearings), including to require the applicants in IAP 2025-2 to order their application into a

responsive spreadsheet format called a "Scott Schedule,[1] as well as extending time for compliance with some of those directions.

8. As lodged, the application in IAP 2025-2 comprised 104 pages, being the 25-page application form, and 79 pages of exhibits: although I do not characterise the application as a "document dump", more care could have been taken in its preparation. By 5 March 2025, however, these issues had been overcome, and the hearing date of 24 March 2025 had been set.

9. On 14 March 2025, I also heard an application by Cr McLindon to be represented, which I refused for the reasons given orally at the time. In that application (which was adjourned from 12 March 2025, because he failed to appear), Cr McLindon was represented by a solicitor. A version of those reasons, edited for clarity and style, forms part of these reasons as **Appendix A**.

10. I heard the applications at the Whittlesea City Council offices at South Morang on 24 March 2025. Crs McLindon, Colwell and Cox attended. The only witness to attend was Cr Martin Taylor in relation to IAP 2024-5 and IAP-2025. I draw no inference from the absence of other foreshadowed witnesses who did not attend.

11. Following the hearing, I progressed my reasons as substantially as I could. However, the contracted transcript provider (who I am informed is also on the approved list of transcript providers for VCAT) failed to issue their transcript for over a fortnight after the hearing, despite persistent follow-up by the Councillor Conduct Officer. Once that occurred, the reasons were a matter of days from being finalised.

12. On 16 April 2025, however, the Governor in Council suspended Cr McLindon, and under sub-s 37(2)(b) of the Act, the applications against him were also suspended.

[1] A "Scott Schedule" is often used in construction litigation (in which I practice as a barrister) to present allegations and responses in an easy to read manner.

13. Despite the 6-month interlude, my core reasoning and intended conclusions are unchanged (other than in relation to sanction), although the additional time allowed me to refine how I express them. In addition, I considered Cr McLindon's prior suspension in deciding the sanctions I am directing, for which I gave the parties a further opportunity to be heard on resumption.

14. Also in the interlude, some matters concerning the internal arbitration applications were considered by the Whittlesea Commission of Inquiry (at which, despite being part-heard in the matter, I was required to give evidence on matters surrounding the internal arbitration processes, but not the processes themselves), whose report was tabled in Parliament on 14 October 2025.

15. Having skimmed the report (in the true sense of "skimmed"), nothing said by the Commission caused me to revisit my findings, as the Commissioners took some care to avoid reaching conclusions on the subject matter of these applications.

16. That was appropriate, and in turn, I have no reason to comment on the Commission's findings (other than to note some reported evidence critical of the Councillor Conduct Framework, to which I respond briefly). However, I do note some of the Commission's findings which were consistent with observations that I was also intending to make concerning Whittlesea and its Councillors.

17. Despite the apparent breadth of concern about Cr McLindon, the applications before me were limited to:

    (a) a select few statements made by Cr McLindon while he was both the Mayor of Whittlesea and a candidate for the by-election for the State Division of Werribee, on television, radio, print media, and social media (at which time he was on a so-called "leave of absence", an issue I will return to); and

    (b) a limited amount of conduct when he "returned" to duties, but in particular, a statement made to his fellow Councillors in a meeting ahead of the unscheduled Council Meeting where it was resolved to refer him to arbitration.

Readers of these reasons and the Commission's report might find the limitations of the applications I heard surprising, given the emphasis on workplace safety in complaints before the Commission: given the breadth of the Model Code, I found it strange these matters were not raised with me, but it is not for me to ponder the merits of the applicants' approach.

18. To avoid doubt, the scope of an internal arbitration process is limited by the allegations contained in the application: it is not an at-large inquiry into the behaviour of a respondent in general.

19. I had inferred, and the Commission's report tends to conclude, that the goal of the applications was to effect the removal of Cr McLindon as Mayor of Whittlesea (it is fairly clear for reasons *other* than those included in the applications, which as noted, were not before me, but which the Commission did consider), internal arbitration being one of two means of removing a Mayor appointed for a term of one year (rather than two[2]): the other means is when the Governor in Council stands down a Councillor on the Minister's recommendation, following a report by the Chief Municipal Inspector or a Municipal Monitor.[3]

20. Although the alleged misconduct was mostly not proven, what I did find would have supported removing Cr McLindon as Mayor, had he not already been removed.

21. To avoid doubt, these reasons are not an assessment of:
    - if Cr McLindon had a "fair go", or was afforded natural justice in relation to steps taken against him by the CEO under section 46 of the Act, or by the Minister under section 229A (as I understand it from the Commission's report, Cr McLindon has sought judicial review of his suspension before the Supreme Court of Victoria);
    - whether it was "right" for Cr McLindon to run as a candidate in the Werribee by-election;

[2] *Local Government Act* 2020 s 23
[3] *Local Government Act* 2020 ss 226 and 228

- whether Cr McLindon performed as Mayor or a Councillor to a satisfactory standard since his election in November 2024 (it appears the Commission of Inquiry has assessed that issue);
- any of the findings of the Whittlesea Commission of Inquiry in relation to the events leading up to the internal arbitration processes,

rather, it is simply a statement of reasons which explains which allegations against the respondent were proven based on the evidence before me, and the consequences that follow for what was proven.

22. Cr McLindon has (or at least had, at the time of the hearing) some strong opinions on the role of a Councillor, what the responsibilities of Councillors should be within a Council organisation, and the resources needed to be an effective Councillor.[4] I have no doubt he is not alone in holding those views. And although it appeared to me, when hearing from him, that Cr McLindon's opinions on these matters were more developed than his understanding of the legal framework in which Councils operate, that is not unheard of for new Victorian Councillors: new Councillors do not always know their role at the outset (section 32 of the Act recognises this), and need time to develop.

23. In the initial months of a Council term, that should not be too plentiful a source of criticism, although perhaps in the case of a Mayor it might be.

24. With all due respect to the applicants, having informed myself in a manner I see fit[5] (in this case, a simple Google search to see what came up for Cr McLindon, which I have not considered in making this determination), and I mean no disrespect to Cr McLindon, his behaviour as complained about was consistent with his reported, *alleged* political history of courting controversy.[6] When he was chosen as Mayor, Cr McLindon's reported political history was easily discoverable. Having skimmed the Commission's report, it appears the Commissioners reached a similar conclusion.

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[4] He also expressed a view that the 2020 Act had the effect of reducing local democracy, compared to the former 1989 Act. I indicated to him the opposite was true, when one considers the expanded role of the Mayor in sections 18 and 19 of the 2020 Act (compared to former section 73AA of the 1989 Act).
[5] *Local Government (Governance and Integrity) Regulations* 2020, sub-s reg 11(3)(b)
[6] I italicise *alleged* as I have simply noted that online material, without giving it any weight, or letting those reports influence my reasons. I am, however, content to note that members of the public and Councillors might have seen that same content, rather easily, when looking to find out more about Cr McLindon.

25. Although I accept that the Councillors were embarrassed, and considered his removal as Mayor urgent, as I note at the conclusion of these reasons, the reported criticisms from witnesses noted by the Commission about the Councillor Conduct Framework, and the suggestion that natural justice requirements should be watered down to "speed up" the process, are highly inappropriate, deflecting from the initial failure by Council to consider if Cr McLindon was a suitable person to fulfil the duties of Mayor.

26. That stated, but-for the Minister's intervention, I would have removed Cr McLindon as Mayor, and have included my reasons for why I would have done so, and why I have directed that he in ineligible to hold that role for the next 12 months (given section 229B of the Act, the legal effect of this sanction is probably superfluous, but as I will explain, it is still important to order it).

27. I would encourage the parties (and perhaps some non-parties) to try and reset their relationship moving forward. Given this application was made early in the Council term, there is much time remaining for the disagreements apparent in these applications to fester.

Issues of law impacting on the application

A. When is a Councillor performing the role of a Councillor?

28. The consideration of these applications requires me to consider two important issues of law, which go to my jurisdiction.

29. The Act does not apply the Model Code to Councillors at all times: that is, the Act does not state that "a person who is a Councillor" must follow the Model Code, rather, it states that a Councillor must act in accordance with the Model Code in '*performing the role of a Councillor*.'[7]

30. For me to find that Cr McLindon engaged in misconduct, the allegations against him must involve conduct occurring while he was performing the "role of a Councillor": if

[7] *Local Government Act* 2020, sub-s 28(2)(e)

I am not satisfied that the conduct complained of falls within the role of a Councillor, the allegations fail, as the Model Code does not apply.

31. Until 26 October 2024, section 28 of the Act provided:

28 Role of a Councillor

(1) The role of every Councillor is—
   (a) to participate in the decision making of the Council; and
   (b) to represent the interests of the municipal community in that decision making; and
   (c) to contribute to the strategic direction of the Council through the development and review of key strategic documents of the Council, including the Council Plan.

(2) In performing the role of a Councillor, a Councillor must—
   (a) consider the diversity of interests and needs of the municipal community; and
   (b) support the role of the Council; and
   (c) acknowledge and support the role of the Mayor; and
   (d) act lawfully and in accordance with the oath or affirmation of office; and
   (e) act in accordance with the standards of conduct; and
   (f) comply with Council procedures required for good governance.

(3) The role of a Councillor does not include the performance of any responsibilities or functions of the Chief Executive Officer.

In 2024, sub-s 28(1) was amended to replace the word 'is' with the underlined words '*The role of every Councillor in representing their municipal community includes the following*', before continuing as before.

32. This amendment to section 28 alters the text of the Act to be more explicit, so that the reading of its prior form that was enunciated by Gray J in *Lew v Blacher* [2023] VSC 604 (as upheld by the Court of Appeal in *Lew v Blacher* [2024] VSCA 304) is clearer on the face of the legislation.

33. At a high level, Gray J held (and the Court of Appeal did not disagree) that sub-ss 28(1)-(c) (prior to the introduction of the word 'including' to section 28) did not

exhaustively define the 'role of a Councillor', rather expressed the '*irreducible minimum*' of the role.

34. However, that is not all there was to Gray J's judgment: there are other elements I must apply to ensure these applications are determined according to law.

35. In determining if a Councillor is '*performing the role of a Councillor*', Gray J stated that it is for the arbiter in each application to assess the evidence and determine that question as a question of fact, after the arbiter has considered:[8]

> the scope of the functions of the Councillor in the context of the relevant Council, and the circumstances as a whole. Provided the arbiter does not make a material error in understanding this, it is a matter for the arbiter to determine whether that test is met on the facts of the relevant case.

The *Lew* decision concerned a Councillor in the City of Stonnington who engaged in a social media discussion with a member of the public, in relation to a decision before Council. His Honour held that 'performing the role of a Councillor' was '*capable of applying to behaviour of a Councillor in communicating with members of the public about matters for decision before the Council* [Arbiter's underline].'[9]

36. I underline the word 'capable' because his Honour subsequently noted that '*engagement with the community is a permissible activity that may be part of the Councillors' role, depending on the approach of the Council concerned*,'[10] and that '*community engagement for the purposes of decision making may, but not must, be part of a Councillor's role envisaged by the Act*.'[11] His Honour suggests that '*the extent and manner of such community engagement is a matter that might vary between Councils and even between Councillors, depending on such matters as policies adopted by the Council, delegations and other forms of authorisation*,'[12] a conclusion which he reached without considering the former standards of conduct, as

[8] *Lew v Blacher* [2023] VSC 604, [132] (Gray J)
[9] Ibid. [8]
[10] Ibid. [107]
[11] Ibid. [113]
[12] Ibid. [115]

Regulations cannot be used to interpret any part of their enabling statute.[13] His Honour also noted the various '*key strategic documents*' a Council must develop under Part 4 as suggesting how this might work.[14]

37. What I conclude from *Lew* is that the role of a Councillor depends on the nature of the activities undertaken by a particular Council: in other words, the extent to which the Act applies depends on what there actually is for the Act to apply to (namely, the actual activities of the Council determine how the Act applies).

38. The Court's reasoning rested in part on former section 139 of the Act, in which each Council could adopt its own Code of Conduct (which is no longer the case). Section 139 now provides for all Councillors to follow the same Model Code.

39. Most provisions of the former Codes of Conduct were not enforceable in an internal arbitration (other than the standards of conduct, now found in the Model Code), and would not ordinarily have been considered by an arbiter. Gray J observed, however, that the arbiter had considered the Stonnington Code of Conduct in assessing the role of Stonnington Councillors (that is, as evidence of their activities), including provisions stating that Councillors were responsible for '*engaging with residents and groups*' and providing '*a bridge between the community and the Council*'.

40. The Court held that having considered the Stonnington Code, it was open for the arbiter to conclude with reference to it that community engagement on matters for a decision was part of the role of a Stonnington Councillor.

41. I do not read this as suggesting that his Honour considered that the Stonnington Code of Conduct was relevant to the interpretation of section 28 (and indeed, his Honour suggested that such an approach would be incorrect).[15] Rather, his Honour noted the Stonnington Code was practical evidence of the role of a Stonnington Councillor, reflecting his Honour's observation (also extracted earlier) that '*the extent and manner of such community engagement is a matter that might vary between Councils and*

[13] Ibid. [116]
[14] Ibid. [127]
[15] Ibid. [116]

even between Councillors, depending on such matters as policies adopted by the Council, delegations and other forms of authorisation.'[16]

42. The effect of *Lew* is that, if a Councillor is engaged in 'community engagement' (being community engagement in connection with formal decision making), they were bound by the former standards of conduct (now the Model Code): the extent to which an individual Council might regulate community engagement *beyond the standards of conduct*, such as through its community engagement policy, was not a matter his Honour had to decide.[17]

43. These reasons were not disturbed on appeal.

44. Although not expressed in lay terms, the practical effect of Gray J's judgment is that the role of a Councillor in section 28 will exceed the '*irreducible minimum*' in sub-s 28(1)[18] depending on the specific activities of the Council concerned, provided of course that those activities are within the role and power of the Council as defined in the Act and in other legislation.[19] I note somewhat happily that while expressed in more legalistic terms, this is consistent with my past approach to the issue.[20]

45. How do these principles impact these applications?

46. Having observed Councillor behaviour in the public realm over a lengthy period of time, my experience is that many Councillors participate in public discussion in the public domain (ie. outside the Council chamber), be it in regards to their own municipality, the local government sector more generally, or matters completely unrelated to the local government sector.

47. I do not think it is correct, however, to say that any person who is a Councillor performs the role of a Councillor by making public statements in the public domain,

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[16] Ibid. [115]
[17] Ibid. [133]
[18] Ibid. [93]
[19] Consider *Local Government Act* 2020 ss 8 and 9
[20] Newton & Laurence (IAP 2022-5; 2022-6), paras 23-27; Smith and Others & Martin (IAP 2023-3), paras 19-22

regardless of the topic: that is, the role of a Councillor is not, as a matter of law, "whatever the Councillor chooses to make it" (although that would make my task substantially easier).

48. I would, however, accept that the role of a Councillor usually includes public discussion about that Councillor's municipality, and issues in the local government sector generally in which that Councillor's municipality has an interest (for example, the appropriate manner of legislating local government). If the Councillor were not a Councillor, chances are the public would have no interest in their opinion, nor would there be much third party interest in publishing those opinions.

49. The evidence before me was that Cr McLindon was campaigning for the Werribee by-election, while also an elected Councillor (and Mayor) in Whittlesea, and that mention of his Whittlesea role was made often in the by-election campaign. There is no geographic overlap between the two areas.

50. Although the role of a Councillor depends on the activities of the relevant Council, it usually does not include running for office at another level of government.

51. This is not to say Councils do not get involved in elections for other levels of government: to the contrary, Councils often use Federal and state elections (and sometimes by-elections in their near geographic areas) to advocate for further funding for local projects, and to urge candidates for other levels of government to adopt policy positions which are supportive of the Council's agenda.

52. While I am not aware of such an example (and while perhaps not prohibited, there would be great legal difficulty in doing so), a Council could perhaps "endorse" the candidacy of a Councillor for an election for another level of government – by notice of motion and against officer advice – in which case that Councillor would be 'performing the role of a Councillor.' However, that would be a matter of evidence in the given case.

53. If a Councillor is running as a candidate for another level of government, use of their position, or Council resources, for or in relation to campaign activities would also fall

within their role: for example, if a Councillor mentions their campaign platform in a speech to the Council chamber, or sends a campaign-related email from their Council email address. This is usually avoided by the candidate taking leave in a campaign, although that "leave" is not recognised by the Act (which I will address).

54. Although a candidate should not use the title of "Councillor" or "Mayor" while campaigning for another level of government, simply using their title,[21] or discussing their work on a Council in their campaign (ie. their ongoing or future responsibilities on their Council), does not mean, without more, that the person is performing the role of a Councillor. Misuse of position requires more (for example, a Councillor who promises to approve a planning decision before Council, in exchange for a promised donation to the Councillor's campaign).

55. Further, a candidate discussing a matter where their Council has an "official" position, or their role in the Council reaching that position, is not performing the role of a Councillor (ie. they can agree, disagree, or laud their involvement in the Council's past achievements, without performing the role).

56. I explain how these considerations apply to Cr McLindon in my assessment of each of the allegations against him.

57. A further complication is that Cr McLindon, at least for some of the time concerned, was on what he and the Council called a "leave of absence" (although as the evidence showed, he also stated during the relevant time period that he was continuing to attend to some Council tasks, which included attending a Council meeting on 4 February 2025).

58. In the local government sector, "leave of absence" is used to mean different things, not all of which reflect the legal meaning of the term.

[21] Having looked into the issue, I am not sure a person gains the title of "Councillor" or "Mayor" under any particular law, as opposed to it being a Victorian convention to address them by those titles.

59. Although the Act mentions that Councillors might take a "leave of absence" for the purposes of their induction training and continuing professional development,[22] what is meant by that term is not defined (for example, is it a leave of absence as approved by a Council meeting, or on advice to the CEO, or something else).

60. While the Act also states, in sub-s 35(4), that a Council must '*grant any reasonable request for leave*' if a Councillor is to be absent from Council meetings for a period of 4 consecutive months, there is nothing to indicate that the two concepts are one and the same. To the contrary, training and development leave, and extended leave, are quite different matters.

61. Other than those two instances, there are no other occasions when a Councillor can take leave under the Act (which is not to be confused with their ability to apologise for meetings, which most if not all Governance Rules permit), for example, because of medical incapacity,[23] or because they wish to campaign for election to a different level of government.

62. This means that a Councillor cannot "step down, with the right to step back up": unless they resign, **they are still a Councillor for all intents and purposes**.

63. While I am aware that many (if not most) local councils have policies that permit or require Councillors to take "leave", that "leave" is not leave within the meaning of the Act, and is irrelevant when seeking to determine if a person is fulfilling the "role of a Councillor". In other words, Councillors do not have an option to "opt out" from performing their role.

B. The Model Councillor Code of Conduct does not adopt Council documents made beyond the power

64. In IAP 2025-2, it was alleged that Cr McLindon had breached clauses 3(b) and 3(b)(iii) of the Model Code, which provide as follows:

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[22] *Local Government Act* 2020 sub-ss 32(4A) and 33A(6)
[23] While perhaps inapposite, even the US Constitution deals with this scenario in its Twenty-Fifth amendment when a President is incapacitated.

3. Good governance

A Councillor must comply with the following Council policies and procedures required for delivering good governance for the benefit and wellbeing of the municipal community—

(b) the Council's Governance Rules developed, adopted and kept in force by the Council under section 60 of the Act, including in relation to—

(iii) the Council's election period policy included in the Council's Governance Rules under section 69 of the Act, including in ensuring that Council resources are not used in a way that is intended to influence, or is likely to influence, voting at a general election or by-election;

I note that where clause 3 uses the terms 'general election' and 'by-election', what is meant are Council elections (not elections for other levels of government).[24]

65. The applications referred me to several provisions of Whittlesea's Election Period Policy, as adopted on 3 September 2024:

3. Application of Resources

3.1.1 The use of Council resources, including, but not limited to, vehicles, staff, services, property, equipment, stationery, websites, social media and hospitality for any Council, Federal or State election campaign purposes is prohibited.

Federal and State Government Elections

5.1.1 Councillor will ensure there is a demonstrable distinction between their obligations to Council and their personal interests as a candidate, or member of a political party, in an election period prior to a Federal or State election.

9.1 Application of Resources

[24] *Local Government Act* 2020 s 3(3)

9.1.2 Any Councillor misusing their position to gain or attempt to gain, directly or indirectly, an advantage for themselves or any other person or to cause or attempt to cause detriment to Council or another person may breach section 76D[25] of the Act. Circumstances involving the misuse of a position include using public funds or resources in a manner that is improper or unauthorised may be prosecuted.

10.3 Councillors

Councillors will not use their position as elected representatives or their access to Council Officers and other Council resources to gain media attention in support of an election campaign.

66. None of these provisions are within my jurisdiction, which I explain below.

67. Under section 60 of the Act, a Council '*must develop, adopt, and keep in force*' Governance Rules with respect to certain matters.

68. Close attention to the words of section 60 illustrates that it does not actually give Councils a statutory power (as opposed, for example, to the power of the Principal Councillor Conduct Registrar to appoint a member of the Arbiter Panel List to hear and determine an application for arbitration). Rather, it requires Council to do a certain thing (ie. to develop "Governance Rules", as defined).

69. That thing, or things, when meeting the description of what the Act requires a Council to do, attracts legal significance under the Model Code. Things done outside what the Act requires do not. This is significant.

70. Under section 69 of the Act, a Council must include an 'election period policy' in its Governance Rules. The section further provides that:

(2) An election period policy must prohibit any Council decision during the election period for a general election that—

[25] This is an outdated reference in the policy to the 1989 Act (the same text is found in section 123 of the 2020 Act).

(a) relates to the appointment or remuneration of the Chief Executive Officer but not to the appointment or remuneration of an Acting Chief Executive Officer; or

(b) commits the Council to expenditure exceeding one per cent of the Council's income from general rates, municipal charges and service rates and charges in the preceding financial year; or

(c) the Council considers could be reasonably deferred until the next Council is in place; or

(d) the Council considers should not be made during an election period.

(3) An election period policy must prohibit any Council decision during the election period for a general election or a by-election that would enable the use of Council's resources in a way that is intended to influence, or is likely to influence, voting at the election.

71. Whether an election period policy must be limited to the matters in sub-ss 69(2) and (3), or only to the items that Gray J called the '*irreducible minimum*' which a policy might contain, is not something I need to decide.

72. Nor am I required to decide the legal effect *more generally* (if any) of an election period policy to the extent it applies outside the 'election period', as defined in section 3 of the Act (which as mentioned, refers to the election period for the Council, not elections in Australia or Victoria more generally).[26]

73. However, I can and should determine when a provision of an election period policy is within my jurisdiction: in my view, provisions of policies that go beyond what section 69 requires – both in terms of the time period of their application, and the matters they purport to regulate – *are not picked up by the Model Code*, because as explained, Councils adopting an election period policy do not exercise statutory power, rather they are complying with a requirement imposed by Parliament to do a particular thing within specific parameters. While not a cardinal sin to exceed those parameters, doing so does not extend the application of the Model Code.

[26] Section 3 defines '*election period*' as the period which starts at the time nominations close on '*nomination day*', and ends 6 p.m. on '*election day*'.

74. The text of clause 3(b)(iii) of the Model Code states that a Councillor must comply with, *inter alia*, the Council's election period policy '**included in the Council's Governance Rules under section 69 of the Act**.'

75. For the purposes of the Model Code, provisions of an election period policy are not '*included in the Council's Governance Rules under section 69 of the Act*,' to the extent they purport to operate outside an election period, in which case, those provisions are not part of a policy 'included' in the Governance Rules under section 69.

76. Because an election period policy is part of a Council's Governance Rules, I also considered if any of the provisions of the election period policy relied on by the applicants could be considered "non-election period matters" that the Governance Rules could include under sub-ss 60(1) and (2) of the Act.

77. I concluded they were not.

78. The matters that in-ss 60(1) and 60(2) broadly concern meeting procedures and decision-making processes, although the regulations can prescribe 'other matters' that the Governance Rules can cover. In other words, section 60 is not a 'general law-making' power for any matter a Council wishes to regulate (indeed, as I have explained, it is not a power at all, but an obligation Councils must fulfil).

79. At present, neither the *Local Government (Governance and Integrity) Regulations* 2020 or any other local government regulations seem to allow any additional matters to be included in a Council's Governance Rules or election period policy (for example, Councillor behaviour in relation to state or federal elections, which is what the provisions relied upon by the applicant deal with).

80. Clause 3(b) of the Model Code states that a Councillor must comply with a Council's Government Rules as '**developed, adopted and kept in force by the Council under section 60 of the Act**.'

81. Provisions in any Governance Rules which are outside what section 60 requires are not Governance Rules '*developed, adopted, or kept in force*' in accordance with section 60. If section 60 does not require something, the Model Code gives it no legal significance.

82. An arbiter must always be mindful that our jurisdiction is not defined by individual Councils.

83. Clauses 2 and 3 of the Model Code require Councillors to comply with the documents that each Council must adopt under the Act (for example, the Governance Rules). But in an arbitration, document headings (eg. "Governance Rules") are not conclusive evidence of their legal effect, rather, the arbiter must determine if the parts of the document relied upon receive legal effect under the Act.

84. The alternative would be to conduct each internal arbitration, where reliance is placed on Council documents referred to in the Model Code, without any consideration of the arbiter's jurisdiction. A Councillor having proper grounds to contest jurisdiction would have no option but, after a finding of misconduct (which would be left to stand for some time), to appeal the affected decision (at great cost and stress) to the Supreme Court of Victoria. It is fortunate that is not the situation.

85. Although I had considered doing so, I have not included any "alternate findings" in these reasons of what I would have found, if I had concluded differently with respect to the Whittlesea Election Period Policy. Although alternate findings can sometimes be appropriate, I do not think these applications present such an occasion.

<u>Determination of the Allegations in IAP 2025-2</u>

86. In the various allegations, the applicants relied on many provisions of Model Councillor Code of Conduct.

87. Other than clause 3 (which does not arise for consideration, given what I have said about the Whittlesea Election Period Policy), those are:

1. Performing the role of a Councillor

A Councillor must do everything reasonably necessary to ensure that they perform the role of a Councillor effectively and responsibly, including by—

(a) representing the interests of the municipal community by considering and being responsive to the diversity of interests and needs of the municipal community

(e) acknowledging and supporting the Mayor in the performance of the role of the Mayor, including by—

(ii) refraining from making public comment, including to the media, that could reasonably be perceived to be an official comment on behalf of the Council where the Councillor has not been authorised by the Mayor to make such a comment.

2. Behaviours

(1) A Councillor must treat others, including other Councillors, members of Council staff and members of the public, with dignity, fairness, objectivity, courtesy and respect, including by—

(a) not engaging in demeaning, abusive, obscene or threatening behaviour, including where the behaviour is of a sexual nature; and

(b) not engaging in behaviour that intentionally causes or perpetuates stigma, stereotyping, prejudice or aggression against a person or class of persons; and

(c) not engaging in discrimination or vilification; and

(d) supporting the Council, when applying the Council's community engagement policy, to develop respectful relationships and partnerships with Traditional Owners, Aboriginal community controlled organisations and the Aboriginal community; and

(e) supporting the Council in fulfilling its obligation under the Act or any other Act (including the **Gender Equality Act 2020**) to achieve and promote gender equality).

4. Integrity

(1) A Councillor must act with integrity, exercise reasonable care and diligence and take reasonable steps to avoid any action which may diminish the public's trust and confidence in the integrity of local government, including by—

(a) ensuring that their behaviour does not bring discredit upon the Council; and

(b) not deliberately misleading the Council or the public about any matter related to the performance of their public duties

88. In addition, Cr McLindon relied on clause 5 of the Model Code, which states:

> **5. The Model Councillor Code of Conduct does not limit robust public debate**
> Nothing in the Model Councillor Code of Conduct is intended to limit, restrict or detract from robust public debate of issues in a democracy.

89. I have previously considered the concept of 'robust public debate', which is framed as it was in the former standards of conduct, in previous internal arbitration applications,[27] including its coverage of what might be described (to use Cr Cox's terminology) as "tone deaf" or politically incorrect language.

Allegations 1-4

90. Allegations 1-4 concerned several comments Cr McLindon made in a segment he participated in on the Sky News program "Outsiders" on 26 January 2025.

91. Each allegation relates to a particular phrase or statement made by Cr McLindon in the course of the segment, and different provisions of the Model Code were relied on for each (as well as parts of the Whittlesea Election Period Policy outside my jurisdiction).

92. Although I have considered the full interview (the topic of which was Australia Day being on 26 January, and what the program participants evidently consider the erosion of that date's significance by the political left), for ease of reference, the below table contains the particular statements of concern (<u>underlining</u> showing those parts relied on by the applicants, with allegation 2 coming before allegation 1 because the words involved occurred in sequence first), and the Model Code provisions relied on:

[27] Newton & Laurence (IAP 2022-5; 2022-6), paras 28-31; Holland and Ors & Bissinger (IAP 2023-19 and IAP 2023-25), paras 53 to 59.

Allegation	Statement	Model Code
2	**Rita Panahi**: Well, tell me about the position Councils are in Victoria. Surely if your constituents, you as Mayor, want to celebrate Australia Day, you can. Or have you got some restrictions on what you can do in Victoria? **Cr McLindon**: Look, there's a bureaucratic machine down here. And Dan Andrews actually amended the Local Government Act of 2020, which effectively has taken the representation from the local representatives away from them and shifted the power base into the bureaucracy. And unfortunately, we have 79 councils here that effectively become pseudo Labor Party branches. So it's a false democracy. They put the councillors on $38,000 a year, so they have to work full time. They've only just got enough time to read what's put in front of them, on a Tuesday night, full Council and rubber stamp it. That's not good enough. It needs an overhaul… [**continues as Allegation 1**]	4(1)(a), 4(1)(b)
1	It needs an overhaul. And that's why Australia Day is being played out, divided across the 79 councils. In Whittlesea particularly, the administration unfortunately three years ago decided that they would have no celebrations and shift the citizenship ceremony. So that was pre my time, I'm trying to make some moves internally to change that.	1(e)(ii)
3	**Cr McLindon**: I woke up this morning to see the Premier, Jacinta Allen, have her post this	2(1)(a), 2(1)(b), 2(1)(c), 2(1)(e)

	morning for Australia Day was ‘make sure you remember to swim between the flags’. **Rowan Dean**: Which flags would they be? Would that be the Aboriginal and Torres Strait Islander flags perhaps? **Rita Panahi**: No. it’s Victoria, with the Trans flags. **Cr McLindon**: No, this would be the trans flag on one side. And a gender neutral flag on the other. That's the only flags that the Labor Party want to talk about these days. I'm a big believer in let's bring people together, let's not divide them. And that's why I'll put this proposal to say, let's have a minute's silence at 11:59 to 12pm.	
4	**Cr McLindon**: There's nothing lost in reflecting on the past, embracing our present, to get along with it and celebrate into the future. I see it as a compromise to say, guys, the date is in Albo's court. He hasn't changed it. It's a federal government date. It's not when Captain Cook landed here. So there's so much, you know, cloud around this issue. The reality is we are one people. We need to get together and say, you know what? Regardless of what's happened in the past, we respect that, you know, that that's happened. It wasn't me. Don't put the guilt onto my children. And in the classrooms, try and transfer that. Stop dividing this issue. We are one people. I was born in Darwin. I visited all the Torres Strait Islands. I	1(a), 2(1)(a), 2(1)(b), 2(1)(c), 2(1)(d)

	was raised in Victoria, then 25 years in Queensland. I've dealt with the indigenous communities and I can tell you now, unfortunately, there's a handful of indigenous people who have sold out to the white man bureaucrat and they're laughing all the way to the bank. And we've got to call it out for what it is.	

93. For each of the allegations to succeed, I must form a view on the evidence on if Cr McLindon was "performing the role of a Councillor."

94. If he was not, the allegations are not subject to the Model Code, and fail.

95. For the remaining allegations, although Cr McLindon made a clear statement, at the start of the interview, that he was "*on a leave of absence from Mayor*", and that "*all my statements are my own opinion, otherwise I will be sacked*," I am not convinced that a disclaimer is sufficient to extricate a person from their role as a Councillor if they proceed to discuss matters relating to their Council.

96. To accept that would be akin to my suggesting that this paragraph 96 is not part of my written statement of reasons in this internal arbitration process: it clearly is, given that what I am doing is delivering a statement of reasons, otherwise no one would be reading it.

97. Given the matters I considered earlier in these reasons, I have formed the view that to decide if an allegation concerns a person's role as a Councillor, *when they are campaigning for another level of government*, I must assess each statement with which issue is taken individually, meaning that some statements in an interview might occur within the role of a Councillor, others not. Where a Councillor is running for office at another level of government, and has identified that the interview is occurring as part of that campaign, a reasonable person would not treat their statements as arising in their role as a Councillor, other than on issues where the subject discussed is clearly connected to that role.

98. In my view, ***Allegations 1 and 2*** concerned Cr McLindon's *ongoing* role as a Councillor: steps he proposed to take for an Australia Day citizenship ceremony to occur on 26 January in Whittlesea, and his experience as a local councillor in Whittlesea which led him to form the view that local government in Victoria is a "false democracy". As such, I have jurisdiction to consider them.

99. In contrast, ***Allegations 3 and 4*** do not concern Cr McLindon's *ongoing* role as a Councillor. Their lack of connection to any matter concerning Whittlesea puts them outside my jurisdiction, meaning they fail.

100. Although within my jurisdiction, ***Allegation 1*** fails: a Mayor making a public statement cannot breach clause 1(e)(ii) of the Model Code, which is to the effect that a Councillor cannot make public comment on behalf of Council (or which is perceived to be on behalf of Council) when '*not… authorised by the Mayor to make such a comment*'.

101. However, ***Allegation 2*** succeeds.

102. As a Victorian Councillor, Cr McLindon's statement that councillors have '*just… enough time to read what's put in front of them… and rubber stamp it*' would be understood by a reasonable person to concern his experience in Whittlesea (which on 26 January 2025, comprised about 2½ months, much of which was over the Christmas-New Year period when Council activities are less intense).

103. While it is true that Councillor remuneration does not reflect the dedication shown by some, and many Councillors also work full-time (which makes holding public office somewhat of a juggling act), it is not true that Councillors are not generally given time to consider documents before their regular Council meeting.

104. I put to Cr McLindon that, in my own experience as a former Councillor, I usually had a week or so to consider the documents to be considered at a forthcoming Council meeting (initially in draft, followed by a finalised version), and asked him if that was his experience at Whittlesea. He responded that it was.

105. While Cr McLindon attempted to explain his commentary as simply comparing Councils in Victoria to Queensland (he previously served on Logan City Council) – and I note that depending on the Council, some Queensland Councillors seem to be given resources and pay on par with Members of Parliament – there is nothing in the interview that would lead anyone to conclude that is what he was saying.

106. In my view, a reasonable person hearing Cr McLindon's statement would conclude that in his experience, Council staff in the City of Whittlesea were not providing documents for consideration to Councillors in a timely manner.

107. If Cr McLindon *himself* did not have enough time to consider documents, a reasonable conclusion on the evidence is that Cr McLindon had not allocated sufficient time to perform his responsibilities as a Whittlesea Councillor, indeed, as the Mayor of Whittlesea.

108. A possible explanation for Cr McLindon's time management issues is that, despite being elected as Mayor, he continued in his paid employment as a schoolteacher, as well as taking on the responsibility of running in the Werribee by-election.

109. The applicants allege that in making these statements, Cr McLindon breached sub-clauses 4(1)(a) and 4(1)(b) of the Model Code, because the statement diminishes the public's trust and confidence in the City of Whittlesea, brought discredit on Council, and deliberately mislead the public concerning the performance of his public duties (specifically, that Council staff were failing to provide Councillors, including him, with sufficient time to consider documents before meetings, resulting in their being forced to 'rubber-stamp' documents).

110. I agree, including that Cr McLindon was deliberate in misleading the public: on my reading, where the Model Code uses the term '*deliberately*', it gives an arbiter scope to find a Councillor's words conveyed a secondary meaning which the evidence of the conversation or publication concerned shows the Councillor did not intend to convey (ie. it was an unintended double-meaning), rather than assertion of what the Councillor subjectively intended.

111. Although my impression of Cr McLindon is that his strong opinions are sometimes formed without a strong factual basis, I do not think that is enough to escape the Model Code.

112. Allegation 2 is proven.

Allegation 5

113. Allegation 5 concerned two statements Cr McLindon made to journalist Jacqui Felgate, which were broadcast on her 3AW Afternoons program on 23 January 2025, who was discussing his decision to run in Werribee while also Whittlesea Mayor. Cr McLindon told me that 3AW called him, rather than him phoning in.

114. Cr McLindon told the hearing he had not heard of Ms Felgate before the interview, and did not initially recognise her name when I turned to the allegation.

115. The applicants alleged that Cr McLindon had breached clauses 1(e)(ii) and 4(1)(a) of the Model Code (as well as, again, provisions of the Whittlesea Election Period Policy outside my jurisdiction). As with Allegation 1, I am not satisfied that a Mayor could ever breach clause 1(e)(ii), which narrows my task.

116. The relevant parts of the interview are extracted, with the parts complained of <u>underlined</u>:

> **Felgate**: Constituents might be feeling a bit aggrieved. Have you been in the job, is it about nine weeks? And you're already going to go for a different job.
>
> **McLindon**: Look, it's a solid nine weeks.
>
> **Felgate**: So you've worked in the job as the Mayor of Whittlesea for nine weeks. And you're saying you've done a solid nine weeks work. Do you therefore feel entitled to get annual leave already to go and essentially apply for another job?

McLindon: Well, I'm not going on annual leave. This is the problem, this is what the Labor Party's rolling out there. I'm still a Councillor working every single day in the ward of Kirrip despite[…]

Felgate: But you've been elected as Mayor, though, right?

McLindon: Correct. And we're not sitting until the 18th.

Felgate: But as Mayor, you work all the time, I would imagine, as you've just said.

McLindon: Naturally I do.

The interview continues on, with further propositions put to Cr McLindon by Ms Felgate which the applicants do not complain of.

117. The thrust of the applicants' complaint is that in the interview, Cr McLindon failed to properly distinguish his role as Mayor from that as a candidate in Werribee, and that in doing so, he brought discredit on Council.

118. I have jurisdiction to consider this allegation, because Ms Felgate's questions were directed to Cr McLindon's role as a Councillor, and asked him to reflect on the difficulties caused by wearing two hats. In other words, when he took the call, he was performing the role of a Councillor.

119. However, while I agree that Cr McLindon performed poorly in the interview, I do not agree that he brought discredit on Council.

120. Ms Felgate's questions were directed squarely to Cr McLindon's personal decision to run as a candidate, while also holding the Mayor's role. With respect to Cr McLindon, his answers proved Ms Felgate's contention that he had not really considered how his involvement in the Werribee by-election would be seen by the public.

121. Allegation 5 fails.

Allegation 6

122. Allegation 6 concerned an article published by the *Star Weekly* on page 5 of its 21 January 2025 edition, titled "Mayor unveils Australia Day plan." The author of the article is identified as Laura Michell.

123. The article, which Cr McLindon did not author, does not mention that he was a candidate in the Werribee by-election (other coverage of the "plan" suggests it was connected with his candidacy), and also refers to his intention to raise a notice of motion to move the Australia Day citizenship ceremony in Whittlesea to 26 January.

124. While the article contained a statement from the CEO that Cr McLindon was stating his personal perspective, rather than the "official position of council", I nevertheless have clear jurisdiction to consider this allegation.

125. The applicants alleged that Cr McLindon had breached clauses 1(e)(ii) and 2(1)(d) of the Model Code, although clause 1(e)(ii) is inapplicable.

126. The particular statements said to breach clause 2(1)(d) were across three paragraphs, containing two quotes from Cr McLindon:

> Cr McLindon said it was his belief that observing a minute's silence on January 26 would help to unite the community.
>
> "Yes, there were atrocities that happened [in the past], nobody can deny that. To me, this is a very reasonable proposal to ensure we are all united as a community going froward (sic)," he said.
>
> "I am absolutely sick of our indigenous brothers and sisters being exploited to bring division in our communities."

127. A risk of a person participating in an interview is that only part of what is said makes it into publication. Unless a record of the original interview is kept (which Cr McLindon did not provide me), I must read the words as published.

128. It seems to me that Cr McLindon's argument is not directed at Indigenous/Aboriginal persons (by which I mean First Nations people): rather, he is suggesting that non-Aboriginal persons who support "changing the date" of Australia Day are co-opting Aboriginality to make a political issue, but that implies that no Aboriginal persons have any interest in changing the date (an implication which is clearly wrong).

129. An issue for the applicants, however, is that to make good an allegation that clause 2(1)(d) of the Model Code has been breached, the applicants had to lead evidence of Whittlesea's community engagement policy, and how it requires Council to develop '*respectful relationships and partnerships with Traditional Owners, Aboriginal community controlled organisations and the Aboriginal community*.'

130. The application filed in IAP 2025-2 did not refer to or annex Whittlesea's community engagement policy.

131. When I raised this during the hearing, Cr Colwell could not indicate how exactly the community engagement policy applied to the allegation. He also could not inform me if Aboriginal Action Plan (which is called Reconciliation Action Plan in other Councils) formed part of its community engagement policy.

132. I invited Cr Colwell to provide me with extracts of Whittlesea's community engagement policy, and to file a written submission after the hearing (with a response from Cr McLindon to be directed if I required one).

133. What I received in response from Cr Colwell was not helpful. It sought to expand the allegations beyond what was contained in the original application. I have noted previously that an arbiter cannot hear allegations that were not included in the application received by the Principal Councillor Conduct Registrar.[28]

[28] See Holland and Ors & Bissinger (IAP 2023-19 and IAP 2023-25), paras 18-20

134. Given the date of the Whittlesea policy (19 December 2023), I am not sure a more thorough approach by Cr Colwell would have advanced the allegation: clause 2(d) of the Model Code is a new addition (ie. there was no equivalent in the former standards of conduct), and it seems to anticipate additional subject matter being included in Council community engagement policies (although sections 55 to 58 of the Act do not mention the matters contained in clause 2(d)), which is yet to occur.

135. At the time of the applications, the Whittlesea policy remained to be updated to include these matters, although it seems to me that clause 2(d) of the Model Code is more directed to the contents of a Reconciliation/Aboriginal Action Plan than a community engagement policy, not being a document recognised in the Act or the Model Code (ie. the Act does not seem to require Councils to endorse a Reconciliation/Aboriginal Action Plan, which the Model Code could pick up).

136. Allegation 6 fails.

Allegation 7

137. Allegation 7 concerned an article published by *The Age* in its 21 January 2025 edition, titled "Mayor in Australia Day push as byelection bid looms." The journalist attributed to the article is Adam Carey.

138. The applicants alleged that Cr McLindon had breached clauses 1(e)(ii), 2(1)(d), and 4(1)(a) of the Model Code. Again, clause 1(e)(ii) is inapplicable, and the applicants failed to make a complete argument under clause 2(1)(d), although as discussed above, I am not sure Whittlesea's community engagement policy in its 2023 form is germane to dealing with the matters under the Model Code.

139. The applicants took issue with Cr McLindon's statement, as reported by Mr Carey, that "local government is currently a false democracy" because the Act prevented councillors from speaking freely on all issues (my words not in quotation marks are what the journalist reported other than as direct speech), as well as his proposal for a minute's silence to be introduced on 26 January to commemorate what he called the

"horrific tragedies and atrocities" that occurred to Aboriginal persons during European settlement.

140. I do not have jurisdiction over these allegations. As expressed, they only concern Cr McLindon's election platform for the Werribee by-election, being a statement concerning local government generally, rather than his experience in Whittlesea (if he was more explicit, or had made the statement in the Council chamber, I would have found otherwise): had it been proven, however, I would not have been satisfied that this allegation required an additional sanction to what I am already directing.

141. Allegation 7 fails.

Allegations 8 to 13

142. Allegations 8 to 13 concern provisions of Whittlesea's Election Period Policy that are outside my jurisdiction, and accordingly fail.

Allegation 14

143. Allegation 14 concerns a comment made by Cr McLindon on a Facebook post, in response to a comment from a former Whittlesea Councillor, who I will call Mr Q; I prefer not to name persons in my findings who have not participated in the internal arbitration process, and have not been heard in relation to it.

144. The applicants alleged that Cr McLindon had breached clause 2(1)(a) of the Model Code.

145. Cr McLindon was responding to a comment made by Mr Q on a post to one of Cr McLindon's Facebook profiles. Cr McLindon noted to me that he was not the best at using Facebook, which is why he has several Facebook profiles and pages, some of which have been set up for him by others.

146. The "page" concerned is called "Aidan McLindon", and has the web address https://www.facebook.com/aidanpmclindon. Cr McLindon informed me that the page

was established for him when he ran in the Mulgrave by-election in 2023, following the resignation of former Premier Daniel Andrews.

147. The post, made on 20 January 2025, contained a video of Cr McLindon standing outside the Victorian Parliament, announcing his candidacy, and with the following description:

> *After much deliberation* (sic) *I decided I needed to run in the Werribee by-election to help the City of Whittlesea and the other 78 local councils in Victoria who have been restricted and suppressed by Dan Andrews' 2022* (sic) *Local Government Act. Time for an overhaul*

148. The following exchange then ensued with Mr Q:

> **Q**: I'm calling bullshit on this rationale. Just try and deliver on what you promised to do in the campaign for WHITTLESEA!
>
> **McLindon**: the ole drunk spectator in the footy stand continues to bellow out sweet nothings to the atmosphere.
>
> **Q**: Fruit juice or fruit loops?
>
> **McLindon**: kindergarten comment. You had your time and blew it. You sound like an angry drunk at a football stand who can't read the scoreboard from the front row seats. Misguided spectator.

149. The applicants took issue with Cr McLindon referring to Mr Q as a drunk, and his use of the term '*kindergarten comments*'.

150. Unlike *Lew*, where the social media discourse concerned involved a matter before Council for decision, the discussion above does not deal with a matter before Council, meaning it is not "community engagement" for the purposes of the Act. Rather, Mr Q was criticising Cr McLindon for running for another office, at the expense of his existing office as a Councillor.

151. To consider this allegation, I would need to find that Cr McLindon was performing the role of a Councillor. The fact that Cr McLindon was engaging in a discussion with a former Whittlesea Councillor, who was criticising him for neglecting Whittlesea at the expense of Werribee, is not enough (although this conclusion is on or about the borderline). As such, I have no jurisdiction.

152. Allegation 14 fails, although had it succeeded, any sanction would have overlapped with other sanctions I have directed.

153. Jurisdiction aside, I accept that Councillor social media management is a vexed issue under the Model Code.

154. The applicants put to me that I should be concerned that Cr McLindon had failed to segregate his "Council-related" social media from "campaign" social media.

155. While I accept that having separate Council and personal social media is good practice, there is no legal requirement to do so, and the failure to separate has no relevance to if a person is or is not performing the role of a Councillor.

156. It seems to me that unless:
    (a) Council staff are assisting in the operation of a particular page (such that it is an "official" Council page, and thus a Council resource); or
    (b) the page is identified as being, for example, "Cr Bloggs, Deputy Mayor, City of Blackacre", such that all content on the page is readily deemed to within the person's role as a Councillor,

    a person operating a social media account does not perform the role of a Councillor (including by engaging in non-Council political discussion, such as commenting on issues at other levels of government), unless or until they choose to discuss matters relating to their Council (not just matters before Council for a decision).

Allegation 15

157. Allegation 15 concerned comments that Cr McLindon made on a Facebook post that he had made on 13 January 2025 – before he had declared that he was running in Werribee – showing a photograph of himself meeting then-Opposition Leader Peter Dutton, using his Facebook profile (rather than the page mentioned in Allegation 14), which he then shared in a Facebook group called the "Doreen and Mernda Community Page."

158. In response to a comment on the post stating, "No party politics", Cr McLindon responded as follows:

> I agree, and as an independent Mayor I am best placed to meet with both the Prime Minister and the Leader of the Opposition to ensure that I can attract many more millions of dollars for our city. Personally I think Liberal and Labor are like Pepsi and Coca-Cola and the people are crying out for fruit juice.

159. The applicants alleged that Cr McLindon had breached clauses 2(1)(a) and 4(1)(a) of the Model Code.

160. I do not agree with either of those arguments. Criticism of political parties in this manner (which is not offensive) is robust public debate of issues in a democracy under clause 5 of the Model Code, and as such does not fall within either of the clauses relied on by the applicants.

161. Allegation 15 fails.

Determination of the Allegations in IAP 2025-4 and 2025-5

162. As there is a degree of overlap between these applications, I deal with them concurrently. They comprised two effective allegations (which I have designated alphabetically, to distinguish them from the allegations in IAP 2025-2):

Allegation A. At a briefing meeting held on 4 February 2025, following which the Council was to hold a formal meeting and resolve to make IAP 2025-2, Cr McLindon made a statement to the effect that he had engaged legal

representation in relation to the possible application, and that Councillors should consider the possible consequences of putting their names to any application for internal arbitration.

In IAP 2024-5, Cr Cox alleged clause 2(1)(a) of the Model Code was breached, and in IAP 2025-5, Cr Colwell relied on clauses 2(1)(a) and 2(2)(a) of the Model Code.

Allegation B. In IAP 2025-5 only, Cr Colwell took issue with a statement made by Cr McLindon on 11 February 2025 in an email to a member of the public, who had emailed Cr McLindon calling for his resignation. The statement complained of was copied from a statement Cr McLindon had made through one of his Facebook accounts, headed "Statement from the Mayor of Whittlesea"):

> *Council has been in recess since our last meeting on 17 December 2024 and I look forward to an exciting year ahead as we prepare to resume our first next full council meeting next Tuesday, 18th February.*

Cr Colwell relied on clauses 4(1)(a) and 4(1)(b), and says that because Council had met during the relevant period (albeit there had not been a public meeting), the statement was false.

163. IAP 2025-5 also raised evidence of what I will call "surrounding circumstances", not being allegations in themselves, which I found of no assistance. I also excluded evidence on some matters referred to in the application and in Cr Taylor's witness statement, where the relevant witnesses were not called.

164. Dealing with them in reverse order, I am not satisfied that Allegation B is made out.

165. In particular:

- I am not satisfied that the statement brought "discredit on Council" (clause 4(1)(a)); and

- Cr Colwell has not satisfied me that Cr McLindon had sought to "deliberately" mislead "the public about any matter related to" the performance of his public duties (clause 4(1)(b)). Most Councils do go into a form of "recess" over the Christmas/New Year period, when Council Meetings are not held (which it seems was the case in Whittlesea, other than the meeting to refer Cr McLindon to internal arbitration). Although I would accept that he was attempting to minimise the significance of his time campaigning for Werribee, I am not satisfied Cr McLindon was seeking to deliberately mislead the public.

166. Allegation A requires somewhat more detailed consideration.

167. Cr McLindon accepted that Cr Taylor's contemporaneous notes of Cr McLindon's spoken words to the Councillor group were accurate "almost to the word." Those words were recorded as follows:

> *I have engaged my own lawyers on this, and just for your knowledge, obviously, it's an opt in process. They have cleared me on every allegation levelled against me, and in doing so, they are prepared to make a public statement at the right time. My point to you is that I am just telling you now rather than later. The legal firm, whose expertise is in this area, has cleared me on everything. If you were to sign it, that's fine, but there may be ramifications. I don't want to let anyone hang out to dry if they are not privy to the details. I am just saying, do what you need to do.*

Although it would of course be difficult for Cr McLindon's lawyers to "*clear* [him] *on every allegation*" in IAP 2025-2 (given Cr McLindon was not privy to the materials, and the application had not been made), there was sufficient evidence before me that various concerns had been raised with Cr McLindon prior to that date, which is what I infer he meant (ie. that what he had told his lawyers, they have "cleared him" of, or given him advice that he had not acted improperly).

168. The background to the discussion was that:

- Cr McLindon was not included in an email sent at 4.56pm on 30 January 2025, from Council's Governance Team, alerting them to the meeting documents for 4 February 2025 being uploaded to Council's documents portal;

- However, earlier that day at 12:55pm, Cr Colwell had emailed the proposed motion to an "all Councillors" group email address;

- Cr McLindon conceded that he had probably "skimmed" the agenda (by which I assume he meant a physical agenda) before he entered the meeting, although he was unclear in his evidence as to when he did that;

- Skimming would not have assisted Cr McLindon, as the proposed motion did not include a draft application for arbitration, nor did it come close to anything that might be described as an application, rather it simply resolved that an application would be made;

- The evidence before me suggested that other Councillors had participated in meetings at which Cr McLindon's social media posts were discussed (being those which were annexed to the subsequent application in IAP 2025-2), meaning that other Councillors broadly knew what was proposed.

169. In other words, there is some truth in Cr McLindon's position that he did not know what was proposed. But that does not assist him.

170. Cr McLindon contended that I should accept that his statement was not intended to threaten, rather, he was seeking clarification, as he was not across what was being proposed in relation to him. In particular, Cr McLindon said that what he meant was "*Is everybody aware of what they're actually doing? Because if this is untoward, what's happening, and leave themselves open, the potential for defamation could be*

there,"[29] and that he was attempting to start a dialogue. I reject this interpretation, as the only person who could commence a defamation proceeding was Cr McLindon, so it is not as if he was alerting them to something out of his control.

171. In other words, what Cr McLindon expressed was a threat: he was not concerned for his colleagues, he was concerned for himself. No other conclusion can be reached on a statement that, if adverse action were taken against Cr McLindon, "*there may be ramifications*".

172. Accordingly, I find that Allegation A is proven, and that Cr McLindon breached clause 2(1)(a) of the Model Code by failing to treat his colleagues with courtesy and respect by engaging in threatening behaviour. It is a breach of clause 2(1)(a) for a Councillor to make a statement to the effect that, if another Councillor makes an application for internal arbitration under the Act, the Councillor will take legal action against them in response. It is the arbiter who decides if an application has substance, and it is completely inappropriate for a Councillor to try and stop an application from being made by foreshadowing legal action (eg. for defamation).

173. I do not find that Cr McLindon breached clause 2(2)(a) of the Model Code: despite referencing the clause in IAP 2025-5, Cr Colwell did not lead evidence of or refer me to any '*applicable systems and policies*' enacted by the CEO to '*manage risks to health and safety in the workplace*'.

174. As a footnote of sorts, I note that an application under sub-s 143(2)(a) of the Act permits an application for internal arbitration to be made by a Council '*following a resolution of Council*'. In my view, this requires a draft application to be annexed to the Council meeting papers, which did not occur here: otherwise, the question arises, what was the application that Council was authorising? It is quite possible that this means the application in IAP 2025-2 and the resolution supporting it were not valid under sub-s 143(2)(a). This does not undermine my jurisdiction, as the application

[29] There were several variations of what Cr McLindon said that he meant throughout the hearing. Another variation was "*Depending on what takes place tonight, you could leave yourself open... for defamation.*"

would have been valid under sub-s 143(2)(b) as an application made by a group of Councillors (not being an application made based on a resolution).

Sanction

175. While not the most severe instance of misconduct I have dealt with, Cr McLindon's statement in Allegation 2 to the effect that he had inadequate time to consider his Council papers ought to be corrected by an apology.

176. I also consider that he would benefit from some coaching to assist him in improving his time management, in order to satisfactorily execute his duties to his constituents for the remainder of the term.

177. I will accordingly make the following directions under section 147 of the Act:

(a) at the next Council Meeting after these reasons are tabled, I direct Cr McLindon under sub-s 147(2)(a) of the Act to make the following apology, which shall be made in the open component of the meeting:

> On Sky News on 26 January 2025, I made a statement that Councillors in Victoria have "*just got enough time to read what's put in front of them*" and to rubber-stamp it. I accept that this comment would be understood as reflecting on how Whittlesea City Council operates. I did not intend to suggest that this was my personal experience as a Whittlesea Councillor, or that Council staff were not giving me enough time to consider Council papers. I wish to apologise to Council staff for my remarks, and hope that apology will be accepted.

(b) under sub-s 147(2)(e), I direct Cr McLindon to undertake a course of training and counselling to be delivered by a suitably qualified trainer (external to Whittlesea City Council), who shall be nominated by the Mayor (now Cr Cox). The course shall involve 5 hours of training across 4-5 in-person, one-on-one sessions, and shall be designed to assist Cr McLindon develop practical strategies to improve diary and time management. The training shall conclude no later than April 2026,

and the trainer shall provide a written report to the Mayor detailing areas of progress and areas for improvement, and recommend any further assistance the trainer considers would assist Cr McLindon.

178. Prior to his suspension, and as a sanction in respect of Allegation A, I intended to direct that Cr McLindon be ineligible to hold the office of Mayor for 12 months (which under sub-s 20(e) of the Act, would have caused him to cease being the Mayor), and to suspend him for a period of 1 month under sub-s 147(2)(b) of the Act. I will still direct that he be ineligible, for the reasons which follow, but I will not suspend him further, as while Cr McLindon should be suspended for one month, I would have directed that his one-month suspension be served concurrently with his 6-month suspension, instead of a cumulative 7 months' suspension. As that period has been served, no further sanction is needed.

179. Prior to the 2024 amendments to Act, a Mayor or Deputy Mayor would become ineligible to hold office, by default, under sub-s 167(2) if a Councillor Conduct Panel made a finding of serious misconduct against them, unless the '*Panel directs otherwise*'. The 'positive' power of an arbiter under sub-s 147(g) should be exercised with respect to the same considerations as the 'negative' power in sub-s 167(2): as there have not (to my knowledge) been any Panel findings of serious misconduct against a Mayor or Deputy Mayor, and as such, no consideration of when a Panel should 'direct otherwise', those are considerations I need to identify.

180. Unless a Mayor is appointed for a two-year term, the Act does not give a Council the ability to itself remove a Mayor. The rationale for this is clear: changes in Mayoralty at intervals of less than one year disrupt Council operations, and encourage dysfunction and division among the Councillor group.

181. Although the Arbiter Panel List has always had indirect power to remove a Mayor (because our power to suspend a Councillor has the legal effect of causing them to vacate the Mayoral office), it is not appropriate to suspend a Councillor for the indirect purpose of causing a Mayoral vacancy. Suspension is a specific sanction, which must be warranted on its own merits.

182. The text, context, and purpose of the Act make clear that the removal of a Mayor elected for a one-year term is a serious matter (given the limited circumstances in which it can occur). Reading the Act, that should only occur if:
    (i) *through their misconduct (as found)*, the Mayor has demonstrated incapacity to fulfil their defined role in sub-s 18(1) of the Act; and
    (ii) *through the misconduct (as found)*, the Councillor group cannot reasonably 'support the role of the Mayor' as required by sub-s 28(2)(c) of the Act.

    I also do not accept that by Parliament giving arbiters the power to declare a Councillor ineligible to hold the Mayoralty, a 'lower threshold' has been set to order that sanction (compared to before, when ineligibility would result only from a finding of serious misconduct in a Councillor Conduct Panel, unless the Panel decided otherwise). The change simply recognises that ineligibility might be warranted for *some* instances of misconduct.

183. Under sub-s 18(1)(e) of the Act, a Mayor must promote behaviour that is consistent with the Model Code: threatening colleagues in the manner Cr McLindon did is clearly inconsistent with fulfilling the Mayoral role.

184. Following the resumption of the applications in October, I made directions referring the parties to the Minister's press release of 16 April 2025, in which he stated that Cr McLindon's 6-month suspension was "necessary to protect the health and safety" of Councillors and Council staff, and invited them to address me on if I should take into account Cr McLindon's previous suspension in determining my revised sanction.

185. In response, I received brief written submissions from Cr Colwell and Cr Cox on 3 and 4 November respectively. Both contended (and I am paraphrasing rather than repeating their submission in full) that based on the Minister's statement, Cr McLindon was suspended on different grounds to those which they had raised, and that I should consider a specific sanction for any misconduct I find proven.

186. On 5 November 2025, I received a submission from Cr McLindon, which I have considered, although I will not repeat the full content in these reasons.

187. In effect, Cr McLindon argued that there was a level of overlap between these applications and the Commission's work (which I interpret to mean that I should treat matters considered by the Commission as providing a form of retrospective reasoning for Cr McLindon's suspension, although I note that the Commission did not in fact make findings in relation to the matters before me), and to account for the impact of the suspension on Cr McLindon and his family.

188. Given the Minister's April press release, I accept that the Governor in Council did not suspend Cr McLindon based on any of the matters that were before me (such as Allegation A). As such, in imposing any further sanction on Cr McLindon, it cannot be said that he had already been sanctioned.

189. I will direct under sub-s 148(2)(g) of the Act that Cr McLindon is ineligible to hold either the office of Mayor or Deputy Mayor for the period ending 12 months from the provision of a copy of these reasons to Council under sub-s 147(3) of the Act. While this will not cause him to vacate the Office of Mayor, which he no longer holds, and while section 229B of the Act means it has a superfluous effect (unless his earlier suspension were set aside on appeal), directing this sanction is an appropriate denunciation of Cr McLindon's misconduct and will warn others of the possible consequences of engaging in similar behaviour.

Others matters

190. I note that before the Commission, evidence was given that these internal arbitration processes were "slow," and that these applications took "far too long", and contributed to matters in Whittlesea deteriorating.[30]

191. As summarised by the Commission in their report, this evidence appeared to seek to absolve the Whittlesea Councillors themselves of responsibility for failing to exercise due diligence in choosing a Mayor, which if the Commission's findings are accepted, is a serious governance failure of itself (amongst other governance failures identified by the Commission).

[30] Pages 60 and 72 of the Report

192. As noted, the Councillor Conduct Framework includes a mechanism for "immediate action" (as it is called in the medical professionals' context[31]), being the CEO's power under sub-s 46(3)(c) of the Act, allowing the CEO to regulate interactions between Councillors and Council staff, without needing to go through a hearing akin either to an internal arbitration process or Councillor Conduct Panel.

193. That power was used in relation to Cr McLindon: the fact that some in Whittlesea considered it insufficient (as Cr McLindon remained Mayor) is no reason to water down natural justice in an internal arbitration process.

J A SILVER
ARBITER

[31] *Health Practitioner Regulation National Law Act* 2009 (Qld), s 156, adopted as a law by the State of Victoria by the *Health Practitioner Regulation National Law (Victoria) Act* 2009 (Vic)

Appendix A – Ruling on Application for Representation

1. Having given reasons orally on 14 March 2025, this written version is part of my written statement of reasons under sub-s 147(3) of the Act. I have made some changes to what I said that day with reference to the transcript and also for flow and clarity, but they are substantially the same as what I previously expressed.

2. On 7 March 2025, Cr McLindon applied to be represented in these internal arbitration processes by Mr Nicolas Karamouzis, solicitor.

3. The email making the application stated as follows:

> *Dear Council conduct officer:-*
>
> *I advise as follows:-*
>
> 1. *I wish to be represented;*
>
> 2. *My representatives details are Nicolas Karamouzis, Principal Lawyer of Verus Legal;*
>
> 3. *It is fair for me to be represented for the following reasons:-*
>
>   a. *There are issues of some legal complexity with which I require assistance, given I do not have a legal background;*
>   b. *Given the allegations made (which I deny) it would seem that the attendance of a legal representative would be preferred by all;*
>   c. *The station of the Mayor in and of itself warrants that I be represented;*
>   d. *The gravity and potential consequences of the allegations make it appropriate for me to have legal representation;*
>   e. *As the elected Mayor, it could not reasonably* [be] *viewed as fair to the constituents of the Council to deny me legal representation, and such a denial might constitute procedural unfairness.*

In good faith

Aidan

4. Given the imminent hearing date, I scheduled an urgent hearing for 12.00pm on 12 March 2025 (ie. 5 days later), with directions sent by the Councillor Conduct Officer to the parties on 4.31pm on 7 March 2025. This included giving Cr McLindon leave to be represented by his solicitor, for the purposes of the application only.

5. Cr McLindon did not appear on the scheduled Teams call. The Councillor Conduct Officer informed me he had not accepted the invitation. Despite this, the Councillor Conduct Officer confirmed that she had communicated with Cr McLindon since the directions had been sent to him.

6. Although I was satisfied that Cr McLindon should have attended, I declined to proceed in his absence, and gave a brief summary of my proposed directions for an adjourned hearing date later that week. The proper interpretation of the legal issues involved was not something I was prepared to express a concluded view on, without hearing from the applicant to the application.

7. Having expressed that view, but before I concluded the hearing, the Councillor Conduct Officer received a text message from Cr McLindon to advise that he was currently teaching (I was told he is a schoolteacher). I then rescheduled the hearing. Although I have not "held it against him", I was unimpressed that Cr McLindon had not responded to the email sent some days earlier confirming the hearing time.

8. The matter resumed on 14 March 2024 at 3.00pm: that hearing was almost vacated, again because Cr McLindon had not responded in a timely manner to correspondence to confirm that he would attend. When called on, he attended, together with his solicitor, Mr Karamouzis.

9. Mr Karamouzis was polite and respectful. He made the following arguments on Cr McLindon's behalf in support of the proposition that representation would ensure the arbitrations were conducted "fairly" (which I paraphrase):

   (a) the arbitrations involved the assessment of complex facts and the interpretation of the Model Code, for which an arbiter would be assisted by the presence of a legal practitioner;

   (b) Cr McLindon was struggling due to restrictions imposed on him by the CEO, the effect of which is that he was under-resourced and needed assistance. Mr Karamouzis described the applications as "groundbreaking", and that it would be "rancidly" unfair if I did not permit representation;

   (c) Mr Karamouzis contended that there would be a perception of procedural unfairness (which he described as giving rise to an apprehension of bias) if the application was not allowed;

   (d) that because Cr McLindon was "the Mayor", he should be represented to ensure the decision is made "correctly", as otherwise he would be in a boat with what Mr Karamouzis called "half a paddle";

   (e) Whittlesea's recent history under Administration requires a degree of caution.

10. I subsequently engaged in discussion with Mr Karamouzis of the meaning of the term "fairly" under the Act, and how it should be approached: I summarised the effect of his arguments (and he agreed that I had understood his argument) that I should give a literal meaning to "fair" (rather than adopting a meaning of the term as it appears, for example, in the *Victorian Civil and Administrative Tribunal Act* 1998), and that if there was any case in which I should permit representation, Cr McLindon ticked "all the boxes."

11. I subsequently took Mr Karamouzis through other considerations that I proposed to take into account, which will feature later on in these reasons: to his credit, Mr

Karamouzis did not suggest I should ignore those matters, only that the term "fairly" could include both its literal and common law meanings.

12. I did not agree, and determined that under sub-s 141(2)(c) of the Act, Cr McLindon was not entitled to be represented in the internal arbitration processes. There is no room for a literal reading of the section, and while I had sympathy for Cr McLindon's application, the matters that he identified were not relevant to whether I should permit him to be represented.

13. Whether to permit representation in an internal arbitration process is not a matter for the parties to determine by agreement, nor does it turn on the complexity of the matter or the seriousness of the allegations, or how a lack of representation might be perceived by the public (to whom the internal arbitration is, of course, closed).

14. Rather, an arbiter must reach the conclusion that "*representation is necessary to ensure the process is conducted fairly*," as required under sub-s 141(2)(c) of the *Local Government Act* 2020 (‘**the Act**’). As I will explain, what this admittedly opaque provision means is that the arbiter must not permit representation, unless without representation, the arbiter takes the view that they could not conduct the internal arbitration fairly in accordance with common law requirements.

15. The Act in sub-s 141(2) states:

The following applies to an internal arbitration process—

(a) any processes prescribed by the regulations, including any application process;

(b) the arbiter must ensure that parties involved in internal arbitration process are given an opportunity to be heard by the arbiter;

(c) the arbiter must ensure that a Councillor who is a party to an internal arbitration process does not have a right to representation unless the arbiter considers that representation is necessary to ensure that the process is conducted fairly;

(d) any requirements prescribed by the regulations;

(e) the rules of natural justice.[32]

In addition:

- in sub-reg 11(2) of the *Local Government (Governance and Integrity) Regulations* 2020, the requirements prescribed under sub-s 141(2)(d) are that an arbiter must:
  (a) conduct the hearing with as little formality and technicality as the proper consideration of the matter permits; and
  (b) ensure that the hearing is not open to the public.
- sub-reg 11(3)(b) provides that an arbiter '*is not bound by the rules of evidence and may be informed in any manner the arbiter sees fit*.'

Each of these requirements is identical to a requirement that has applied to all Councillor Conduct Panels since 2008, under what is now sub-s 163(3), previously sub-s 81I(2) of the *Local Government Act* 1989.

16. In the case of the restriction on representation, sub-163(2)(b) of the 2020 Act provides that at the hearing of a Councillor Conduct Panel,

> there is no right to representation at the hearing except if the Councillor Conduct Panel considers that a party requires representation to ensure that the hearing is conducted fairly.

17. Applications for representation in both processes are interlocutory (a legal term that describes pre-hearing procedural steps). This means that, while many applications have been heard and determined, there are no published statements of reason of either the Arbiter Panel List or a Councillor Conduct Panel that address what is meant by ensuring that a process or a hearing is "conducted fairly."

18. This state of affairs has troubled me for some time. It is not helpful for parties entitled at law to be represented, but unable to ascertain on the face of the Act what matters

[32] It is hard to see sub-s 141(2)(b) is anything other than superfluous, as the natural justice required in sub-s 141(2)(e) is usually understood to include the common law "hearing rule".

they must address to claim that right. Of more concern, however, is that it enhances the likelihood that the law (in particular, what is meant by "conducted fairly") will not be understood or applied consistently or correctly on this issue.

19. I have accordingly used Cr McLindon's application to identify in writing the proper approach to construing sub-s 141(2)(c), which I suggest would be the same for sub-s 163(2)(b).

20. The term "fair" (or variations of it) is a common legal term. As with other terms or phrases, its meaning turns on the text, context and purpose of the law of which it is a part,[33] rather than the whim of a particular decision-maker. This involves a bit more than simply observing, for example, "in my opinion, fair is the opposite of unfair", or that "fair means what is just in all the circumstances," and then either accepting or refusing an application. Although sub-s 141(2)(c) gives a decision-maker some discretion, that is different from saying that the section itself should be applied based on the decision-maker's own idiosyncratic notion of fairness.[34]

21. Consideration of how the term "fair" is used in other statutes does not provide a solution (other than perhaps to highlight that it is used in quite different ways): laws such as the *Victorian Civil and Administrative Tribunal Act* 1998, *Domestic Building Contracts Act* 1995, and *Owners Corporations Act* 2006 (to name a few) all turn on the individual text, purpose and context of those laws.

22. So where is the meaning of "conducted fairly" to be found?

23. It is first necessary to consider the background of the relevant statutory provisions.

24. Although the restriction on representation in internal arbitrations was not mentioned in the Second Reading Speech for the then-Local Government Bill 2019, the same restriction for Councillor Conduct Panels was addressed when Minister Wynne

[33] Consider *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 (McHugh, Gummow, Kirby and Hayne JJ)
[34] *Christ Church Grammar School v Bosnich & Anor* [2010] VSC 476, [40] (Sifris J)

introduced the Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008 on 11 September 2008:

> Clause 18 of the Bill, which inserts new section 81I… provides that there is no right to representation at a hearing of a panel except if the panel considers a party requires representation to ensure that the hearing is conducted fairly, that the panel is not bound by the rules of evidence and that the procedure of the panel is otherwise in its discretion.
>
> The panel's ability to hear a matter with as little formality and at the panel's discretion does not interfere with the right to a fair hearing, since the panel is bound by the rules of natural justice. It simply ensures that the hearing is 'user-friendly', and that parties are not disadvantaged for having limited legal expertise or access to legal representation (my underline). It also provides a cheaper and quicker means of resolving disputes.

25. What follows from this are three propositions:

    (a) first, the restriction on representation (which the Minister states means legal representation) in Councillor Conduct Panels is not to be viewed in isolation, but as part of a scheme in which the deliberations of the Panel are conducted less formally than in a court, subject always to the requirements of natural justice;

    (b) second, to prevent the parties from turning the Panel process into what might be called a lawyers' duel; and

    (c) third, that it is the responsibility of the Councillor Conduct Panel to ensure, as best it can, that parties do not require legal expertise to conduct their case, and are not disadvantaged from its absence.

26. Given the provisions establishing the internal arbitration process use similar language, it is a comfortable conclusion that the restriction on representation is prefaced on the same considerations as in Councillor Conduct Panels. I also conclude that the drafting differences between sub-s 142(c) and 163(2)(b) are of no practical consequence.

27. What follows is that Parliament has determined that in most cases, parties to an internal arbitration process must be self-represented, subject to the overriding consideration that the process must be "conducted fairly."

28. A process "conducted fairly" means conducted fairly in accordance with common law requirements, including to fulfil the duty to assist self-represented litigants. This duty was explained by the Court of Appeal of the Supreme Court of Victoria in *Trkulja v Markovic* [2015] VSCA 298 (Kyrou and Kaye JJA and Ginnane AJA) (footnotes omitted):

> [39] *In determining the proper scope of assistance to be offered to a self-represented litigant, the touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. In some cases, it may be necessary for the judge to identify the issues and the state of the evidence in relation to them so as to enable the self-represented litigant to consider whether he or she wishes to adduce evidence. It is elementary that a judge ought to ensure that the self-represented litigant understands his or her rights so that he or she is not unfairly disadvantaged by being in ignorance of those rights. Notwithstanding this, the judge should refrain from advising a litigant as to how or when he or she should exercise those rights.*
>
> [40] *The High Court has stated that a frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy. Similarly, this Court has endorsed the proposition that '[c]oncealed in the lay rhetoric and inefficient presentation may be a just case'.*
>
> [41] *It is clear that a judge cannot become the advocate of the self-represented litigant. This is because the role of a judge is fundamentally different to that of an advocate. Further, a judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. Accordingly, the restraints*

upon judicial intervention stemming from the adversary tradition are not relevantly qualified merely because one litigant is self-represented.

[42] *Where all the parties are self-represented, the need for the judge to act fairly and in a balanced manner becomes particularly acute. The judge must be very careful to provide an equal playing field having regard to the parties' circumstances and the nature and complexity of the case. In many cases, the judge will need to provide the same level of assistance to both parties. However, a more selective approach may be appropriate where only one of the self-represented litigants is a lawyer or has extensive litigation experience.*

[43] *The judge must also consider carefully the type of assistance that is to be provided to each self-represented litigant. Assistance to a self-represented party which may be appropriate where the other party is represented and has the expertise to determine how best to protect its interests in response to such assistance may not be appropriate where the other party is also self-represented and lacks that expertise. In such a situation the judge's attempt to be fair to one self-represented party may result in unfairness to the other self-represented party.*

[44] *A failure by a judge to provide the necessary advice and assistance to a self-represented litigant may constitute a denial of procedural fairness and warrant an appellate court setting aside the trial judge's decision and remitting the matter for a further hearing in accordance with law. It is well established that not every departure from procedural fairness at a trial will entitle the aggrieved party to a new trial. An appellate court will not order a new trial where such a trial would inevitably result in the making of the same order as that made by the trial judge at the first trial. However, where a denial of procedural fairness affects the entitlement of a party to make submissions on a material issue of fact, it is more difficult for an appellate court to conclude that compliance with the requirements of procedural fairness could have made no difference.*

29. I have no difficulty in concluding that Parliament intended, in using the words that it did, that arbiters and Councillor Conduct Panels must assist parties as a Court must assist a self-represented litigant.

30. Executing this duty is not simple, and has proven difficult to carry out even in the Supreme Court itself.[35] That is, however, what Parliament has chosen. It means that arbiters must provide significant guidance and explanation to ensure the parties understand the process (repetition and revisitation of guidance is common), while keeping neutral, and without forming an adverse view of parties who appear disinterested in conducting their own application or defence.

31. It is perhaps because this hard work makes inviting in representation a tantalising decision (even though legal practitioners often complicate matters, more so than helping) – and, because unlike true self-represented litigants, parties to an internal arbitration process are quite enthusiastic in seeking to be represented – that sub-s 142(c) is worded as strictly as it is.

32. What this leaves is that an arbiter (or indeed, a Councillor Conduct Panel) can only permit representation (meaning legal representation) if in the arbiter's view, there is evidence of something the arbiter cannot control that creates a serious risk that the hearing would not be conducted fairly, such as a diagnosed medical condition that inhibits the person participating in the hearing (for example, a stress response that causes a party to fall asleep).

33. As in all internal arbitrations that I have conducted, I was not satisfied that there was anything insurmountable that would prevent me from conducting the processes fairly, without representation being allowed, and I accordingly took steps to ensure that fairness was afforded to all parties.

34. For example, I made directions requiring the applicants to properly express and structure their allegations in a manner that would be easier for Cr McLindon to respond to, in the form of a "Scott Schedule" (a type of spreadsheet I use in

[35] Consider *Loftus v Australia and New Zealand Banking Group Ltd* [No 2] [2016] VSCA 308

construction litigation, in which information is separated into different components and presented in a "side-by-side" format).

35. The parties' relative lack of knowledge or experience of an internal arbitration process (or legal process generally) does not qualify, nor does the experience or knowledge of one party mean that the other is entitled to a legal representative. Rather, the arbiter must cause those issues to be unproblematic. At the same time, an arbiter must be conscious that without the benefit of assistance, parties can be quite anxious, and are entitled to some leeway in how they conduct their cases.

36. The skill or background of the specific Arbiter Panel List member is an irrelevant factor in permitting representation: Parliament has applied the same considerations to all members of the Arbiter Panel List, regardless of legal training.

37. Once the right to representation is given, it is near absolute. It is not a matter for an arbiter to decide who a party chooses as their representation, although that person might be excluded if they frustrate the process (in which instance an adjournment might be granted, in order for new representation to be appointed).

38. An additional matter raised in the hearing is that two stakeholders in the arbitration (Councillors Cox and Taylor) had some experience in advocacy. Although that may sometimes warrant representation for a non-advocate party, I was not satisfied that the playing field had been "unbalanced", as:

    - Cr Cox was not a lawyer, but an "untrained" industrial advocate (ie. he had appeared in industrial tribunals, and gained experience as a lay advocate);

    - Cr Taylor, while a practicing lawyer, was simply to appear as a witness.

    If Cr Taylor had been the representative in IAP 2025-2, I might have concluded differently. In addition, I noted to the applicants that I would not permit Cr Taylor to attend the hearings as a "support person" to any of the parties.

J A SILVER

ARBITER