



Attachments

Ordinary Meeting

Notice is hereby given that an Ordinary Meeting of Council will be held at Council Chambers, 1 Belgrave Street, Manly, on:

Monday 10 December 2012

Commencing at 7.30pm for the purpose of considering items included on the Agenda.

Persons in the gallery are advised that the proceedings of the meeting are being taped. However, under the Local Government Act 1993, no other tape recording is permitted without the authority of the Council or Committee. Tape recording includes a video camera and any electronic device capable of recording speech.

Copies of business papers are available at the Customer Service Counters at Manly Council, Manly Library and Seaforth Library and are available on Council's website:

www.manly.nsw.gov.au

TABLE OF CONTENTS

Item Page No.

GENERAL MANAGERS DIVISION

General Managers Division Report No. 14
Code of Conduct Complaint

AT1: Manly Council Conduct Reviewer Report.....2

***** END OF ATTACHMENTS *****

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

NOTE: This report has been edited to protect the identities of the complainants in accordance with the *Guidelines for the Model Code of Conduct – October 2008* issued by the then Department of Local Government

MANLY COUNCIL CONDUCT REVIEWER REPORT

Complainants: Staff A
Staff B
Staff C
Staff D
Staff E

Subject: Councillor Hugh Burns

Conduct reviewer: Annette Simpson

Date: 30 October 12

Ref: COMP2012-08/01

INTRODUCTION

The General Manager of Manly Council has referred a code of conduct complaint to me to review. The complaint was made by several members of the staff of the Council as follows:

Staff A
Staff B
Staff C
Staff D
Staff E

The detailed complaints are contained in a document dated 10 August 2012 addressed to the General Manager of the Council, Mr Henry Wong. I have been retained as a Conduct Reviewer in accordance with the procedures set out in sections 12, 13 and 14 of Manly Council's Code of Conduct dated September 2009.

DESCRIPTION OF THE COMPLAINT

The complainants allege as follows:

- That they have been *'bullied and harassed by this Councillor on a repeated basis even though we have sought to diligently undertake our professional roles in accordance with the roles and responsibilities for Council staff'*

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

specified under the NSW Local Government Act 1993 and via Council's code of conduct'.

- That they have been *'treated without due respect in our roles at Council'.*
- That they have *'suffered personal rude attacks verbally and in writing and repeated imputations that staff have in some way not undertaken their duties in a professional manner or, have been guilty of corrupt conduct yet these allegations are spurious and have never been substantiated. Rather, they have been used as a coercive and bullying tactic to endeavour to get staff to perform in accordance with Cr Burns' wishes with no regard for due process'.*
- That they have had *'our professional reputations publically (sic) vilified in Council meeting and special purpose committee meetings'.*
- That they have *'had to spend a disproportionate amount of our time and public resources in responding to Cr Burns (sic) lack of regard for due process or normal administrative and business practices adhered to at this Council'.*

The complainants state that *'the behaviours and actions cited...together with the attached email extracts indicate a pattern of behaviour which is contrary to Councils (sic) endorsed Code of Conduct. The behaviours (sic) described are unique to this one particular Councillor in their type and severity'.*

The complainants list what they believe to be the relevant sections of the Code of Conduct that have been breached as follows:

Section 9.2. Councillors or administrators must not:

- a. Direct Council staff other than by giving appropriate direction to the General Manager in the performance of Council's functions by way of Council or committee resolution, or by the Mayor or administrator exercising their power under section 226 of the Act (section 352) (Local Government Act)
- b. In any public or private forum direct or influence or attempt to direct or influence any other member of the staff of the Council or a delegate of the Council in the exercise of the functions of the member or delegate (Schedule 6A of the Act)
- c. Contact a member of the staff of the Council on Council related business unless in accordance with the policy and procedures governing the interaction of Councillors and Council staff that have been authorised by the Council and the General Manager
- d. Contact or issue instructions to any of Council's contractors or tenderers, including Council's legal advisers, unless by the Mayor or administrator exercising their power under section 226 of the Act. This does not apply to Council's external auditors who in the course of their work, may be provided with information by individual Councillors.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Section 9.6 (1 & 2) re obligations during meetings

'You must act in accordance with Council's Code of Meeting Practice and the Local Government (General) Regulation 2005 during Council and committee meetings.'

'You must show respect to the chair, other Council officials and any members of the public present during Council and committee meetings or other formal proceedings of the Council'.

Sections 10.9 and 10.10: Use and security of confidential information.

'You must maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible'.

'In addition to your general obligations relating to the use of Council information, Councillors must:

- a. Protect confidential information*
- b. Only release confidential information if you have authority to do so*
- c. Only use confidential information for the purpose it is intended to be used*
- d. Not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or for any other person*
- e. Not use confidential information with the intention to cause harm or detriment to your Council or any other person or body not disclose any information discussed during a confidential session of a Council meeting.'*

Section 11.9: *'Councillors should not make allegations of suspected breaches of the code at Council meetings or in other public forums'.*

Sections 6.1 and 6.3: General Conduct

'you must not conduct yourself in carrying out your functions in a manner that is likely to bring the Council or holders of civic office into disrepute'

'You must treat others with respect at all times'.

The complainants allege that the breaches fall into three general areas. The first is the alleged behaviour of Councillor Burns with respect to his work and position as Chairperson of the Sustainable Transport Committee; the second is his behaviour and interaction with Council staff generally and especially in his instructions for various Notices of Motion in Council business papers; and the third is his conduct and interaction with Council staff with respect to the purchase of the Stuart Street Manly property by the Council.

In summary the complainants allege that Councillor Burns has:

- repeatedly tried to direct staff in their day to day duties evident in emails and telephone conversations received by staff,
- made statements during Council meetings during the past year which have implied poor conduct and performance by Council staff,

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

- instigated voluminous correspondence with staff in a deliberate attempt to harass and/or coerce staff,
- accused staff of falsifying minutes,
- accused staff of deliberately not providing information and/or not providing 'truthful' information when that information had already been provided,
- personally had contact and 'dealings' with the vendor, the real estate agent and the Council solicitors, in respect of a property in which Council was in the negotiation phase of the purchase,
- Accused staff of acting corruptly both in writing to the General Manager and to other Councillors, without any substantiation for that claim and without using due process to progress such a claim.

The complainants, in their letter to the General Manager, summarised as follows:

'...sitting at the core of this complaint is the damage caused by Councillor Burns' persistent undermining of Manly Council's staff efforts and work and how this, in turn, impacts and resounds through our community that we all work so hard to serve. The individual behaviours described above when considered as a 'collective whole' have impacted staff considerably including staff below the executive level. We anticipate our complaint could have the effect of making Councillor Burns' pattern of behaviour as we have described escalate. This is unacceptable to us as staff, so we would request an arrangement needs to be put in place to deal with requests and correspondence from Councillor Burns through one central monitored channel while this matter is dealt with to protect all parties affected from breaches of the Code of Conduct going forward'.

DATE REFERRED TO CONDUCT REVIEWER

17 August 12

PROCEDURAL HISTORY

On 10 August 2012 the complainants noted above formally lodged a very detailed complaint with respect to the conduct of Councillor Hugh Burns, with the General Manager, Mr Henry Wong. Attached to the letter of complaint was a volume of supporting documents generally consisting of emails from Councillor Burns to various staff members, and the staff responses. On the same date as the complaint was lodged, the General Manager wrote to the General Counsel, Mr James Ng, advising him that he had formed the opinion that the matter should be investigated and reviewed by a member of the Council's Code of Conduct Review Panel, and directing

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

him to brief a qualified reviewer. Mr Wong noted that *'given the election ahead, expediency may be needed'*.

On Friday 17 August Mr Ng contacted me with respect to the investigation and review and on the same day emailed me the letter of complaint and related documents, advising that a hard copy of the file would be forwarded by post the following week.

I initially contacted Councillor Burns by telephone to advise of the investigation and review, introduce myself, and to propose an interview date. I followed that call with a formal letter on 23 August 12 advising him of the allegations and seeking to arrange an interview to provide him an opportunity to respond.

Mr Burns responded by email of the same date advising that he would be seeking legal advice and would not have time to respond by the proposed interview dates. He indicated that the Council elections were then only about a fortnight hence and his workload was too extensive to permit allocating a time. He requested that the matter be *'entirely deferred to after the 8th September'*. It was his stated view that if he was not returned, the matter would be resolved in any event. Mr Burns commented that this was the first indication of any complaints against him; implied that the matter was political and there was resentment against him on the part of the General Manager; that the General Manager might have a conflict of interest in referring the matter; that the matter had a *'long ongoing history'* that the Ombudsman's report should be a starting point for my review; and that the matter might perhaps be done entirely in writing.

During this period the Council received a document entitled Circular to Councils *'The Consideration of Code of Conduct Matters Prior to the September 2012 Elections'*. The Circular directed Councils to defer the consideration of Code of Conduct matters until after the September 2012 Local Government elections. I discussed this circular with Mr Ng, General Counsel of Manly Council and it was the view of both of us that the direction precluded reports being submitted to Council for consideration in the four weeks preceding an election (as noted on the Circular itself), but would not preclude an investigation proceeding through the interview and report phase.

On 25 August 12 after consideration of the matter in light of the approaching Council elections, I wrote to Councillor Burns advising that I would defer the investigation until the result of the elections was publicly announced. I also advised that I would consider the comments in his letter of the 23 August and would contact him further.

On 31 August 12 I responded, dealing in order with the issues he had raised. I advised also that it was entirely his decision as to whether he presented himself for interview or not and whether he made written submissions or not, however sought his advice as to whether he would be available for an interview on Monday 17 September post elections.

On 16 September Mr Burns wrote drawing my attention to the Circular mentioned above. He also advised that as he had *'not taken a break in the last 4 years on Council I am due to go on leave from Monday 17th to Sunday 14th October inclusive atm, so I will regretfully be unavailable in this period to pursue the matter. I would thus be*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

looking at a late October to early November time frame unless the matter is otherwise resolved'.

On the following day I responded advising that the matter had now become urgent and in my view extending it until late October would be unreasonable and inappropriate and not comply with Manly Council Code of Conduct at 14.7, which I then set out in full. I requested the Councillor to advise whether he would be in Sydney during the period of his leave and if so to provide dates for interview if he elected to proceed with that method of response.

On 20 September, with no response to my previous email I advised that I understood that he would be in Sydney attending the Induction for Councillors weekend and also the later Inauguration on 7 October. I attached in full my previous email, and asked his urgent advice, but within 7 days.

On 22 September Mr Burns wrote to me advising that he would not be available until late October or early November as he had previously advised noting that as *'most matters raised by the complainants occurred some time ago...any slight delay due to my leave of absence is not likely impact proper examination of these matters'*. Mr Burns sought a *'fully itemised list of every single email...that is of issue to this matter including transmission dates and times with a specific indication of which charges apply to each specific dated email and well prior to setting any interview date'*. He also sought any other *'evidence to be presented for consideration eg witness statements, transcripts of meetings etc'* in advance.

On 3 October I responded to his emails in order of the issues he raised. I also advised I would provide any documentation to which he was entitled, including all emails that were available to me. During the following day I forwarded to Councillor Burns copies of all the emails which were attached to the original letter of complaint. I asked him to advise as soon as possible whether he intended to make himself available for interview or not, and that in the event he decided not to be interviewed I would, under the provisions of the Code of Conduct, proceed to finalise the matter unless he could advise a reason to the contrary. I advised that in my view the evidence was contained in the emails already available to me.

I had no further contact from the Councillor and on 15 October I wrote to advise him that I would be proceeding to finalise the matter on the documents before me unless I heard to the contrary from him within 4 days. I also advised that in order to provide procedural fairness to him I would provide a copy of my preliminary draft findings for his comment prior to finalisation and my final recommendations. I provided that preliminary draft report on 22 October, and requested Mr Burns respond within 5 business days. As I have heard nothing from the Councillor and the timeframe has passed I have proceeded to finalise the investigation.

ISSUES FOR DETERMINATION

Whether Councillor Hugh Burns breached Manly Council Code of Conduct by his conduct and by his communications and comments with respect to and about Council

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

staff both verbally and in writing. The sections of the Code of Conduct which are relevant in this matter are as follows:

General conduct

- 6.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the Council or holders of civic office into disrepute. Specifically, you must not act in a way that:
- a) contravenes the Act, associated regulations, Council's relevant administrative requirements and policies
 - b) is detrimental to the pursuit of the charter of a Council
 - c) is improper or unethical
 - c) is an abuse of power or otherwise amounts to misconduct
 - d) causes, comprises or involves intimidation, harassment or verbal abuse
 - f) causes, comprises or involves discrimination, disadvantage or adverse treatment in relation to employment
 - g) causes, comprises or involves prejudice in the provision of a service to the community. (Schedule 6A)
- 6.3 You must treat others with respect at all times.
- 9.2 Councillors or administrators must not:
- a) direct Council staff other than by giving appropriate direction to the general manager in the performance of Council's functions by way of Council or committee resolution, or by the Mayor or administrator exercising their power under section 226 of the Act (section 352)
 - b) in any public or private forum, direct or influence or attempt to direct or influence, any other member of the staff of the Council or a delegate of the Council in the exercise of the functions of the member or delegate (Schedule 6A of the Act)
 - c) contact a member of the staff of the Council on Council related business unless in accordance with the policy and procedures governing the interaction of Councillors and Council staff that have been authorised by the Council and the General Manager
 - d) contact or issue instructions to any of Council's contractors or tenderers, including Council's legal advisers, unless by the Mayor or administrator exercising their power under section 226 of the Act. This does not apply to Council's external auditors who, in the course of their work, may be provided with information by individual Councillors.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Obligations during meetings

- 9.5 You must act in accordance with Council's Code of Meeting Practice and the Local Government (General) Regulation 2005 during Council and committee meetings.
- 9.6 You must show respect to the chair, other Council officials and any members of the public present during Council and committee meetings or other formal proceedings of the Council.
- 9.7 You must not engage in any of the following inappropriate interactions:
- e) Councillors and administrators being overbearing or threatening to Council staff.
 - f) Councillors and administrators making personal attacks on Council staff in a public forum.
 - g) Councillors and administrators directing or pressuring Council staff in the performance of their work, or recommendations they should make.

Use and security of confidential information

- 10.9 You must maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible.
- 10.10 In addition to your general obligations relating to the use of Council information, you must:
- a) protect confidential information
 - b) only release confidential information if you have authority to do so
 - c) only use confidential information for the purpose it is intended to be used
 - d) not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or for any other person
 - e) not use confidential information with the intention to cause harm or detriment to your Council or any other person or body
 - f) not disclose any information discussed during a confidential session of a Council meeting.

MEETING DATES (WITH NAMES OF PERSONS IN ATTENDANCE)

Interviews were held with the following complainants over the 18 & 19 September 12:

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Staff A
Staff B
Staff C
Staff D
Staff E

FACTUAL BACKGROUND AND DETAILS OF ENQUIRIES MADE

See description of complaint and procedural history above.

**NAMES OF WITNESSES AND OTHER PERSONS
INTERVIEWED/QUESTIONED**

See above.

FINDINGS OF MATERIAL FACT

Having reviewed and assessed the available evidence I find that there is sufficient evidence to provide substance to the allegations of inappropriate and bullying conduct by the complainants against Councillor Hugh Burns.

REASONS FOR FINDINGS OF MATERIAL FACT

The evidence supporting the allegations by the complainants falls into three broad categories as I have noted earlier in this report. These categories are:

1. Emails relating to Notices of Motion
2. Emails relating to the administration of the Sustainable Transport Committee
3. Emails relating to the 40 Stuart Street Manly property acquisition.

The most appropriate method of dealing with the allegations is to deal with these categories separately. Although the complainants are united in all the allegations, some individual complainants have had a greater involvement than others in a particular category.

Category 1 is the allegations of bullying and harassment relating to the conduct of Councillor Burns in his communication with staff with respect to the issue of lodging Notices of Motion.

The complainants' specific comments supporting their allegations of misconduct in this category are as follows:

- That Mr Burns has repeatedly tried to direct staff in their day to day duties evidenced in emails and telephone conversations received by staff in relation to '*...instructing the inclusion of various Notice of Motion in Council business*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

papers which he has prepared and which have subsequently been ruled out of order by the relevant Staff Person for valid reasons and in accordance with the Local Government Act and Manly Council's Code of Meeting Practice'

- That over the year 2012 there has been a '*continual wrangling and time consuming negotiation each month between staff and Councillor Burns in relation to Notices of Motion lodged by him which are out of order or not legal. This has placed considerable strain on the staff in the production of the business paper to the relevant deadlines. Councillor Burns continues to seem to not understand what constitutes an acceptable Notice of Motion in accordance with the relevant Code of Council*'
- Councillor Burns has by email dated Thursday 12 July addressed to a staff member, the General Manager and copied to Councillors Aird, Macdonald, Whitting, accused staff of acting corruptly and also '*demanding a Notice of Motion be reinstated to a business paper. Mr Burns referred repeatedly to staff being unethical e.g. 'So we as Councillors need to look at some other measure to improve the ethics of staff behaviour that are tough, and in my view the clear threat of dismissal for not providing full and accurate information to Councillors is what is needed. This stiff action is also required to fix the sort of staff arrogance issues raised in the Ombudsman's reports. Personally I am not happy when the Manly residents are not informed or not told the truth, but I totally draw the line when this approach is seemingly taken by Council staff to the Councillors*'.

The two staff members most involved in the allegations and supporting evidence in this category are Staff A and Staff D.

At interview Staff D stated that the procedure is for Notices of Motion to be submitted directly to the General Manager who will then forward them on to the Administrative team. If the General Manager accepts that Notices of Motion are legal and not '*out of order*' he forwards them to the team to be recorded and placed onto the business paper.

Staff D advised that an instance typical of the difficulties she has experienced with Councillor Burns' conduct is the series of emails with respect to a Notice of Motion concerning senior staff contracts. These emails were attached to the letter of complaint. The Notice of Motion submitted by Councillor Burns was headed '*Immediate Amendment of all Senior Staff Contracts with addition of clauses relating to transparency in providing information to Councillors and within Council*'. The body of the Notice read as follows:

'There have been a number of instances where it has been apparent that Manly Councillors have not been informed on certain matters where it would be reasonable (sic) expected they would be so informed. In addition there have been cases where the Mayor has been found to have been briefed on matters and that such briefings or consultation has not been extended to all other Councillors. Further there have been instances of senior staff briefings being found to be factually inaccurate, sometimes with the outcome (whether intended or not) of misleading or acting to manipulate the Councillors.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Recommendation: That Council get an external legal expert to draft clauses to insert in all senior management contracts requiring accurate and timely provision of information to Councillors at all times. The clauses shall include grounds for disciplinary action and even dismissal (after due process, including 2 warnings) in case of intentional misleading of Councillors or any failure to keep Council adequately informed on matters, specifically on matters where Councillors request to be informed (ie one or more Councillors writes to the General Manager requesting to be kept informed). The proposed changes be reported on at the August meeting.'

By letter of 9 July 12 Staff D advised Councillor Burns that she was unable to include the Notice of Motion in Council's Agenda for 16 July 12. Staff D went on to advise that it was '*considered to be out of order as it makes allegations of breaches of Council's Code of Conduct by Council staff.*' Staff D referred the Councillor to Clause 11.9 Code of Conduct which states that '*Councillors should not make allegations of suspected breaches of the Code at Council meetings or in other public forums*'. Staff D referred the Councillor to Section 11 of the Code as providing the proper procedure for addressing such allegations or concerns about Council staff.

Some two hours after Staff D's email, Councillor Burns responded advising '*..This is not good enough. It's not about one or two specific potentially reportable breaches, it's a bigger, wider problem with a continuing pattern, and reporting for investigation is not the appropriate method of attempting to deal with it. Please put the NOM back in, with a prior draft supplied for my approval, deleting/rewording the paragraphs deemed to be not in accordance with the Code... This is a serious matter, not something lightly considered and the problem raised needs to be attempted to be resolved, not simply stymied by vague use of the Council's Code of Conduct. Given its subject potentially includes the GM in its scope, please also beware (emphasis added) there is a potential conflict of interest in the vetting of this NOM by the GM's office. The same will apply if the GM's office briefs any consultant/legal to review it instead. Other Councillors have expressed support for the NOM as proposed and it needs to go before Council for discussion*'.

On 11 July 12 Staff D wrote again to Councillor Burns about his proposed Notice of Motion. She offered legal advice to assist the Councillor understand the reasons the Notice would not be included in the papers. Staff D advised the Councillor that the legal advice was that as written the Notice of Motion '*proposes conduct obligations that already exist under the Code of Conduct and which all staff are required to comply with – see clauses 6.2, 9.4, 10 and 12*'.

Staff D set out the further legal advice to the following effect:

- that although the Councillor had referred to instances in which staff had allegedly not properly provided information, and other instances where senior staff had allegedly provided inaccurate and misleading information to Councillors, he had not provided any supporting information or particulars of such instances and nor had he identified the staff in question.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

- That Clause 11 and Clause 12 of the Code provide the procedure for reporting breaches, and the manner in which Council must enquire into such allegations; that clause 11.9 *'provides that Councillors must not make allegations of suspected breaches of the Code at Council meetings or in any other public forums'*, and that *'Councillor Burns' Notice of Motion seeks to raise allegations regarding staff conduct in a Council meeting where such matters are required to be reported in accordance with the Code of Conduct. This is contrary to clause 11.9 of the code and would be a breach of the Code'*.
- For the reasons provided above, the *'background'* section of the motion is *'unlawful and its inclusion in the motion makes the motion unlawful'*.

Staff D concludes her advice by stating that given the legal advice is that the item is *'deemed fundamentally out of order it would not be appropriate for me to redraft or reword the motion'*.

On 12 July 12 Councillor Burns wrote to Staff D, Mr Wong (GM), Ms Aird (Councillor), Mr Macdonald (Councillor) and Mr Whitting (Councillor). His letter is long and detailed and he commences it by stating *'as Councillor I give notice that I formally require the motion on the Proposed Amendment of Senior Staff Contracts to be included in the agenda of the next (July) meeting so that the matter can be put before the other Councillors for discussion.'*

Mr Burns states in summary:

- He does not wish to engage in further argument on the matter
- That as GM Mr Wong is free to advise on Motion submissions and that advice will be reasonably considered
- That it would be improper and approaching corrupt conduct if the GM attempts to *'try to prevent me placing reasonable motions before my fellow Councillors, because you or your staff have a conflict of interest in what I propose (as you clearly do here)'*.
- That he will *'place on record your Office's corruption (and I do not use this term lightly) of my May meeting motion'*
- That the only relevant point in the Code of Conduct which relates to the Notice of Motion with respect to staff contracts is 6.2 but that this provision is, in his opinion, *'clearly proving to be weak and useless in controlling the accuracy and distribution of information from senior staff.'*
- That Councillors need to look at some other measures to improve the ethics of staff behaviour that are tough and that in his view *'the clear threat of dismissal for not providing full and accurate information to Councillors is what is needed. This stiff action is also required to fix the sort of staff arrogance issues raised in the Ombudsman's reports.'*

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

- That to suggest that he may not raise the matter (of staff contracts) because of Clause 11.9 is *'ridiculous and improper'*.
- That the rules must be *'invalid if they prevent me performing my statutory functions as Councillor'*.
- That to *'suggest I list every occurrence of what I note for formal investigation is a deliberate ploy to bury the matters I raise, knowing how long it takes to do a formal investigation and the scope to derail and blunt this'*.
- That urgent corrective action is needed now and he provides an example of the advice and *'action on 40 Stuart Street who was briefed and when on the swim centre, the misrepresentation on the Council caretaker provisions from the DLG (Department of Local Government) and many more'*.
- That he has two choices in the manner of presenting the Motion in the Chamber; that he can raise examples to support his proposal anonymously to comply with 11.9, or he can do it fully and precisely naming names with verbatim meeting minutes noting every word said for the meeting to consider if *'maintaining 11.9 is appropriate if the converse obligation of 6.2 is not being observed'*.
- That the Motion needs to be put on the July agenda because the *'current behaviour of staff is not acceptable to me as a Councillor and I am sure the community would feel the same way'*.
- That he is prepared to amend a part of the Motion to comply with 11.9 viz *'In addition there have been cases where one Councillor has been found to have been briefed on matters and that such briefings or consultation has not been extended to all other Councillors. Further there have been instances of staff briefings to Councillors being found to be factually inaccurate, sometimes with the outcome (whether intended or not) of misleading or acting to manipulate the Councillors'*.

At interview Staff D stated that although she believed the Notice of Motion was not in order, she sought the advice of the in house Counsel Mr James Ng, and it was his advice she quoted in her letter to Councillor Burns. She stated that she and her team had previously attempted to assist the Councillor with the Notices of Motion he submitted, to enable him *'to get the outcome he wanted without it being out of order'*. It was her view that the Councillor had become accustomed to staff assisting him and making suggestions to *'bring the Notices into a state that'* was proper, but that over time he would

'just become demanding and say 'no' or 'yes' or like fix that and then send it back to me and then he would just start to cross that line where we were trying to help him and then he starts to instruct us (the staff)...like his staff...maybe in hindsight we could (have said) 'no that's out of order' ' and sent him away to redraft the Notice, rather than helping him to reword them...so possibly to be fair, maybe we coached him down the bad habit line and he's gone too far with that'.

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

Staff D commented on the problems she and her staff had encountered in dealing with Councillor Burns. She stated that

'I think that there's those subtleties that Councillor Burns doesn't see and...in his dealing with staff....these are very subjective comments...he just doesn't seem to have any...emotional connection that these are people you're dealing with, not, like he's very, almost hostile..there's an attitude but you know like it's too subjective to sort of play around too much with it, but it does make dealing with him...I've learned that when I speak to him to be very blunt, and be very accurate in what I say to him, and he works well with that sort of level of communication, but... there's no room for niceties, or being polite'.

She went on to say that

'..it's because in trying help him he then takes the message that you are subservient to him and you do what he says, and a few times I've asked him to come back to me...to have a think about what I've said in terms of...maybe even rewriting even an element of one of his Notices of Motion and he...(does) not pay any respect in terms of timeframes, in terms of 'I've got my staff here waiting to finish a business paper off' ...he just kind of doesn't have that concept of other peoples' needs or....staff staying back to wait for his final call on business papers'.

Staff D stated that over the period of time she has dealt with the Councillor she has always been *'very thorough with my responses to him and I'm very....give him a very clear message about why we can and cannot do things all the way along...in the end I just, in the end I said to him 'we won't be putting it in' and I was kind of expecting a visit but it didn't happen.'*

When I asked Staff D to comment upon the statements Councillor Burns had made in his letter of 12 July to her as well as the General Manager and other Councillors, she stated that she *'really took offence to that, because he's actually referring to me in my previous role, I believe, in this particular paragraph. ('potential conflict of interest in the vetting of this NOM by the GMs office')* Staff D was of the view that that was what the Councillor was implying, given the fact there were no other staff copied into the email, and that the comments were directed at her, and it was her view that the Councillor would expect her to show the email to both the GM and to Staff A. She stated that *'..I thought it was quite threatening that email, because it said to me that you've got a conflict and I'm vetting it, and it's all very personal and I really objected to that'.* Staff D stated that the Code of Conduct does not make provisions for generalised attacks and is very specific, but that the Councillor responded that *'there's been too many...in other words the breaches of the Code of Conduct that he's referring to were so broad-ranging and so frequent that he didn't want to document them, and just wanted to broad-brush a whole lot of staff, implying that they were in breach of the Code of Conduct'.*

Staff D advised that all staff matters at Manly Council are entirely the domain of the General Manager, pursuant to the Local Government Act, with the exception of senior staff contracts which are referred to the Council for endorsement. She stated however, that the provisions of the contracts which deal with performance management have no input from Council but are dealt with separately, and that the General Manager has sole responsibility in this area.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

To support the allegation of Councillor Burn's constantly attempting to direct Council staff, the complainants have included other draft and revised Notices of Motion including the *'Planning for protection of Sydney Water Reservoir in Fairlight'*, *'Proposed works on Manly Swim Centre'* and the *'Approval to enter into contract for purchase of 40 Stuart Street'*.

With respect to Councillor Burns comment in his letter of 12 July about the *'Restoration of Public Access to Development Application (DA) information'* Motion, Staff D stated that this was a Motion for the May meeting which was also deemed out of order. She stated it was in respect of the publication of documents to the Council website; that Council had been working with the Office of the Information Commissioner to establish what is appropriate to publish; and there was some *'conflicting legislation around DA requirements under the relevant Acts....versus the copyright and privacyso ...this became quite political...so we took down a lot of information off our website, regarding DAs and still haven't resolved this whole issue'*. Staff D expressed the view that because of this there were problems with the Notice of Motion Councillor Burns was attempting to submit and staff were endeavouring to assist him to reword it sufficient to be put into a business paper. In her view the Councillor was *'still harbouring some resentment from us not complying with his demands then.'*

Staff A has been employed by Manly Council for about ten years. Staff A reports to Mr Wong, the General Manager.

When I asked Staff A to speak to the allegations he and the other complainants had made with respect to the Notices of Motion he advised that the Council is guided by the Code of Conduct in all aspects and Motions must be phrased or prepared in a manner that did not breach the Code.

He stated that in his experience Councillor Burns caused difficulties on a consistent basis giving an instance of the Councillor always putting in Notices of Motion after the Tuesday deadline, and expecting the staff to remain at work after hours to assist him with the wording and to hold the collation of the business papers for the following Monday Council meeting. With respect to the Notice of Motion alleging corrupt or inappropriate or unethical conduct by staff members, Staff A stated *'...under the Code of Conduct those matters can't be raised in the Council directly in the chamber, they need to be referred to either the General Manager or the Mayor depending on who it's about...so all we were left with was well if someone is alleging misconduct it's a serious matter..and you'd better report it...you have an obligation or duty to report it, under the Code of Conduct...so we would get advice because we're not all lawyers and so we would get advice from our General Counsel and he has various staff that work with him that are experts in Administrative Law...and what was tending to happen ...month by month, these Notices he was putting forward just weren't legal and so we had to write back and say....and we are not meant to..and then he'd put it back on us that we should be trying to help him reword it, his Notice of Motion...but as staff it's not our job to be ..put this bit in, or take this bit out...it puts us in a very difficult situation...You ..try and be helpful and say...you simply can't allege bad conduct, you've got to report this and this is*

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

the mechanism to deal with this matter...and that's all you can say, and then he'd come back again'.

Staff A said because of these difficulties

'..what happened then is that would then delay the meeting to finalise an agenda getting it to the General Manager and we were all sitting back here at 9 or 10 o'clock at night trying to finalise an agenda..and one of the reasons we're late and other things aren't dealt with is because with Councillor Burns...because to run a final business paper there's a system that collates all the papers together, depending on the attachments and that can take half an hour or longer to run. So every time this is changed we have to go through it all again and we'll sit there and we have to reword things and drop in what he wants and then that's where mistakes happen and we have to recheck it all, so that there's just this constant barrage...I would refer you to the emails, I think they pretty much tell the story'.

Staff A stated that it was his view that because the Councillor didn't get what he wanted, which was agendas exactly as he wanted, or Notices of Motion worded as he demanded, even though possibly in breach of the Code of Conduct or the Code of Meetings or other relevant legislation or policies, he '*alleges corrupt conduct*' on the part of staff. He stated that when the Councillor then circulates his emails with these allegations to other Councillors '*we all get tarred with that brush...and after a while we just go, well that shouldn't be allowed, it's just not acceptable. It's our professional reputation we've been working in local government for twenty plus years and we've got reputations and careers and we don't want those to be..played with*'.

Later in our interview when I asked Staff A to make any final comments about the issues he said

'...I think in a lot of situations staff are feeling intimidated..he's alleging corrupt conduct and he's going I'm going to push this guy and you think 'God I'm not going to push this guy, you know, what's going on here..because it's all very confronting so I think that needs to occur. I think we've reached that point now where we've done all we need to have, Hugh (Burns) is still with us we've got to sit down and work out a way that we can transact business in a civilised way and that can accommodate differences of opinion, but still transact the business and not hold up the business and not impinge on people's reputations...'

When I spoke to Staff B about this issue, he stated that Councillor Burns

'..doesn't bully or harass me face to face because he's probably come to the conclusion that that cannot be done. However as I have found out that he's been bullying and harassing me by putting myself down with the sustainability committee on information that he falsely, in other words he called me a 'liar' and in giving untruthful information...staff at the end wouldn't go to it (the Sustainability Committee meetings)....in the end I refused to go to it'.

Staff B went on to explain that in this role he comes into contact with the Sustainable Transport Committee chaired by Councillor Burns. He stated that he provided all the information requested by Councillor Burns; that staff went to the meetings and advised Councillor Burns that everything he had requested had been provided; but

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

that notwithstanding that, Councillor Burns still insisted that the information had not been provided and demanded that Staff B attend meetings. Staff B said that he had decided that his presence would not further assist matters and that he was not intending to put himself in the position of being denigrated by Councillor Burns. He stated that he had seen emails written by Councillor Burns which had denigrated his reputation by stating that Staff B was not providing 'truthful information'. Staff B also confirmed the evidence given by Staff C that Staff F had become so stressed by Councillor Burns' conduct with respect to the Committee meetings that she felt intimidated and bullied.

Category 2 is the issue of the administration of the Sustainable Transport Committee. The complainants' specific allegations with respect to this issue are as follows:

- *'Councillor (Burns) has repeatedly tried to direct staff in their day to day duties evidenced in emails and telephone conversations received by staff including instructing staff to administer the arrangements relating to the Sustainable Transport Committee of Council in a way other than defined by the terms of reference and in accordance with regular administrative and business practices of the other special purpose committees of Council.*
- *Staff have been repeatedly belittled and bullied during the conduct of the Sustainable Transport Committee chaired by Councillor Burns who also accused staff of falsifying (doctoring) minutes and then refused outright for staff to take the minutes of this Special Purpose Committee of Council. One staff member who serviced the committee concerned was reluctant to attend these meetings as she felt too intimidated and stressed to be able to do so following feeling harassed by the committee and its Chairperson Councillor Burns.*
- *Councillor Burns also has accused staff of deliberately not providing information or not providing 'truthful' information to the Sustainable Transport Committee when they had in fact provided the information requested. This has occurred more than once. The staff members' reputations were denigrated by Councillor Burns to other Committee members'.*

Councillor Burns was appointed to the Committee by the General Manager at the commencement of the Council term and has been Chairperson during that period. The Committee, apart from the Chair, is comprised of volunteers from the local community. Staff F is the 'Lead officer' of the Sustainable Transport Committee.

At interview Staff C stated that prior to Staff F another officer held the position but had left to take employment with another Council. Staff C held the view that a contributing factor to the former Lead Officer's decision to resign was the stress caused by the alleged problems associated with working with Councillor Burns. Staff C stated that although Staff F

'didn't ask to be removed from the position of Lead Officer, she had a number of issues with it in that she comes back from the meeting (Sustainable Transport Committee meeting) and she's really stressed and she feels that

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

she's treated without respect and particularly when he (Burns) in front of others says thing like 'I ask for this information and staff haven't provided it' while she has or had provided it previously..and he makes statements like 'staff couldn't do proper Minutes'.

Staff C stated that in the short time period between the former Lead Officer leaving the Council and Staff F taking up her position, he attended the Sustainable Transport Committee meetings himself, although he did not take minutes. He said that Councillor Burns took his own minutes and Staff C reviewed them, but that there had been difficulties all through the term of the Committee because of this practice by the Councillor. He said that when the formal minutes were referred to the Councillor he frequently changed them, put his own view of the proceedings, or added comments or agreements that had not occurred at the meeting. He stated that this caused difficulties with the Lead Officer and the staff generally, and eventually Staff C spoke to the General Manager about the problems and suggested that the process be changed so that staff referred the Minutes to Staff C; that he reviewed them and then sent them himself to the Councillor for his review. Staff C took the view that this change of procedure would mean that he would be standing between his staff who were under stress because of the alleged conduct of the Councillor, and the Councillor himself.

Staff C added that in his view Staff F was very proficient in her role and was well qualified and thorough, however recalled several occasions where Councillor Burns treated her

'..badly and said 'I asked for that stuff and they haven't provided that' and its there in front of him in the document...then the minutes are distributed at the meeting which the minutes haven't gone to the person, so his own minutes are distributed to the members but that is totally out of line and then when the staff try to do minutes then he's changing things...then he tries to put things in there that the staff don't agree with and staff know what happened at the meeting and in the meeting he simply says 'is that right then write it' but that doesn't necessarily mean all the committee members had the agreement to that..staff were trying to say to me that we can't agree with this because this is not what happened'.

I am advised by Staff C that Councillor Burns refused the formal minutes taken by Staff F, and instead took his own minutes at each of the meetings of the Committee which eventually caused delay and problems after each meeting because those minutes were not finalised within a reasonable timeframe, not provided to other members, or not provided for formal documentation at all. Staff C added that his staff were competent and the Minutes, in his view, were professional and that the comments by Councillor Burns that his staff could not write '*proper minutes*' were incorrect and insulting to his staff. It was his view that the comments were made simply because Councillor Burns '*didn't agree with what was being said at the meeting...*' by Council staff and other committee members.

Staff C stated that '*..if they (staff) had been dealt with in a more polite way, things could have been different...it's the method and the authority and the way you put it to them, and the emails saying how many times I told Council, how many times do you want to hear the word 'Ombudsman' here that sort of thing...its not his role to talk to staff at all about the matter*'.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Staff C explained to me that the Committee is an advisory committee only, and is not in a position to make determinations itself, rather it is to look at various issues and recommend strategies or proposals to the Council for discussion and determination. This information is confirmed by the Terms of Reference of the committee which forms part of this report. Staff C stated that some of the difficulties were created because Councillor Burns sought confidential information to which he was not entitled, or reports of an operational nature to be compiled which were also not appropriate because the scope was far too large for the committee staff to deal with.

The bundle of emails which are attached to the letter of complaint entitled '*Emails relating to Administration of Sustainable Transport Committee*' have been provided by the complainants in substantiation of their allegations. They relate to the alleged problems that Council staff have been faced with in their respective dealings with Councillor Burns.

The first of the emails is from Staff F addressed to Staff C and is dated 11 May 12. Staff F states that she has a couple of comments that she would '*..like to make to senior management on the March minutes*'. In this email, which is clearly as a response to comments made by Councillor Burns about her alleged performance, or lack thereof, Staff F confirms that Councillor Burns was provided with requested information by email prior to the committee meeting being held, and further that at the meeting in question a Council staff member explained to the Councillor in person that all requested budget information had already been provided to the Councillor.

This email was then in turn sent to the General Manager and other staff members for their information with Staff C commenting that the Minutes in question were '*..not the minutes prepared by the Lead Officer and sent to the Chair...(but) his (Burns) own minutes.*'. Staff C requested a meeting as soon as possible. It is clear from a later email that the two sets of Minutes were provided to Staff B.

The next few emails are dated in August and commence with a request from Staff F on behalf of the Sustainable Transport Committee for information. This information was requested on a Tuesday for the Thursday meeting, and from an observers viewpoint, appears to require substantial work from Council staff to provide in the short timeframe. However it was provided on the same day as the email from Staff F. Councillor Burns, as Chair of the Committee, again sought further extensive information at the October Meeting and Staff F forwarded that request onto Staff B. Similar emails followed over the next months, with the Committee asking for updates on a regular basis.

The problem with the Minutes appeared to be a continuing problem and this is apparent from the flow of emails between Staff F and the Secretariat. The fact that Councillor Burns was using his own Minutes, and that the Lead Officer was preparing the formal Minutes caused delays. It is also apparent from the emails that Councillor Burns was providing his own version of the Minutes to the committee members during the meeting, and that any formal record with some oversight was being short circuited by the Councillor's actions.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

It is also apparent that this situation was in place at least in September 2011 under a former lead officer and Councillor Burns was not satisfied that the Minutes were accurate at that stage.

He wrote to Staff C on 16 September 11 in an email headed '*re STC July and August minutes*' and the Councillor's views as documented in that email can be summarised as follows:

- That the Councillor thanks Staff C for '*at least running the proposed changes past me*'
- That the '*trouble is any staff redrafting of the minutes re-raises a lot of the minutes 'doctoring' issues that unsettled Councillors in 2009*'.
- That the purpose of the committee is to assist Councillors with expert advice
- That he takes the minutes to '*ensure the record of the STC meeting is adequate (no disrespect intended but many Council staff can't take minutes properly/professionally in my direct experience) and to ensure the record is fairly recorded from the Committee's perspective and recording is not open to being politically managed to other agendas*'.
- That as Chair '*I record I will accept correction of any typographical error, factual error or technical amplification from staff..however I cannot accept any political redrafting from staff. Procedurally it would also be better for the staff representatives to raise such corrections/amplifications in front of the Committee members at the point the minutes are confirmed..rather than attempt to change them after this point*'.
- That staff may not like Item 4 wording (in the 21st July meeting minutes), but '*..that is what happens when the committee request something, receives apparent agreement that it will happen, and then it does not happen. It is not reasonable to fail to deliver and then expect to be able to edit out/spin any criticism of this.*'
- Re the Minutes of the 25 August '*..Item 9 was a resolution of the Committee and it simply cannot be redrafted by staff. I frankly do not understand how staff cannot see this. This is a very important point and knowing your staff are intelligent suggests a level of latent disrespect towards the ST Committee and its Chair. This issue is why I have felt uneasy about returning the production of the STC minutes to staff. Thus it worries me that nothing appears to have been learnt out of the second Ombudsman's report affair*'.
- That Councillor Burns watches for anything that '*could by intent or accident marginalise the ST committee, so encouraging direct reporting without going through the committee*'.
- That this '*ongoing conflict problem appears to stem from not accepting the position that most Manly Council committees exist to advise the Councillors and that the role of the staff is to support and facilitate the committee*'

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

operation which may include providing advice, but without any attempt to manage the committees or their determinations.'

- That '*..the point at which the GM/staff should come in officially is at the adoption by Council under 'Committee Minutes with items of a substantial nature'*'.
- That another issue is '*...the time being consumed in dealing with it...none of this is intended to be personal and I suppose we are all just advocates for our respective teams'*'.

As I have noted earlier in this report, the problems with the Committee and Councillor Burns as Chair continued with Staff C advising the Councillor on the 13 February 12 that '*..it is the duty of the staff officer to prepare Minutes and Agendas and it is my responsibility to ensure minutes are done on time. If you have issues with the quality I will address it. As agreed Staff F will take the minutes from the next meeting. I have no problem with you taking shadow minutes'*'. Staff C also attached to this email to Councillor Burns, a copy of the Terms of Reference of the Sustainable Transport Committee. This followed a similar email dated 9 February after a discussion between the Councillor and Staff C and to which the Councillor responded that it was not his recollection of the conversation, however he would '*trial'* the Lead Officer taking the committee meeting minutes and would '*speed up the distribution of the Minutes'*'.

Councillor Burns responded to the email of 13 February the same day advising Staff C that the Terms of Reference had not been adhered to in three years '*so there is no justification that we should suddenly adopt these now'*'. From the exchange of emails it is apparent that the problem of the delay in minutes and the fact that the Councillor was taking his own minutes to the meeting to be agreed had escalated. The Councillor advised Staff C that in his view the '*minutes timeframe issue is really irrelevant to the matter of who is producing the minutes'*'. He added that '*avoiding any potential for editing was a factor in why they are presently done by the STC committee rather than staff who may be tempted to second guess their superior's wishes over the committee's intent'*'. Councillor Burns stated that he had consulted other Councillors and on reflection considered

'..it best to maintain the existing STC agenda and minutes arrangements to September 12. Naturally staff continue to be free to contribute items to the meeting agendas like any committee member and the timeframe for minutes production will be shortened to meet the request...'

In his email the Councillor then goes on to state that he intends particularly to bring up the matter of the reports on the implementation of STC signage as '*an example of the committee not getting required information from Council staff..that gives me little confidence that staff written minutes would independently reflect the committee's views and position on matters connected with Council's internal performance'*'.

However this statement by Councillor Burns is inconsistent with the emails between Staff F and Staff B and the detailed information supplied to the Councillor at his request on this issue.

In the same email Councillor Burns states

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

'..I note the instances last year where I was requested to 'politically' soften the wording of some minutes recording the ST Committee's disappointment in staff performance, that had been previously approved by the committee as an accurate record of the proceedings, that I considered quite improper. I made the point that like any other committee member if staff were ever not happy with the wording of the draft meeting minutes then their concerns should be raised in front of the whole committee at the time these minutes were being adopted for everyone's views on the issue.....it is not appropriate that ...they are fully managed by staff as regards controlling what the committee examines, or records particularly including senior staff.'

Mr Burns then went on to refer again to the Ombudsman's report on Manly Council.

Both sets of Minutes are contained within the documents provided to me in the bundle relating to this category. Staff F minutes appear to be professional, and she writes in an email to Mr Ross Fleming (former Deputy General Manager) and Staff C that there are inconsistencies in the Minutes presented by Councillor Burns and her own notes. For instance she states that according to her own notes there were no apologies received (Burns notes the Mayor) and that there was a person present at the meeting not noted by the Councillor. She also notes other issues raised at the meeting, but not minuted by Councillor Burns, and also the issues of signage and budget documents raised earlier in this report. Staff F commented on the delay problems stating that that the draft Minutes for the 15 March meeting were provided to Councillor Burns on 22 March, with his amended minutes being received on 10 May.

In response to the two very different and inconsistent sets of Minutes from that meeting, Mr Ross Fleming wrote to the GM, attaching for his information the formal Minutes and advising that there were two sets with the Minutes being provided by Councillor Burns including issues and details of conversations which should not be included in Minutes and the items which were disrespectful to staff. Mr Fleming recommended that the staff minutes be adopted and referred to the Secretariat for distribution. He also advises that once this course of action is approved, he will inform Councillor Burns

'..that the Minutes of Special Purpose Committees are to be completed within 2 weeks of the meeting and then reported to the next available Council Meeting; the Minutes should only record what was resolved by the Committee with brief notations added for explanatory purposes where necessary. The Minutes should not contain comments that are disrespectful of staff'.

It is clear from the chain of emails that this course of action was adopted because there is an email from Mr Burns to Mr Fleming stating he is 'mystified' by the email concerning the Minutes because his minutes had already been adopted by the STC committee meeting at the April meeting. Councillor Burns adds in his last paragraph of this email of 29 May 12 that 'otherwise you seem to have a problem bordering on corrupt conduct'.

Councillor Burn's Minutes record in respect of Item 6 as follows

'There was no report provided on this item by the staff present, notwithstanding it was on the agenda. It was considered disappointing that there was no prior advice to the chair or committee members that this report

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

would not be forthcoming. The chair noted that as the items were included in the agenda, such advice, including reasons, should have been provided before the meeting, to enable the matter to be discussed with the Chair. Additionally the handling of this ongoing matter in terms of low progress and lack of reporting is considered most unsatisfactory’.

In respect of Item 7 ‘Outline of Bicycle and Sustainable Transport Projects currently in the draft 2012-13 budget’ as follows:

‘The requested report on these items was also not provided by staff to the assembled committee members, as per the meeting agenda. Again the lack of prior advice was noted with the expectation such advice should have been provided. It was noted other committees such as the Community Environment Committee were given access to draft budget projects and figures for discussion and review, and there was no satisfactory explanation from staff present as to why the same could not have been done with the STC.’

The formal Minutes prepared by staff note the same Items as follows:

‘Item 6: Staff reported that all information given to the traffic team regarding this project had been provided previously and that Staff B had been invited to the meeting as previously requested. Staff B was unable to attend the meeting so no further information could be provided.’

Item 7: Staff explained that the budget process was an operational matter and that a draft budget would be published for Councillors in due course (as occurs annually). Staff also explained that budget bids had been submitted for all the items that had been discussed at the February 2012 Sustainable Transport Committee.’

On 4 June Mr Ross Fleming in an email to Mr Burns, with copies to the GM, Staff C and Staff A addressed the difficulties that had been consistently occurring with the Minutes of the Committee. He notes the previous emails that had been addressed to Councillor Burns which advised him of the procedure for Committee Minutes and the agreement that Staff F would attend the Meetings as Lead Officer to act as a secretariat for the Committee. Mr Fleming then addressed the problem of the Minutes of the 15 March meeting which were inordinately delayed and not referred to the Lead officer for review, but provided by Councillor Burns directly to the Committee. Mr Fleming notes that the Minutes were generally in accord with those of the Lead Officer, however commented that Minutes generally do not require details of conversation between committee members. He also noted the two matters I have noted above, namely Items 6 and 7 and the inconsistencies between the formal and informal minutes. Mr Fleming stated that ‘the way these matters have been recorded in the Minutes could be interpreted by some as demeaning to the staff who were present at the meeting and are generally critical and disrespectful of staff’. He goes on to note that it was his understanding that Councillor Burns was informed on 8 March (a week prior to the meeting on 15th March) that Item 6 would be placed on the Agenda; that the information sought by the Committee at the previous meeting had already been provided; that Staff B had advised staff that he was unable to attend the meeting; and that because this matter was placed on the agenda late, there was insufficient time for staff to prepare a report.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

As to Item 7, Mr Fleming advised that at the meeting in question the committee had been advised that the budget process was an operational matter and *'that a draft budget would be published for Councillors in due course....'*. Mr Fleming concluded his email to Councillor Burns by stating

'as you will appreciate, these Minutes become public documents. Under Council's Code of Conduct Council has an obligation to treat staff and others with respect. It then follows that matters involving staff should be reported respectfully, and should not be unduly critical or report information incorrectly. Council's Traffic section staff are diligent in their duties and work very hard to provide reports and advice to the...Committee and the Traffic Committee as well as to Council...'

In response to the email noted above by Mr Fleming, Councillor Burns responded on 4 June as follows (in summary):

- He disputes many aspects of Mr Fleming's email and was surprised to receive another *'request to get me to agree to changes of previously approved ST Committee minutes'*.
- *'There is no lack of respect to staff, its just a matter of fact recording but without 'spin'.'*
- He has outlined numerous times the *'key issue of staff independence, with current and past staff often displaying conflict of interest problems as regards preparation of agendas and minutes'*.
- That in his discussion with Staff C it was *'only agreed to trial staff taking minutes but as previously it again proved infeasible as the present staff servicing the committee were quickly caught up in conflict of interest due to lack of independence ie a perceived attempt to limit the STC agenda and manage recording of the committee's deliberations to more suit the interests of staff and senior management than the interests of the Committee'*.
- He requests the existing March STC Minutes (his version) be placed on the public record *'as doctoring of any approved meeting minutes would appear to constitute corrupt conduct'*.
- He states that *'nothing has been learnt from the second Ombudsman's report into Manly Council'*.
- He states that it is his opinion that there *'is a continuing cultural problem in Manly Council of senior staff arrogance – the senior staff and the General Manager do not appear to accept the authority of the Councillors (acting as a group) if it does not suit them. Addition (sic) there is a sort of hostility/disregard shown to those that take a 'different ' view to that of senior management whether Councillor or residents'*.
- It is his view that the General Managing is attempting to manage the Committees through the support staff provided by controlling agendas and

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

minutes. He believes this is improper and is a *'potential corruption of the Committee system operation'*.

- If *'you are upset at staff non-performance being placed on the public record, then please rectify the problem, not the reporting in an attempt to shoot/muzzle the messenger'*.
- Staff are always provided at least 30 minutes prior to Meeting to peruse and review the previous Minutes and are free to raise any matters at the point the minutes are considered by the committee.
- It is Councillor Burns' view that Staff B did not provide proper or truthful responses to past ST Committee requests therefore he does not wish to deal with him directly. *'The lack of any reply to the committee's recent requests is either a gross communication failure within Council or an indication that Staff B does not feel he has to answer or respond to the ST Committee. Either way a poor result and none that should be on record.'*
- The draft budget is not *'operational'* because the Councillors are involved and can adjust it. The apparent *'directive to staff not to provide this information to the STC frustrated my role as a Councillor chairing a Committee and was then shown to be quite selective..'*
- With respect to minutes and the detail included, Councillor Burns *'finds they are far more useful if the minutes include a summary of the views and deliberations rather than just the minimal of decisions reach by the committee'*. He states that he would prefer the minutes to be taken *'Hansard style'*.

The final email contained within this bundle is from Staff C to Staff A and Staff D and is marked confidential, and dated 9 August 12. It contains a numbered list of the problems encountered with Councillor Burns and his conduct and interaction with staff. It reads as follows:

1. *'Treating staff without respect in STC meetings*
2. *Often refers to Council staff not having learnt lessons from Ombudsman inquiry. As a result of this he says he needs to retain control of the committee*
3. *Threatening behaviour – repeatedly saying to staff that if he doesn't get what he wants he will complain to the GM*
4. *Refused to follow Terms of Reference in spite of advice from staff and the DGM*
5. *Breach of Council's protocols*
6. *Doesn't provide minutes in a timely manner*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

7. *Unsubstantiated claims that staff are not performing to deliver his expectations*
8. *Refusing to take advice from Lead Officers'.*

Staff C at interview commented that the Code of Conduct is specific with respect to the interaction between Council staff and Councillors; that Councillors cannot direct staff to carry out instructions (unless in secretariat function with agendas etc); and that if there is any concern on behalf of Councillors as to the performance or ethics of a staff member, that should be reported to the General Manager who will then deal with the matter as necessary and through the correct channels. It is Staff C's view that the Councillor has *'no respect for the process..but I told him that there is due process he needs to follow and the process is that he can review the minutes but the minutes have to go to the General Manager, to the secretariat and once the General Manager approves that, then it goes to the committee members, via the secretariat but he was bypassing that'*. He stated that he had attempted to establish a good working relationship with Councillor Burns and it was his view that he had to some extent succeeded. He stated that he ensures that Councillor Burns is *'kept in the loop'*, however that when it *'comes to the specific issues like the problems with the committee, he does not listen'*.

Category 3 is in respect of the purchase by Manly Council of the 40 Stuart Street property. The complainants' specific allegations with respect to this category are:

- *'attempting via email to coerce senior staff to arrange for that senior staff member to seek the delegation for the placing of the seal of Council on a legally binding contractual document relating to a multimillion dollar property acquisition matter. This attempt was in the absence of the General Manager with whom the delegated authority for placing of the seal of Council under resolution of the Council resides. The staff member concerned did not have the delegations to do so. This attempt was despite the Councillor being advised that the contract would progress with the General Manager within the next 2 business days.*
- *Staff have been accused of delaying enacting resolutions made by Council where clearly due diligence proceedings need to be undertaken before this could occur. This is in particular, in relation to acquiring a property at 40 Stuart Street Manly.*
- *During a June 2012 meeting of Council, Councillor Burns stated in the chamber words to the effect that staff provided 'amateurish and partisan' advice on a particular matter affecting Council's budget. Such statements impute staff have ulterior motives in the professional advice they provide without fear or favour. The advice in question (relating to the financing of a property acquisition at 40 Stuart Street Manly) had originally been provided by the Executive Manager of Corporate Support Services and the Chief Financial Officer (the later a qualified CPA) and also backed up and supported with a covering report authored by the General Manager and supported by the Executive of Council. Councillors not agreeing with staff*

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

advice is one thing (and part of the cut and thrust of the business of local government) however, imputing lack of professionalism and ulterior motives in advice given is quite another and unacceptable.

- *Councillor Burns has indicated verbally in Council meetings and intimated in emails he has sent that he has personally had dealings with the vendor of a property Council had resolved to acquire at 40 Stuart Street Manly; the real estate agent who the vendor of the property had initially engaged to transact the sale process; Council's lawyers (Pikes) regarding where the execution of documents was up to.*
- *Because the acquisition process is an operation matter to be executed under the Local Government Act under the authority of the General Manager, Councillor Burns has 'meddled' in these proceedings by his own admission.*
- *The acquisition process was a 'confidential property matter' related to the acquisition of the property by Council. All such matters had been resolved in closed committee. Councillor Burns intimated he had held discussions with the parties mentioned above where he had enquired about the negotiation for purchase process and reported such matters back to other Councillors and staff of Council via email and/or telephone conversations..'*

Staff E has been employed by Manly Council in various capacities and reports to the General Manager. Staff E advised me that the Council determined to purchase the property at 40 Stuart Street Manly although the vote was not unanimous. She stated that the advice provided by Council staff, supported by three independent valuations, was that the property was overvalued. Staff E stated that to her recollection the original Motion for the purchase of the property was in about April 2012, but that due process was required including valuations, pest and building reports etc and that these were issues considered by Council staff in the final advice to Council itself.

She added that the process was time consuming because of changes in dates for exchange of contracts, borrowing arrangements, further Council Motions and Resolutions to permit the various alterations in the timeframes and the sale contract and the borrowings, and finally the caretaker period leading to the recent Local Government elections. She states that because she only took up her present position in the middle of July, she wasn't dealing directly with the issue of the purchase until that date, at which time

'..Councillor Burns was asking certain questions why not this, why haven't you done that..we would respond to him he would not accept that response. He would go and seek his own answers from I don't know, our lawyers, go back to the Local Government Act, go back to the Department of Local Government...so checking what we were saying all the time, checking out the veracity of our statements. I then became the contact with him because I actually can get on quite well with him and I haven't been directly bullied...but my involvement in this and I feel incredibly strong about it, is that I do not want myself, my professional reputation, my General Manager, my colleagues to be vilified around the town as though we are all idiots, we are not'.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Staff E stated that over the period since she took up her position she has responded to Councillor Burns *'...numerous times and he keeps coming back saying he didn't get a response. So I write back and say, I'm sorry you didn't get it, I will resend it to you...now that happened again yesterday. He came back to not only the General Manager saying he didn't get my response but to a whole stream of people. That undermines my credibility'*.

Staff E advised that although the interaction between Council staff and Councillors is limited, senior staff are *'delegated to deal with the Councillors at our level, because the General Manager simply cannot deal with everything so he would delegate out to us and has particularly delegated the communication with Hugh, because Hugh actually doesn't upset me, or insult me – I just think he doesn't have a clue about how local government really works'*. It is Staff E's view that Councillor Burns' conduct in approaching the property vendor, the real estate agent, and Manly Council's solicitors was *'totally inappropriate'*. It is her belief that many of the problems and delays in the purchase of Stuart Street were actually contributed to by Councillor Burns in the various Motions that he proposed, many of which led to further Motions as original documentation required amendment. She gave an example of resolutions being put by Councillors in the Chamber of the Council which perhaps resolved to sign the contract, but with no resolution to sign the contract under the Common Seal of the Council and authorise the General Manager to execute the document. Therefore, yet another Motion had to be prepared to enable Council to properly resolve the latter.

Staff E advised that the original decision to purchase the property led as a matter of procedure to the General Manager delegating the negotiation to a suitable staff member in conjunction with Council's lawyers. She stated that Councillor Burns was kept informed of the progress of the purchase and it proceeded as quickly as possible given the due diligence required, however the finalisation was also delayed because the vendor was ill and advised he was undergoing chemotherapy and preferred the settlement date after 2 October. She states that because of the further month delay she advised all Councillors in writing. She states it is her practice that when a question is put to her by one Councillor, she provides the response to all Councillors.

The first emails in this category are dated 5 April 12, and the next are dated at the end of July with the General Manager advising the Mayor and all Councillors that although the contract for the purchase of the property was due for execution by COB on the following day, the vendor had advised that for personal reasons they were unable to agree to settle on or before 10 September as was resolved by Council on 16 July. Mr Wong advised that the vendor had nominated 2 October with which Council had no difficulty except for the fact that the resolution of the Council had made the dates a fundamental term of the contract which the Council alone could amend. He advised that staff would report to Council on 6 August on this matter. Councillor Burns responded to this email just after midnight of that day, copying his comments to his fellow Councillors and also to Staff E and Staff A. In summary his email is as follows:

- That he cannot understand why he does not receive prompt replies to his emails and *'detailed information about where things are up to'*.

ATTACHMENT 1

General Managers Division Report No. 14.DOC - Code of Conduct Complaint Manly Council Conduct Reviewer Report

- That he had asked Staff E to request the General Manager to send a corrective and briefing email to all Councillors concerning the current status of the purchase
- That he had not received any replies to his emails to the General Manager
- That he requests that the General Manager confirm to all Councillors that there is *'no other impediment to the contract being executed other than the legal clearance certificate issue; that he gives a deadline for the receipt of the certificate and a deadline for execution of the contract for sale; that he commits himself in writing to meeting the deadline and complying with Council's resolution; that he factually corrects the information he sent to Councillors the previous day as regards the revised status of the matter.*
- That he wants to place on record that the General Manager has not complied with the Councillor's resolution to complete exchange of contracts for purchase by the 14 day deadline of the 30 July
- That given the issues he has raised, it seems the Manly Councillors need to independently verify Council staff claims and reports at every opportunity.
- That measures are needed to improve governance at Manly Council.

On Wednesday 1 August Councillor Burns wrote to the General Manager, all Councillors and Staff E and Staff A to the effect that he had spoken to the Council lawyers that morning and Mr Baxter from Pikes Solicitors had confirmed that he had supplied *'all required items to Mr Ng last night to enable execution of the contract by Council, and that all remaining action to execute the contract is with the Council'*. Mr Burns then noted that *'it appears the matter can be concluded today'*. The next correspondence is dated 1 August at midday and is an email from Staff E advising all Councillors that legal certification had been received and the General Manager had executed the contract and certified it fit for the Council seal on 31 July 12. She added that the General Manager had now left the office for the week.

Councillor Burns responded to Staff E's earlier email almost immediately, following up a phone message, asking for confirmation that the process had been completed and seeking advice when the seal would be applied and the documents sent to the vendors or agents. Staff E responded drawing his attention to her previous email which clearly answered his questions. The Councillor again wrote asking to be kept informed, and the following day, 2 August 12, Staff E advised again that on the return of the General Manager he would make an appointment to brief the Mayor on the contract and the associated legal memoranda to fully inform her for the affixing of the Council seal.

On the same day, some three hours later, Councillor Burns again wrote to Staff E in the following terms:

- That he wanted recorded that the action of the General Manager in *'..proceeding on leave with the 40 Stuart Street purchase left incomplete and contrary to the deadline requirements of the Council resolution, constitutes*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

...grossly unprofessional conduct and regretfully indicates an apparent disregard of the will of Council and the Councillors concerned’.

- That he had sought advice and checked the Local Government Act and by section 378(1), the General Manager is able to delegate the application of the Council’s seal to complete the documents so that they can be issued.
- That he had been advised by Councillor Macdonald that the Mayor would not be involved in the process.
- That any further delay by Council in issue of the documents would constitute unconscionable conduct towards the vendor.
- That he requested that Staff E seek the General Manager’s delegation to take all necessary steps to expeditiously apply Council’s seal to the Contract for the purchase so that the contract could be issued to the vendor or agent with the deposit cheque.

Staff E responded promptly to the Councillors request, advising him that she did not have the delegated authority to affix the Council seal under the Local Government Act. Councillor Burns responded by requesting she provide him with the Clause in the LGA upon which she was relying.

The same day, 2 August 12, the General Manager himself responded to Councillor Burns’ email to Staff E. He responded in the following terms:

- That Councillor Burns has made assertions with no regard for the facts
- That the *‘language you used in the email is disturbing and inconsistent with what is expected of an elected official. Further I have been advised that your demands are repeated demands of staff over this issue. All of this is really unacceptable’.*
- That his plans to be absent had been made well before Councillor Burns’ Notice of Motion which set a two week window for the execution of the document.
- That the timeframe in the Notice of Motion took no account for the due diligence required which had not been completed.
- That the Councillor’s Notice of Motion took no account of the possibility that the vendor might have difficulty with the *‘mandated dates’*, which as it transpired the vendor did
- That Council staff had worked very diligently to attempt to accommodate the vendor’s particular circumstance and *‘had someone not interfered with due process everyone would have been happy with 2 October for completion’.*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

- That Councillor Burns had forgotten that the legal certificate which was required did not arrive at Mr Wong's office until after the close of business.
- That he had executed the document the same evening despite being extremely late for an appointment and as Staff E advised, issued the required certification to start the process for the affixing of the seal on the same evening.
- That even though the Councillor might not have been aware of it, if time had been of the essence then the vendor would have notified Council and the fact that they had nominated the completion date of 2 October for pressing personal reasons reflected this circumstance.
- That the '*required cheque is now drawn, banks have been approached for the required funds, and my certificate was issued for the affixing of the seal*'
- Mr Wong concluded by advising the Councillor that the contract was due to be exchanged '*well before the completion date of 10 September....in the meantime we have to have the money in place and approved for the transaction.*'

Notwithstanding the information contained in Mr Wong's email, Councillor Burns responded the same day advising him that he did not make '*the assertions lightly and you can be sure any I make are based on truth, however inconvenient*'. Councillor Burns stated in summary as follows:

- That the General Manager might take '*offence at what I have said as a diversionary smokescreen but I will not be distracted from the central issue being that you have failed to comply with Council's resolution...by not delegating authority in your absence you continue to not comply.*'
- That if the General Manager wanted to '*restore some good faith, delegate Staff E the power to action the affixing of the seal tomorrow and end the delay and close this drawn out matter.*'
- That he is making a '*GIPA request*' to reveal the details of when the date of 2 October was decided.
- That '*everyone wants the contract exchanged tomorrow with the deposit cheque issued...make it happen with no more delay and no more misinformation*'.

On 5 August 12 Councillor Burns wrote to his fellow Councillors with respect to the purchase of 40 Stuart Street Manly. In this email he advised that there were conflicts between the vendor's reports and the content of the briefings/correspondence that Councillors had received from the General Manager. He looked at the timeline and drew the conclusion that there were questions to be answered by the General Manager, implying that there was some type of improper conduct on his part.

Councillor Burns also attached a letter he had received from the vendors dated 5 August which gave some information about the timelines, including the fact that the

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

vendors had agreed on the timeline and settlement dates to suit their own personal situation, however the Council without further information had resolved on a different date. This letter is very important because it makes clear that Councillor Burns had contacted, and was in contact, with the vendors of the property in the process of being purchased by the Council.

On 6 August 12 Councillor Burns wrote to Mr Wong, Staff E and Staff A, with copies to Councillors Aird, Macdonald, Whitting, Murphy, and Morrison asking that Council staff provide all Councillors with an update on where the matter of the property purchase was and also seeking information on whether the General Manager had returned and was acting in his role; whether Mr Ng, General Counsel, was in his office on that day; and whether the Council Seal had been applied that morning to the contract.

On the same date the General Manager responded to Councillor Burns stating that *'once again (he had chosen)...to attack my character and reputation in emails to my peers, Councillors and the Mayor. I find the pattern of your personal attacks by imputing improper motives and your casting of aspersions on the veracity of information communicated and circulated to the Mayor and Councillors most disturbing'*.

On this date also, Councillor Burns again requested information about the completion of the purchase of the property, attaching the provisions under the Local Government Act as to affixing of Council Seals. It would appear from the provisions, contrary to the constant assertions of the Councillor, that there was no power for Staff E to affix the Council Seal to any documents.

Again on the 6 August, the Councillor wrote to the General Manager asking that he confirm that the document had had the Council's seal applied and seeking information as to when the exchange would take place, suggesting that day as appropriate.

It should be noted that the above emails, all on the 6th August, 08 and most of them seeking the same information from the General Manager, Staff E or Staff A were written by Councillor Burns within a 3 – 4 hour period.

These emails were written against a background of various Notices of Motion and letters from the Vendors, Mr & Ms Chapman.

I noted earlier in this category that the first emails are dated 5 April 12. The first is from Staff A to Mr Stephen Clements and is a file note to the effect that Staff A had attempted to unsuccessfully call Councillor Burns' mobile phone, and had eventually left a text message stating that *'Mr Clements ask (sic) that I call you to respond to your email on 40 Stuart St matter. We have contacted the agent who is aware of Council's interest in acquiring the property. We are in the process of obtaining 3 valuations. This is where it is up to. Regards'*.

The second email is again from Staff A to Mr Clements on the same day and is a file note stating that he had received a response from Councillor Burns by text which stated *'Thank you awaiting a reply. I also traced and rung the agent to check from*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

their side and they confirmed this. Please keep Councillors updated. Regards Hugh Burns'.

The text from Councillor Burns makes it clear that he had personally approached the real estate agent acting for the vendor of 40 Stuart Street Manly, and this approach was during the negotiation phase of the proceedings.

At interview Staff B advised that at the time of the purchase of the property at Stuart Street Manly he had been acting in the role held by Mr Steve Clements, the Deputy General Manager in charge of the Land Use & Sustainability Division. He states that it was in this role when he was sitting on the executive that he became aware that Councillor Burns had been in discussions with the vendor of the property under negotiation, and also the vendor's estate agent. Staff B stated that Councillor Burns *'...had given out confidential information of how much Council was approved to purchase the property for, which probably cost the Council..we went through the due diligence, we did inspections for termites, we did the market research on what the property was actually worth and it was worth considerably less than what we were told we could spend...we had to negotiate and get the best price possible for Council'.*

When I asked Staff B whether it would be normal practice for a Councillor to be in contact in such a situation with the vendor of a property, or an estate agent, or in fact the Council's own solicitors with respect to a property purchase, he said *'none whatsoever, it should be going through the Mayor or the General Manager. The General Manager is the proper person'.* He stated that the Council had made a resolution and staff had gone ahead and *'tried to do the best we could but this guy has made it very difficult for us in the negotiation stages. Not only that he was rude'.*

Apart from the three categories noted above, the complainants also comment as follows:

- *'there is a volume of email requests from this Councillor which staff view as a harassing and coercing tactic. For example various matters such as the acquisition of a property or implementing an action requested by a special purpose committee may take longer than anticipated for a variety of reasons. There is no reasonableness or empathy displayed by this Councillor who repeatedly has demonstrated he is not happy with anything but same day responses to quite complex issues and matters being transacted by staff. In fact his continual requests take staff away from actioning the very business Councillor Burns is worried about and other important business of Council which is of a high priority.'*
- *'Councillor Burns has been advised by Staff D the correct way to report corrupt conduct via the mechanisms outlined in Council's Code of Conduct. To date he has not done so. All senior staff live under the shadow of this and other imputed allegations of corrupt conduct in various email correspondences from Councillor Burns. If Councillor Burns is aware of any corrupt conduct it is his duty as a Councillor to report it in a way outlined under the Code of Conduct'.*

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

- *'Sitting at the core of this complaint is the damage caused by Councillor Burns' persistent undermining of Manly Council's staff efforts and work and how this, in turn, impacts and resounds through our community that we all work so hard to serve'.*
- *'The individual behaviours described (in the letter of complaint) when considered as a 'collective whole' have impacted staff considerably including staff below the executive level.'*

REVIEW

I have set out the above evidence in some detail because most of the evidence before me is in the form of emails or other correspondence, between Councillor Burns and the Council staff. The allegations relate to the type of words used by the Councillor, the extent and volume of the correspondence, and the allegedly unsupported claims by the Councillor of behaviour ranging from poor performance to gross incompetence and corruption.

I have accepted the evidence before me on its face, as I have been provided no reason to the contrary.

The complainants allege bullying and harassment over a long period of time, a lack of respect by the Councillor, inappropriate and rude communications from the Councillor, vilification and denigration of staff reputation and performance and a waste of Council resources because of the Councillor's behaviour.

I have set out earlier in this report the sections of the Manly Code of Conduct which relate to these allegations. It is also worthwhile, in my view, to set out here the definition of bullying and harassment as published by NSW WorkCover:

'WHAT IS BULLYING:

Bullying is repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. Bullying can occur wherever people work together. Under certain conditions, most people are capable of bullying. Whether it is intended or not, bullying is an OHS hazard. A broad range of behaviours can be bullying, and these behaviours can be direct or indirect. Examples of direct forms of bullying include:

- *verbal abuse*
- *putting someone down*
- *spreading rumours or innuendo about someone*
- *interfering with someone's personal property or work equipment.*

Single incidents

A single incident of unreasonable behaviour may have the potential to escalate into bullying and therefore should not be ignored. Single incidents can still create a risk to health and safety.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Indirect Bullying

Examples of indirect bullying include:

- *unjustified criticism or complaints*
- *deliberately excluding someone from workplace activities*
- *deliberately denying access to information or other resources*
- *withholding information that is vital for effective work performance*
- *setting tasks that are unreasonably above or below a worker's ability*
- *deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers*
- *setting timelines that are very difficult to achieve*
- *excessive scrutiny at work*

Bullying can be carried out verbally, physically or in writing, eg via email, internet chat rooms, instant messaging and mobile phone technologies such as text messaging. Bullying can be directed in a range of ways in a workplace – downwards (from supervisors or managers to workers), sideways (between workers or co-workers) and upwards (from workers to supervisors or managers). Bullying can be directed at a single worker or at more than one worker. It can be carried out by one or more workers.

WHAT ISN'T BULLYING?

Reasonable management actions carried out in a fair way are not bullying.

For example:

- *setting performance goals, standards and deadlines*
- *allocating work to a worker*
- *rostering and allocating working hours*
- *transferring a worker*
- *deciding not to select a worker for promotion*
- *informing a worker about unsatisfactory work performance*
- *informing a worker about inappropriate behaviour*
- *implementing organisational changes*
- *performance management processes*
- *constructive feedback*
- *downsizing.*

It is outside my terms of reference to consider the performance of any of the parties in this matter. My terms of reference are simply to examine the allegations made by the five staff members, review the evidence before me, and to determine whether Councillor Hugh Burns has breached the Manly Code of Conduct by his behaviour towards both the complainants and other staff he has dealt with at the Council.

It is clear from the evidence that Staff F, a more junior staff member, was affected by Councillor Burns' behaviour in respect of his chairmanship of the Sustainable Transport Committee. Her emails relating to the difficulties with the Minutes and her responses that Councillor Burns' own Minutes were inconsistent with the facts of the situation are supported by Staff C, Staff B and Staff A and the chain of emails relating to the information provided by Staff A and the relevant staff relating to budgetary

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

matters. There is nothing before me which is contrary to these emails and I therefore accept the comments of Staff F as facts in the matter.

Allegations of bullying behaviour: (Sections 6.1, 6.3, 9.2 and 9.7)

Based on Councillor Burns' own emails, I have formed the view that he has breached the Manly Code of Conduct in that he has, over some period of time, used bullying words and strategies, whether deliberate or not, towards staff of the Council. Bullying behaviour is both overt and subtle and in this particular instance, in my view, Councillor Burns has been guilty of both. For instance he has '*put someone down*', in his dealings with various staff as his emails imply poor performance or lack of competence in various aspects of their duties. Staff F's competence was called into question with the March 2012 Minutes. Councillor Burns commented on the lack of information provided when requested, however the chain of emails between Staff F, Staff A and Staff B confirms that the information requested by the Councillor was provided in a proper and timely manner. Yet notwithstanding this and the fact that it was drawn to his attention, he continued to maintain his own position. I accept Staff F's comment in her email wherein she suggested that the reason that the issue concerning Staff B's attendance was not on the Agenda was because of the lateness of the Agenda which was the Councillor's own responsibility.

With respect to the attaching of the Common Seal of the Council to the documentation for 40 Stuart Street, the number of emails sent by Councillor Burns; the stridency of those emails and the fact that many of them reiterated the same questions that had been responded to by both Staff E and the General Manager at an earlier stage must incline an independent observer to the fact that the emails were in a deliberate attempt to bully and harass Staff E into conduct which was outside her delegation. Councillor Burns himself was aware of the legal position which is attested to by the emails to his colleagues and his attaching the Local Government Act provisions for the Common Seal of Councils, yet he still maintained his view that Staff E was in a position to delegate for the General Manager, and he insisted on her doing so. In my view the barrage of emails could be viewed as bullying conduct, with threatening overtones, to a Council staff member, albeit senior.

Councillor Burns' own emails indicate he was well aware of the legal position, yet he continued to strongly and deliberately press Staff E to act contrary to that. In my view he has breached the Manly Council Code of Conduct at 6.1.c, 6.1.d and 6.1.c in that his behaviour was '*improper or unethical*', was '*an abuse of power or otherwise amounts to misconduct*', and '*causes, comprises or involves intimidation, harassment or verbal abuse*'. He has also breached 6.3 in that he showed a lack of respect to Staff E in the circumstances; 9.2.a in that he '*directed*' Council staff other than by giving appropriate directions to the General Manager; and arguably 9.7.c in that he was overbearing or threatening to Council staff.

In many of the emails Councillor Burns has sent to various staff members, he has copied the correspondence to his fellow Councillors. This, in my view, appears to be another tactic in his attempts at intimidation of Council Staff.

The WorkCover definition above cites examples of indirect bullying. One of those examples relates to unjustified criticism or complaints. Councillor Burns has complained of poor performance, incompetence, unethical conduct and corruption in

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

his volume of emails to senior staff at the Council. In none of that correspondence is there even a modicum of evidence to support those allegations. Rather, the allegations seem to be at random when he is unable to act as he wishes because of the imperatives of the Code of Conduct or various relevant legislation or Council policies. Setting aside for the moment the fact that there is a proper manner of dealing with concerns held by Councillors about Council staff, such unsupported allegations by the Councillor are unacceptable and improper.

The complainants in this matter are staff who have clearly not taken such a step lightly, or precipitately. They have expressed their concerns, both in their letter of complaint and at interview, at the allegations of improper conduct made by Councillor Burns, and the fact that his written allegations have been copied to other staff members and his fellow Councillors. The staff are, with justification, concerned for their individual reputations and careers.

From the evidence before me Councillor Burns has verbally abused staff by his conduct in describing various staff members as *'incompetent'* or deliberately obstructive. It could be argued that he has *'spread rumours or innuendo about staff members'* in his behaviour in describing staff in various emails or Notices of Motion as *'incompetent'*, *'negligent'*, and *'corrupt'* amongst other terms. His criticism or complaints appear to be unjustified in that he has not supported his comments with evidence of such conduct and there is no evidence before me. It could also be argued that the Councillor has deliberately denied access to information and withheld information that is vital for the performance of staff duties (Sustainable Transport Committee Minutes). The Councillor's behaviour has been repeated and in my view unreasonable; it has been directed towards a single worker or a group of workers; and it has continued over a significant period of time. His behaviour in my view meets many of the elements contained in the WorkCover definition of direct or indirect bullying behaviour.

Lack of Respect and 'Directing' staff: (Sections 6.1, 6.3, 9.2, 9.7, Part 3)

The administration area of the Council appears to have been a particular focus for Councillor Burns' ire. I accept, based on the various emails and the comments by staff at interview, that staff has attempted to assist the Councillor in preparing his proposed Notices of Motion to ensure there is no breach of the Code of Conduct or any other Council policies or legal principles. The General Manager and the staff are obligated to work within these legal guidelines and would in fact be in breach themselves if they permitted documents to be formally submitted which did not comply. With respect to the chain of emails about staff contracts and Councillor Burn's insistence on wording his document in a manner which breached the Code of Conduct, there is no justification for his actions. The Code is not a complex document and is very clear on its face. In my view, by using the wording insisted upon by Councillor Burns which implied misconduct by Council staff, there would be a clear breach of the Code at 6.1 (General Conduct), 6.3 (respect), 9.7.5 and Part 3 (Procedures). If staff had acceded to the Councillor's wording of the Motion, they would have also been in breach of the Code under some of the same Clauses. Staff D suggested at interview that staff may have in some manner contributed to the difficulties in that over a period of time they have attempted to assist the Councillor in the wording of his Notices of Motion to ensure compliance, and she commented that perhaps they should have

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

simply instituted a policy of advising him that his Notice of Motion was in breach and unacceptable until it was again presented in a proper manner. In my view, and based on the Councillor's emails and conduct, this course of action would probably have not altered the Councillor's conduct.

Notwithstanding the Code's provisions at 9.2.a and 9.7 against Councillors '*directing*' staff, the Councillor has clearly, based on his own emails, continued to attempt to direct staff. This direction has been outside the exclusion of the Committee situation where he does have the authority to direct the lead officer to provide information, or take actions that have a direct bearing, only, on the workings of the particular committee itself. For instance, as Chair of the Sustainable Transport Committee he had the authority to direct the Lead officer to provide information, prepare agendas, etc in the course of the business of that committee. The Terms of Reference of the Sustainable Transport Committee refer directly to the fact that Councillors must not direct staff unless in relation to the activities of the Committee.

Allegations of improper conduct with respect to the purchase of 40 Stuart Street Manly: Section 6

With respect to the property at 40 Stuart Street Manly, the allegations are that the Councillor has conducted himself in an improper manner in breaching confidentiality by having contact with the vendors, their agents, and the Council lawyers. The Councillor himself, in his emails, has confirmed that he approached each of these persons, and it appears that he was in regular contact with the Vendors. Very significantly, the evidence appears to point to the fact that Councillor Burns was in contact with the vendor's real estate agents during the '*negotiation*' phase of the purchase which may have put the Council in a vulnerable position.

In looking at these particular allegations I must not simply look at the facts, but at the perception of an independent observer. The question to be answered is what would be the reaction of a constituent, observing that the Council was in the process of purchasing a property and that a Councillor who is neither the Mayor nor the person delegated the authority to negotiate the purchase, was in contact with the three parties noted above. In my view the response would be a query as to why this particular Councillor was acting in this manner, and also whether it would jeopardise the purchase under optimum conditions for the Council.

The complainants have made it clear in their letter of complaint and at interview that they believe that Councillor Burns' actions in this matter have been improper and may have jeopardised the Council purchasing the property on the best terms possible. There is speculation but no firm evidence before me that Councillor Burns breached confidentiality by advising either the vendors or their agent of the price Council was agreed it would pay to purchase the property. However, it might well be the perception of an observer that in his contact with the parties Councillor Burns put himself in an unacceptable and improper position as a representative of Council. In my view, in putting himself in this position, he has breached the General Conduct provisions of the Code of Conduct at section 6.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Councillor Burns at the time of the letter of complaint was nearing the end of his term as a Councillor, but has since been re-elected in the Local Government elections held recently. At the time of taking up his last term as a Councillor, he attended an Induction process instigated by the Council for incoming Councillors, at which time he was provided with and addressed on, the Manly Council Code of Conduct, the legal provisions under which the Council operates, and an introduction into the various procedures and processes which are integral to Council business. Councillor Burns has made clear in his various emails that he is aware of the Code and familiar with its provisions. At the time the Councillor wrote the emails the subject of the allegations, he had been involved in the various processes and procedures of the Council for over 3 years. He was therefore, in my view, in a position to know, or should have known, the proper manner in which business was conducted at the Council within the terms of the various Codes, policies and legislation.

It is therefore surprising and somewhat alarming that notwithstanding this he has committed egregious breaches of the Code of Conduct, and even when counselled that his actions might constitute a breach, he has deliberately continued in his course of action.

**Allegations of unsupported complaints of staff behaviour and unethical conduct:
Sections 6, 9, 11, 12**

In countless emails to various persons and also during my telephone conversation with Councillor Burns he commented on the two Ombudsman's reports. He implied that the Council remained under scrutiny and that the comments in both reports, but especially the first, were still pertinent. I have been provided with both reports and it has been my understanding, confirmed by various staff members I interviewed, that although the first report condemned various aspects of the operation of Manly Council, the second report was supportive of the changes made to the policies and procedures in an effort to ensure greater transparency. On several occasions in his emails, and by telephone to me, Councillor Burns used the phrase '*arrogance of staff*' as being one which the Ombudsman used in relation to senior staff of the Council, however I am unable to find that phrase in the second Ombudsman Report. Councillor Burns refuses to comply with the formal policies and procedures instituted at the Council as a result of the first Ombudsman's report; he quotes the Ombudsman's report as something to adhere to; yet in his emails he derides unnecessary policies or sections of the Code of Conduct such as the section which prevents Councillors from directing Council Staff, and the section which provides the manner in which Councillors should report allegedly improper conduct by staff members.

Section 11 of the Code of Conduct contains the provisions with respect to possible breaches of the Manly Council Code of Conduct. Section 11 of the Independent Commission Against Corruption Act 1988 requires the principal officer to report suspected cases of corrupt conduct to the Commission.

Section 11.6 of the Code of Conduct provides that suspected breaches of the Code of Conduct by Councillors, members of staff of Council (excluding the General Manager) must be made to the General Manager in writing, with 11.7 providing that if

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

the suspected breach is by the General Manager, then the report should be to the Mayor in writing.

Section 11.9 provides that Councillors should not make allegations of suspected breaches of the code at Council meetings or in other public forums.

Section 12 provides that complaints about the conduct of Councillors, members of staff of Council, members of Council committee and delegates of Council should be addressed in writing to the General Manager, with complaints about the General Manager to be addressed to the Mayor (12.2)

Section 12.3 provides that the General Manager is responsible for dealing with complaints alleging breaches of the Code regarding members of staff, delegates of Council and/or members of Council committees and will determine such matters.

Taking into consideration the available evidence which is largely the words used by Councillor Burns in his emails over the past several months alleging conduct ranging from incompetent to corrupt by Council staff and the General Manager, and based on the provisions of the Manly Council Code of Conduct, the Councillor had a duty to report such conduct on the part of Council staff to the General Manager in writing, and such conduct on the part of the General Manager to the Mayor. He also had a duty under Section 11 of the ICAC Act 1988 to report his alleged suspected corrupt conduct by the General Manager. Councillor Burns took no such action. In my view, he is therefore in breach of the Code of Conduct himself under Sections 6.1, 6.3, 9.7, 11 and 12, and possibly derelict in his duty to report the suspected conduct to ICAC.

As I have already commented earlier in this report, with respect to the allegations of bullying and harassment, in my view there is sufficient supporting evidence to indicate a pattern of bullying behaviour by Councillor Burns towards both senior and junior staff of the Council, including Staff E, Staff D, Staff F, Staff C, Staff B, Mr Wong and Staff A. The emails from Councillor Burns alone appear to amount to a systematic bullying of Council staff, and particularly an attempt to bully and intimidate Staff E to act unlawfully with respect to the affixing of the Council Seal.

Taking into consideration all the evidence before me, the Councillor has breached several sections of the Manly Council Code of Conduct as follows:

Sections 6.1, 6.3
Sections 9.2, 9.7
Section 11.9
Section 12
Part 3

RECOMMENDATIONS

That if the above Investigation and Review report is accepted, the General Manager and/or Council take appropriate action against Councillor Hugh Burns in accordance with section 14.9 of the Manly Code of Conduct.

**General Managers Division Report No. 14.DOC - Code of Conduct Complaint
Manly Council Conduct Reviewer Report**

Section 14.9 provides that:

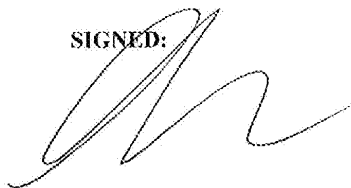
Where the conduct review committee/reviewer determines, in its view that the conduct referred to it comprises a breach of this Code of Conduct it may, in its report to the Council, make recommendations, that the Council take any of the following actions;

- a. Censure the Councillor for misbehaviour
- b. Require the Councillor or General Manager to apologise to any person adversely affected by the breach
- c. Counsel the Councillor or General Manager
- d. Make public findings of inappropriate conduct
- e. Prosecute for any breach of the law
- f. Revise any of Council's policies, procedures and/or the Code of Conduct.

Based on the above evidence and after consideration of Section 14.9 of the Manly Council Code of Conduct, I have formed the view that the following sections are the relevant sections under which action should be taken and so recommend:

- The censure of Councillor Burns for his misbehaviour (14.9.a)
- Require the Councillor to apologise in writing to each of the complainants and also Staff F.(14.9.b)
- Arrange counselling of the Councillor for his inappropriate behaviour (14.9.c)

SIGNED:



Annette Simpson Dip Law, MLLR
Conduct Reviewer

DATE OF REPORT:

29 October 12