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## Local Government Standards Panel

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Complaint Number	SP 27 and 28 of 2018 [DLGSC 20180287 and 20180288]
Legislation	<i>Local Government Act 1995</i>
Complainants	<b>President Murray Scott</b> <b>Mr Christopher Scott</b>
Respondent	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms S Siekierka (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	21 August 2018 Determined on the documents
Outcome	Two breaches of regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Published 25 September 2018

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



## Summary of the Panel's decision

1. The Panel found that Councillor Michael Southwell ("Cr Southwell"), a councillor for the Shire of Capel ("the Shire"), committed two minor breaches under the *Local Government Act 1995* (WA) ("the Act") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he submitted a Question on Notice as part of the agenda for the Shire of Capel Ordinary Council meeting on 28 March 2018.

## Jurisdiction

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 10 April 2018 the Panel received two Complaint of Minor Breach Forms; complaint SP 27 of 2018 dated 28 March 2018 ("First Complaint") and complaint SP 28 of 2018 dated 5 April 2018 ("Second Complaint"). Both Complaints were in relation to the same "Question of which Notice has been given" ("Question on Notice") which was submitted as part of the agenda for the Shire of Capel Ordinary Council meeting on 28 March 2018.
4. In a letter dated 7 June 2018, the Department advised Cr Southwell of the two Complaints and invited him to respond. The Department sent Cr Southwell a copy of all the supporting documents provided by the Complainants.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 21 August 2018 the Panel convened to consider the Complaints.
6. The Panel accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Southwell was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 21 August 2018.
7. The Panel was satisfied the complaints had been made within two years after the alleged breaches are said to have occurred<sup>3</sup>, that they had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup> and that the Department had provided procedural fairness to Cr Southwell.
8. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> As Cr Southwell had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.

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<sup>1</sup> Section 5.105 of the Act.

<sup>2</sup> Section 5.110(2)(a) of the Act.

<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.

<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.



9. Based on the information referred to in paragraphs 2 to 8 above the Panel found it had jurisdiction to determine whether Cr Southwell had breached regulation 7(1)(b) in connection with both Complaints.

### **Panel's role**

10. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
11. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
12. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
13. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

### **Regulation 7(1)(b)**

14. Regulation 7(1)(b) provides:

*"7. Securing personal advantage or disadvantaging others*

*(1) A person who is a council member must not make improper use of the person's office as a council member –*

*...*

*(b) to cause detriment to the local government or any other person."*

*(2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83."*

15. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

### **Substance of the two Complaints**

#### **First Complaint**

16. Cr Southwell submitted a "Question of which Notice has been given" ("Question on Notice") as part of the agenda for the Shire of Capel Ordinary Council meeting on 28 March 2018.

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<sup>6</sup> Section 5.106 of the Act.

<sup>7</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



17. Cr Southwell's Question on Notice related to payments made to two individuals for their roles as volunteer firefighting officers and queried whether similar payments are made to other volunteers in the Shire.
18. Cr Southwell's Question on Notice is as follows:

### **Questions of which notice has been given – Cr Southwell**

1. In regard to the Council Policy which sees annual payments made by the Shire to the Council's President, Cr Scott and one of his relatives Mr Chris Scott, of \$830 and \$2,453 respectively, for their roles as volunteer firefighting officers, are any similar payments made to other volunteers in senior firefighting roles, or to any other volunteers in the Shire who may offer significant commitments in terms of time, effort and personal expense?
19. The complainant, Mr Murray Scott ("the First Complainant") is the President of the Shire; he also holds the position of Deputy Chief Bush Fire Control Officer. He is one of the individuals mentioned by Cr Southwell as being in receipt of payments (an annual payment of \$830).
20. The First Complainant alleges that Cr Southwell has breached regulation 7(1)(b) by inferring that he and one of his relatives are receiving payments because of his position as Shire President and not because of their distinct roles as volunteers; and in actual fact there is a policy already established on 27 November 2002 which authorises payments to be made to the Chief and Deputy Chief Bush Fire Control Officers.

#### **Second Complaint**

21. Mr Christopher Lindsay Scott, ("the Second Complainant") is the Chief Bush Fire Control Officer of the Shire. He alleges that Cr Southwell, in the same Question on Notice, has breached regulation 7(1)(b) by making reference to the individual person (himself) currently occupying the position of Chief Bush Fire Control Officer, and the relationship of that person to an elected member of the Council, thereby causing disadvantage to him and future incumbents of the position in the eyes of the community.
22. This disadvantage has occurred through the inferred alignment of the payment as an outcome of the relationship, rather than on the actual merits of the payment that seeks only to acknowledge the significant financial impact upon the person holding the office of Chief Bush Fire Controller over other volunteers.

#### **Councillor Southwell's Response**

##### **First Complaint**

23. Cr Southwell does not dispute that he filed the Question on Notice but denies causing any detriment to the First Complainant in that:



- a) the complaint does not allege that the question itself caused any detriment, only that this was caused by an inference which arose in the mind of the complainant;
- b) he is not responsible for any or all inferences which are drawn from his legitimate question;
- c) The question was asked honestly and reasonably in the performance of his duties as a councillor. He would argue that he asked the question in a forum where he was entitled to freedom to make enquiries as he sees fit in relation to Council business and under the protection of qualified privilege;
- d) he did not know the answer before he asked the question; and
- e) any inference which arose in anyone's view arose only from the answer to the question itself. He is not responsible for the answer provided.

### Second Complaint

24. Cr Southwell does not dispute that he filed the Question onf Notice but denies causing any detriment to the Second Complainant and repeats points a) to e) of paragraph 24 above.

### **Elements of regulation 7(1)(b)**

25. In order to find that Cr Southwell breached regulation 7(1)(b) the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity (third element);
- (d) that when viewed objectively, such use was an improper use of the person's office as a council member in that it:
  - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
  - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;

(fourth element)



- (e) that the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

### **Panel's consideration**

#### First, second and third elements satisfied for First and Second Complaints

26. The Panel finds that Cr Southwell engaged in the conduct which is the subject of each Complaint; and that he was a councillor and was acting as a councillor at all relevant times.
27. The first, second and third elements of regulation 7(1)(b) are established for both the First Complaint and the Second Complaint.

#### Fourth element - meaning of "to make improper use of....office"

28. The Macquarie dictionary definition of "improper" is "not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular."<sup>8</sup> The Shorter Oxford dictionary definition is "irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly."<sup>9</sup>
29. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?<sup>10</sup> "For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty."<sup>11</sup>
30. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>12</sup> It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
31. Regulation 3 of the Regulations sets out general principles to guide councillors' behaviour, although contravention of any of any of these does not amount to a minor breach.<sup>13</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
32. The meaning of "improper" must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor's role and conduct, such as the local government's Code of Conduct, and

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<sup>8</sup> Macquarie Dictionary, Revised Third Edition.

<sup>9</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>10</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>11</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>12</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>13</sup> Regulation 3.



the circumstances and context of the case.<sup>14</sup> All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.

33. Conduct can be improper even though the councillor's judgment is that it isn't improper. A councillor's use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.<sup>15</sup>

Fifth element - meaning of "to cause detriment to the local government or any other person"

34. "Detriment" means loss, damage or injury.<sup>16</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>17</sup>
35. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>18</sup> However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>19</sup>
36. "To cause detriment" has been interpreted as meaning "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.<sup>20</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.<sup>21</sup>

## **Findings in relation to the First Complaint**

### Whether Cr Southwell acted improperly (fourth element)

37. The Panel is satisfied that the fourth element has been established in relation to the First Complaint and that Cr Southwell did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Southwell did not meet the standards of conduct expected of a councillor when submitting the Question on Notice, in that:

- (a) The Question on Notice refers to the First Complainant's position as Shire President and the fact that he and one of his relatives receive payments for their roles as volunteer fire fighters:

<sup>14</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

<sup>16</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>17</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>18</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>19</sup> *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

<sup>20</sup> *Chew* 2010.

<sup>21</sup> *Treby* 2010.





*In regard to the Council Policy which sees annual payments made by the Shire to the Council's President, Cr Scott and one of his relatives Mr Chris Scott, of \$830 and \$2,453 respectively, for their roles as volunteer firefighting officers...*

- (b) Cr Southwell queries whether other volunteers receive similar payments:

*...are any similar payments made to other volunteers in senior firefighting roles, or to any other volunteers in the Shire who may offer significant commitments in terms of time, effort and personal experience?"*

- (c) Cr Southwell's Question on Notice is constructed in such a way as to imply that the First Complainant is given preference over other volunteers in the Shire and he receives an annual payment of \$830 because of his position as Shire President and not because of his role as Deputy Chief Bush Fire Control Officer.
- (d) There is also an implied allegation that the Second Complainant receives payment in the sum of \$2,453 because he is related to the First Complainant.
- (e) The fact that the two individuals are related or that the First Complainant is Shire President is irrelevant, and the full context in which payments are made and why is not referred to in Cr Southwell's Question on Notice. By including reference to these, it makes the issue personal and raises doubts as to the legitimacy of the payments.
- (f) Cr Southwell shows a lack of respect for the First Complainant in both his role as President and as Deputy Chief Bush Fire Control Officer.
- (g) Allegations of impropriety in relation to any benefits (including payments) received by members of Council are sensitive in nature and need to be dealt with carefully; if not handled in such a manner there is potential to cause great damage to the reputation of an individual in the eyes of their fellow members and the community.
- (h) There are other more objective and respectful ways that Cr Southwell could have expressed the matters he raises in his Question of Notice; instead Cr Southwell specifically names the First Complainant and the position he holds at Council; he refers to the First and Second Complainant being relatives; and he queries whether it is only these two individuals who receive payments for their services. Any reasonable person would expect that by submitting the Question on Notice framed in this way, it would offend the First Complainant and it demonstrates a lack of professionalism and respect for the First Complainant on the part of Cr Southwell.
- (i) In relation to Cr Southwell's claims of qualified privilege, the Panel finds this does not apply.

Whether Cr Southwell intended to cause detriment to the local government or any other person (fifth element)

38. The Panel is satisfied to the required standard that the fifth element has been established and that Cr Southwell submitted the Question on Notice to cause detriment to the First Complainant in that:





- (a) the Question on Notice calls into question why payments are made to the First Complainant and the Second Complainant; the clear suggestion is that payments are made to the First Complainant because of his position as Shire President, and to the Second Complainant because he is related to him, which would cause embarrassment to him;
- (b) the Question on Notice was submitted as part of the Agenda to the Ordinary Council Meeting on 28<sup>th</sup> March which is published online on the Shire's website; and
- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to submit the Question on Notice to publicly embarrass and undermine the First Complainant thereby causing detriment to his reputation.

### **Findings in relation to the Second Complaint**

#### Whether Cr Southwell acted improperly (fourth element)

39. Applying the tests for impropriety referred to earlier, the Panel finds that Cr Southwell acted improperly and did not meet the standards of conducted expected of a councillor by submitting the Question on Notice:

- (a) The Question on Notice is stated and communicated in such a way as to imply that the Second Complainant is given preference over other volunteers in the Shire and receives an annual payment of \$2453 because he is a relative of the Shire President and not because of his independent role as Chief Bush Fire Control Officer.
- (b) The Second Complainant's relationship with the First Complainant is irrelevant and by highlighting it in the Question on Notice, it shows a lack of respect for the Second Complainant in his role as Chief Bush Fire Control Officer.
- (c) Cr Southwell's duty to ask questions as a Councillor forms an important part of his role in maintaining the openness and accountability of local government; however he is under an obligation to act professionally and with respect to others when doing so.
- (d) Cr Southwell has shown a lack of judgement by submitting the Question on Notice in its current form and crossed the line of impropriety.
- (e) In relation to Cr Southwell's claims of qualified privilege, the Panel finds this does not apply.

#### Whether Cr Southwell intended to cause detriment to the local government or any other person (fifth element)

40. The Panel is satisfied to the required standard that the fifth element has been established and that Cr Southwell submitted the Question on Notice with the intended result that detriment would be suffered by the Second Complainant in that:



- (a) the Question on Notice raises doubts about the legitimacy of payments being made to the Second Complainant;
- (b) the Question on Notice was submitted as part of the Agenda to the Ordinary Council Meeting on 28<sup>th</sup> March which is published online on the Shire's website;
- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to submit the Question on Notice to publicly embarrass the Second Complainant by suggesting he receives payments because of his relationship with the First Complainant, thereby causing detriment to his reputation and undermining the role itself; and
- (d) a reasonable person would expect the Question on Notice to cause the community to question the legitimacy of payments made to certain individuals and causing the community to look less favourably on local government and the system of volunteers.

#### **Panel's finding**

41. The Panel finds that Cr Southwell committed one breach of regulation 7(1)(b) in relation to the First Complaint and one breach of regulation 7(1)(b) in relation to the Second Complaint.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Member)

Rebecca Aubrey (Deputy Member)

Date of Reasons – 25 September 2018



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## Local Government Standards Panel

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Complaint Number	SP 27 and 28 of 2018 [DLGSC 20180287, 20180288]
Legislation	<i>Local Government Act 1995</i>
Complainant	<b>President Murray Scott</b> <b>Mr Christopher Scott</b>
Respondent	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs S Siekierka (Presiding Member) Ms E Rowe (Member) Ms R Aubrey (Member)
Heard	24 October 2018 Determined on the documents
Outcome	Public apology

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### SANCTION DECISION AND REASONS FOR DECISION

Published 20 November 2018]

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#### DEFAMATION CAUTION

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## Introduction

1. On 21 August 2018 the Panel found that Councillor Michael Southwell ("Cr Southwell"), a member of the Shire of Capel ("Shire"), committed two breaches of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) when he submitted a Question on Notice as part of the agenda for the Ordinary Council meeting on 28 March 2018 (Council Meeting").
2. On 25 September 2018 the Panel published its Finding and Reasons for Finding ("Findings") that Cr Southwell had breached regulation 7(1)(b). The Panel reviewed all the evidence presented to it and said:

### "Findings in relation to the First Complaint

37. ....

- (c) Cr Southwell's Question on Notice is constructed in such a way as to imply that the First Complainant is given preference over other volunteers in the Shire and he receives an annual payment of \$830 because of his position as Shire President and not because of his role as Deputy Chief Bush Fire Control Officer.
- (d) There is also an implied allegation that the Second Complainant receives payment in the sum of \$2,453 because he is related to the First Complainant.
- (e) The fact that the two individuals are related or that the First Complainant is Shire President, is irrelevant and the full context in which payments are made and why is not referred to in Cr Southwell's Question on Notice. By including reference to these, it makes the issue personal and raises doubts as to the legitimacy of the payments.
- (f) Cr Southwell shows a lack of respect for the First Complainant in both his role as President and as Deputy Chief Bush Fire Control Officer.
- (g) Allegations of impropriety in relation to any benefits (including payments) received by members of Council are sensitive in nature and need to be dealt with carefully; if not handled in such a manner there is potential to cause great damage to the reputation of an individual in the eyes of their fellow members and the community.
- (h) There are other more objective and respectful ways that Cr Southwell could have expressed the matters he raises in his Question on Notice; instead Cr Southwell specifically names the First Complainant and the position he holds at Council; he refers to the First and Second Complainant being relatives; and he queries whether it is only these two individuals who receive payments for their services. Any reasonable person would expect that by submitting the Question on Notice, it would offend the First Complainant and it demonstrates a lack of professionalism and respect for the First Complainant on the part of Cr Southwell.

38. ....

- (a) the Question on Notice calls into question why payments are made to the First Complainant and the Second Complainant; the clear suggestion is that payments are made to the First Complainant because of his position



as Shire President, and to the Second Complainant because he is related to him, which would cause embarrassment to him;

- (b) the Question on Notice was submitted as part of the Agenda to the Ordinary Council Meeting on 28<sup>th</sup> March which is published online on the Shire's website; and
- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to submit the Question on Notice to publicly embarrass and undermine the First Complainant thereby causing detriment to his reputation.

### **Findings in relation to the Second Complaint**

39. ....

- (a) The Question on Notice is stated and communicated in such a way as to imply that the Second Complainant is given preference over other volunteers in the Shire and receives an annual payment of \$2453 because he is a relative of the Shire President and not because of his independent role as Chief Bush Fire Control Officer.
- (b) The Second Complainant's relationship with the First Complainant is irrelevant and by highlighting it in the Question on Notice, it shows a lack of respect for the Second Complainant in his role as Chief Bush Fire Control Officer.
- (c) Cr Southwell's duty to ask questions as a Councillor forms an important part of his role in maintaining the openness and accountability of local government; however, he is under an obligation to act professionally and with respect to others when doing so.
- (d) Cr Southwell has shown a lack of judgement by submitting the Question on Notice in its current form and crossed the line of impropriety.

40. ....

- (a) the Question on Notice raises doubts about the legitimacy of payments being made to the Second Complainant;
- (b) the Question on Notice was submitted as part of the Agenda to the Ordinary Council Meeting on 28<sup>th</sup> March which is published online on the Shire's website;
- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to submit the Question on Notice to publicly embarrass the Second Complainant by suggesting he receives payments because of his relationship with the First Complainant, thereby causing detriment to his reputation and undermining the role itself.

### **Jurisdiction**

3. The Panel convened on 24 October 2018 to consider how it should deal with the breach. The Panel accepted the Department's advice that on this date there was no available information to indicate that Cr Southwell had ceased to be or was disqualified from being a councillor.



## Possible sanctions

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by —
  - “(a) *dismissing the complaint; or*
  - (b) ordering that —*
    - (i) the person against whom the complaint was made be publicly censured as specified in the order; or*
    - (ii) the person against whom the complaint was made apologise publicly as specified in the order; or*
    - (iii) the person against whom the complaint was made undertake training as specified in the order; or*
  - (c) ordering 2 or more of the sanctions described in paragraph (b).”*
5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel’s finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor’s name.

## Cr Southwell’s submissions

6. If the Panel finds that a councillor has committed a minor breach it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
7. In a letter dated 26 September 2018, the Department notified Cr Southwell of the Panel’s findings, providing him with a copy of its Findings and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).
8. Cr Southwell sent his submissions to the Department by email on 8 October 2018, in which he submitted:
  - The Panel take no action in relation to its finding.
  - Cr Southwell does not understand how he could deliberately cause a detriment to two different people with the same question.
  - The overall message of the Findings is that his question should have been framed better and that message has been received by Cr Southwell and is acknowledged.
  - Any further penalty would only have the effect of discouraging Cr Southwell from asking questions and attempting to fulfil his role in scrutinising the activities of the Council of which he is a member.

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<sup>1</sup> Section 5.110(5) of the Act.



- The Panel in its Findings uses a very broad definition of the crucial terms “improper” and “detriment”. The Panel should not simply arbitrarily adopt the dictionary definition of these words but instead should use the common everyday definition that is used in the context of Australian public life. Cr Southwell’s question was “perhaps ill-advised and badly worded” but he was motivated only by a desire to properly serve the community interest and improve local government.
- The Panel’s inferences about Cr Southwell’s motives are untrue and rely on guesswork by the panel members, rather than solid evidence. The Panel also ignores or dismisses Cr Southwell’s logical submission that detriment only arises from the answer to the question, and not the question itself.
- Cr Southwell has read carefully and taken on board the comments made by the Panel as to his conduct, accepts the findings, and will be more careful with the wording of any future questions to ensure no detriment is caused.
- Cr Southwell has no intention of repeating the behaviour and therefore the complaint process will have been useful, even if no penalty is imposed.

### **Panel’s consideration**

9. On 21 August 2018 the Panel made a finding that Cr Southwell had committed four other minor breaches, with the sanctions considered by the Panel at the meeting on 24 October 2018.
10. The Panel found that Cr Southwell committed two breaches of regulation 7(1)(b) in relation to the above allegations. Both breaches related to the same Question on Notice and the two Complainants named therein.
11. While Cr Southwell states he has taken on board the comments made by the Panel in the Findings, he also takes the opportunity in his response to criticise the decision of the Panel and further justify his actions.
12. The Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that the breach is so minor that no penalty is warranted.
13. Nor does the Panel consider that ordering Cr Southwell to undergo further training is appropriate or an adequate sanction.
14. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Southwell to make a Public Apology (or both).
15. When the Panel makes an order that a Notice of Public Censure be published, that Notice is published by the local government’s CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers.
16. In the present case, on the evidence available to the Panel, the Panel does not consider that it should order a public censure.





17. Cr Southwell's Question on Notice was submitted as part of the Agenda to the Council Meeting and published publicly online on the Shire's website.
18. A public apology is appropriate as it reflects the impact of Cr Southwell's publicly made statements on the two individuals referred to in the Question on Notice. An apology in public is also appropriate when a councillor's conduct does not meet the standards other councillors seek to uphold.
19. The Panel considers a public apology to those who suffered the damage, Shire President Councillor Murray Scott and Mr Christopher Scott, is the appropriate penalty.

#### **Panel's decision**

20. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(ii) of that section, Cr Southwell is ordered to publicly apologise to Shire President Councillor Murray Scott and Mr Christopher Scott.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Member)

Rebecca Aubrey (Deputy Member)

Date of Reasons – 20 November 2018



## ATTACHMENT

Complaint Number	SP 27 and 28 of 2018 [DLGSC 20180287, 20180288]
Legislation	<i>Local Government Act 1995</i>
Complainants	<b>President Murray Scott</b> <b>Mr Christopher Scott</b>
Respondent	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs S Siekierka (Presiding Member) Ms E Rowe (Member) Ms R Aubrey (Member)
Heard	24 October 2018 Determined on the documents
Outcome	Public apology

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## ORDER FOR PUBLIC APOLOGY

Published 20 November 2018

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### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



## THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Michael Southwell ("Cr Southwell"), a Councillor for the Shire of Capel (Shire), publicly apologise to Shire President Councillor Murray Scott and Mr Christopher Scott as specified in paragraph 2 below.
2. At the Shire's first ordinary council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him Cr Southwell shall:
  - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to Shire President Councillor Murray Scott and Mr Christopher Scott;
  - (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
  - (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- (i) A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I submitted a Question on Notice as part of the agenda for the Shire of Capel's Ordinary meeting on 28 March 2018.
- (ii) The Panel found that by behaving in this manner I made improper use of my office as Councillor with the intention of damaging Shire President Councillor Murray Scott and Mr Christopher Scott, thereby committing two breaches of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*.
- (iii) I accept that I should not have acted in such a manner towards Shire President Councillor Murray Scott and Mr Christopher Scott, and I apologise to the parties concerned for having done so."

3. If Cr Southwell fails or is unable to comply with the requirements of paragraph 2 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the Bunbury Mail newspaper.

### PUBLIC APOLOGY BY CR MICHAEL SOUTHWELL

A formal complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I submitted a Question on Notice as part of the agenda for the Shire of Capel Ordinary Council meeting on 28 March 2018.



The Panel found:

(1) I committed two breaches of regulation 7(1)(b) of the Rules of Conduct Regulations when I submitted a Question on Notice as part of the agenda for the Shire of Capel Ordinary Council meeting on 28 March 2018.

(2) By behaving in this way to Shire President Councillor Murray Scott and Mr Christopher Scott, I failed to meet the standards of conduct expected of a councillor

I apologise to Shire President Councillor Murray Scott and Mr Christopher Scott for acting in such a manner.

Date of Order – 20 November 2018



## NOTICE TO THE PARTIES TO THE COMPLAINT

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter.  
*In this context, the term "decision" means a decision to dismiss the complaint or to make an order.*
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (SAT Act), section 20(1).
- (3) The Panel's *Breach Findings and these Findings and Reasons for Finding – Sanctions*, constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act, section 20(1).

#### **Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."

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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : LOCAL GOVERNMENT ACT 1995 (WA)

**CITATION** : SOUTHWELL and LOCAL GOVERNMENT  
STANDARDS PANEL [2019] WASAT 128

**MEMBER** : MS R PETRUCCI, MEMBER

**HEARD** : 24 SEPTEMBER 2019

**DELIVERED** : 9 DECEMBER 2019

**FILE NO/S** : CC 2715 of 2018

**BETWEEN** : MICHAEL SOUTHWELL  
Applicant

AND

LOCAL GOVERNMENT STANDARDS PANEL  
Respondent

ATTORNEY GENERAL FOR WESTERN  
AUSTRALIA  
Intervener

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*Catchwords:*

Local government - Review of decision of Local Government Standards Panel - Alleged minor breaches - Whether improper use of office - Whether intent to cause detriment - Sanction for minor breach of *Local Government Act 1995* (WA) - Breach of reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) - Turns on own facts

*Legislation:*

*Local Government (Rules of Conduct) Regulations 2007* (WA), reg 3, reg 4, reg 7, reg 7(1), reg 7(1)(b)

*Local Government Act 1995* (WA), s 2.10, s 5.103, s 5.104(1), s 5.105(1), s 5.105(1)(a), s 5.106, s 5.107, s 5.110, s 5.110(6), s 5.125, Pt 5, Div 9

*State Administrative Tribunal Act 2004* (WA), s 25(2), s 27, s 29, s 29(3)(c)(ii), s 31(1), s 37(1)

*Result:*

Decisions of the Local Government Standards Panel as to breach affirmed and sanctions varied

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr SA Walker

Respondent : Ms R Davey

Intervener : Ms R Davey

*Solicitors:*

Applicant : S A Walker, Barrister

Respondent : State Solicitor's Office

Intervener : State Solicitor's Office

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

Hipkins and Local Government Standards Panel [2014] WASAT 48

King and Local Government Standards Panel [2018] WASAT 42

Re and Local Government Standards Panel [2017] WASAT 84

Treby and Local Government Standards Panel [2010] WASAT 81



## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1       The applicant, Councillor Michael Southwell, a member of the Council with the Shire of Capel (**Shire**) seeks a review in the Tribunal under s 5.125 of the *Local Government Act 1995* (WA) (**LG Act**) of findings made by the Local Government Standards Panel (**Panel** or **respondent**) on 25 September 2018 and 10 October 2018 of various minor breaches and orders as to sanctions made by the Panel on 20 November 2018.

2       On 17 December 2018, Cr Southwell made his application to the Tribunal because in his view:

The matter is trivial, the penalty is unfair and unjust and the decision is detrimental to the role and reputation of [the] councillor.

3       For the reasons set out below, the Tribunal concludes that the decisions of the Panel of 25 September 2018 and 10 October 2018 in relation to the finding of six minor breaches should be affirmed but that the orders as to sanctions made by the Panel on 29 November 2018 should be varied.

### *The proceeding in the Tribunal*

4       On 4 February 2019, the Tribunal stayed the Panel's decisions until further order (s 25(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**)).

5       Following various procedural steps, the matter was heard by the Tribunal on 24 September 2019.

6       In addition to Cr Southwell's application, the Tribunal received into evidence at the hearing the following documents:

- Exhibit A - Intervener's statement of issues facts and contentions dated 1 March 2019;
- Exhibit B - Respondent's s 24 bundle of documents dated 1 March 2019;
- Exhibit C - Respondent's supplementary bundle of documents dated 1 May 2019;

- Exhibit D - Witness statement of Cr Southwell dated 1 May 2019 (at hearing the parties agreed that the sentence commencing with the words 'In my case, ...' following each of paras 15 and 16 of Cr Southwell's witness statement is not a submission but rather Cr Southwell's evidence); and
- Exhibit E - Cr Southwell's statement dated 21 March 2019.

7        At the hearing the Tribunal had the benefit of receiving oral evidence from Cr Southwell. Further, the Tribunal had the benefit of receiving closing submissions from counsel for the intervener and from counsel for Cr Southwell.

8        Following the hearing on 24 September 2019, the Tribunal reserved its decision.

9        As is appropriate in reviews of this type, the Panel did not play an active role in the proceeding due to the possibility that exists in review proceedings where the Tribunal may invite the Panel to reconsider its decision (s 31(1) of the SAT Act) and that the powers of the Tribunal on a review include the power to remit the matter back to the Panel for reconsideration (s 29(3)(c)(ii) of the SAT Act). The Panel's role was therefore confined to producing the s 24 bundle of documents and supplementary bundle of documents.

10       In view of the Panel's limited participation in the hearing, the Tribunal was assisted by the intervention of the Attorney General for Western Australia (**intervener**) pursuant to s 37(1) of the SAT Act who acted where necessary as a contradictor to the case presented by Cr Southwell.

### ***The six complaints***

11       On 4 April 2018 and 1 June 2018, the Panel received complaints forwarded by the Chief Executive Officer (**CEO/Acting CEO**) of the Shire all of which complained of minor breaches under s 5.107 of the LG Act in that Cr Southwell breached reg 7 of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**Regulations**). Relevantly, it is alleged that Cr Southwell breached reg 7(1)(b) of the Regulations which provides that a Council member must not make improper use of his or her office to cause detriment to the local government or any another person.

12       The complaints may be summarised as follows:

- (1) Complaints of a minor breach made by the CEO of the Shire, Mr Paul Sheedy, on 4 April 2018 (SP 26 of 2018) regarding three posts by Cr Southwell to his Councillor Facebook page on 6 February 2018, 25 March 2018 and 29 March 2018 and reasons given in support of a motion moved by Cr Southwell for a Council meeting on 28 March 2018 (**complaints 1, 2, 3 and 4**);
- (2) Complaints of a minor breach made by the President of the Shire, Mr Christopher Scott, and Mr Murry Scott both on 28 March 2018 and by Mr Sheedy on 4 April 2018 (SP 27 of 2018 and 28 of 2018) regarding a Question on Notice which was submitted by Cr Southwell as part of the agenda for the Shire's Ordinary Council meeting (**OCM**) on 28 March 2018 (**complaint 5**); and
- (3) A complaint of a minor breach made by Mr Sheedy on 25 May 2018 (SP 37 of 2018) regarding the post by Cr Southwell to his Councillor Facebook page on 24 May 2018 (**complaint 6**).

***The agreed facts***

13        The following facts are agreed between the parties. They are uncontroversial and the Tribunal makes these findings of fact.

- (1) Cr Southwell was elected a councillor of the Shire in October 2017, and has remained an elected councillor of the Shire at all relevant times.
- (2) At the OCM of the Shire held on 24 January 2018, Cr Southwell moved the following motion:

That Council instructs the CEO to change the seating arrangements at Council meetings so that only elected members are seated at the Council table, with the only exception of the CEO being seated near the Presiding Member to give advice and answer questions when asked by the Presiding Member. Any other staff who attend Council meetings are to remain in the public gallery and only come forward, if invited by the Presiding Member to do so, to answer any questions elected members may have which the CEO cannot answer.

- (3) The above motion was voted upon by the Council, with seven councillors voting against the motion and one councillor (Cr Southwell) voting in favour of the motion.
- (4) On 6 February 2018, Cr Southwell posted the following comment on his Councillor Facebook page:

Also at the January Council meeting I moved the following motion:

'That Council instructs the CEO to change the seating arrangements at Council meetings so that only elected members are seated at the Council table, with the only exception of the CEO being seated near the Presiding Member to give advice and answer questions when asked by the Presiding Member. Any other staff who attend Council meetings are to remain in the public gallery and only come forward, if invited by the Presiding Member to do so, to answer any questions elected members may have which the CEO cannot answer.'

The motion was Lost with only me in favour and everyone else against, with Cr Schiana absent.

My reasons were that under the Local Government Act, Council meetings should be held, run and conducted by elected Councillors only, not senior staff. At Capel, all the senior staff sit at the council table during all the meetings.

The CEO is at these meetings to answer questions and provide advice. I said having so many staff at these meetings for long periods while not involved is unproductive use of their paid time. It is also confusing for visitors and members of the public attending meetings as to who is and is not a Councillor, when they all sit together at the Council table.

Of course, I respect Council's decision for things to remain as they are.

- (5) An annual electors' meeting (**AEM**) was held by the Shire on 28 February 2018.
- (6) The CEO's report and recommendations in relation to the motions carried at the AEM were contained in the agenda for the OCM to be held on 28 March 2018.

- (7) On 25 March 2018, Cr Southwell posted the following comment on his Councillor Facebook page:

To all those people who attended the recent Capel Shire Electors Meeting and voted in favour of the Motions passed overwhelmingly by that meeting, I feel sorry about the way these have been dealt with by Shire in this week's Council meeting Agenda (available on-line at Shire site).

Hopefully, my fellow councillors have enough respect for the electors and democratic processes to support me in rejecting the proposal to simply brush these aside and instead have them properly considered, individually, as the Local Government Act intends.

The CEO has recommended that the council simply 'Note the contents of the motions, but take no action'.

The Motions deal with making information the Shire has about the toxic waste dump at Dalyellup available to the public, limiting Rates increases, investigating conduct of the CEO and making open to the public secret workshops between councillors and staff on issues like Rates.

I think at least some of these proposals are worthy of taking some action so we can make council more open and accountable.

- (8) At the OCM held on 28 March 2018, the Council resolved to consider each motion brought forward from the AEM as a separate item and to consider the motions separately.
- (9) In relation to electors' motion 1, a motion by the Council to note the content of the motion but take no action was carried, with seven councillors voting in favour of the motion and two voting against.
- (10) In relation to electors' motion 2, a motion by the Council to note the content of the motion but take no action was carried, with eight councillors voting in favour of the motion and one voting against.
- (11) In relation to electors' motions 3 and 4, a motion by the Council to note the content of the motions, but take no action was carried unanimously.

- (12) In relation to electors' motion 5, a motion by the Council to note the content of the motion but take no action was carried, with eight councillors voting in favour of the motion and one voting against.

- (13) On 29 March 2018, Cr Southwell posted the following comment on his Councillor Facebook page:

At last night's council meeting, the CEO recommendation was passed although I voted in favour of most of the people's Motions I was the only councillor who supported any of them. Crs Scott, Scott, Kitchen, Bell, Schiano, Radisich, Hearne and McCleery all voted against. I accept the majority vote even though I still don't understand the reasons.

- (14) At the OCM held on 28 March 2018, Cr Southwell moved the following motion:

That the CEO take steps needed to ensure that, except when a confidential issue is to be discussed, council forums, including the so-called 'round table discussion' held prior to Council meetings, and so-called 'budget workshops' are in the future open to the public, with Agendas published prior to the meetings and Minutes of the meetings taken and published.

- (15) Cr Southwell put forward the following reasons for the above motion:

Reasons: This is another measure aimed at making Council more open and accountable to ratepayers, electors and residents. There is no good reason to hold these meetings in secret. Many people in the Shire feel and express the view that at times they do not comprehend Council decision-making processes and it seems officer recommendations brought to Council are in many cases a 'fait accompli' which must already have been discussed or 'workshopped' in private, behind the scenes. This suspicion is enhanced by Council Minutes which show many officer recommendations on sometimes contentious issues have been decided by Council with a unanimous vote of Councillors, and without any debate. According to the Local Government's Operational Guidelines, the decisionmaking processes of Council should be transparent and where possible take place in public.

- (16) Cr Southwell submitted the following Question on Notice prior to the OCM of the Shire held on 28 March 2018:

In regard to the Council Policy which sees annual payments made by the Shire to the Council's President, Cr Scott and one of his relatives Mr Chris Scott, of \$830 and \$2,453 respectively, for their roles as volunteer firefighting officers, are any similar payments made to other volunteers in senior firefighting roles, or to any other volunteers in the Shire who may offer significant commitments in terms of time, effort and personal expense?

- (17) The Shire's proposed 2018/2019 budget was placed on the agenda for discussion at an OCM to be held on 23 May 2018.
- (18) Prior to the Council meeting, employees of the Shire uploaded graphics on to the Shire's Facebook page, depicting the impact of proposed changes to rates contained in the proposed 2018/2019 budget.
- (19) At the OCM on 23 May 2018, the Council resolved to defer consideration of the proposed budget to a Special Council meeting to be held on 5 June 2018.
- (20) On 24 May 2018, Cr Southwell posted the following comment on his Councillor Facebook page:

The graphics from the Council website are very confusing. (I'm confounded as to why they are even there, considering this has not been voted on yet by Council). Less spin, less cherry picking, and more hard facts on proposed Rates - noting separately changes to fees and charges - would be helpful.

### ***The issues***

- 14           The parties agreed that the issues to be determined by the Tribunal are as follows:

- Issue 1: Whether Cr Southwell was a councillor of the Shire at all relevant times?;
- Issue 2: Whether Cr Southwell posted the Facebook comment on 6 February 2018?;



- Issue 3: Whether Cr Southwell posted the Facebook comment on 25 March 2018?;
- Issue 4: Whether Cr Southwell posted the Facebook comment on 29 March 2018?;
- Issue 5: Whether Cr Southwell put forward the reasons for the motion put at the OCM held on 28 March 2018?;
- Issue 6: Whether Cr Southwell submitted the Question on Notice prior to the OCM of the Shire held on 28 March 2018?;
- Issue 7: Whether Cr Southwell posted the comment on Facebook on 24 May 2018?;
- Issue 8: If any of the issues to 2 to 7 are answered 'yes', whether Cr Southwell's conduct constituted an improper use of his office as a council member?;
- Issue 9: If issue 8 is answered 'yes', whether Cr Southwell made an improper use of his office to cause detriment to the Shire or to any other person?; and
- Issue 10: If issue 9 is answered 'yes', how should any breaches of reg 7(1) of the Regulations by Cr Southwell be dealt with under s 5.110(6) of the LG Act?

15        It was accepted from the outset by all the parties that Cr Southwell was a member of the council of the Shire at all relevant times.

16        It was common ground that in respect of issues 2, 3, 4, 5, 6 and 7 that Cr Southwell accepted that he posted the Facebook comments on his Councillor Facebook page, put forward reasons for the motion put at the OCM held on 28 March 2018, submitted the Question on Notice prior to the OCM held on 28 March 2018. Accordingly, the Tribunal answers 'yes' to issues 1, 2, 3, 4, 5, 6 and 7.

17        This leaves only issues 8, 9 and 10 to be determined by the Tribunal.

***Summary of the parties' positions***

18           In summary, counsel for the intervener submitted that it is open to the Tribunal to conclude, as did the Panel, that Cr Southwell's conduct in each of the six complaints fell short of the standard of a reasonable councillor.

19           It was submitted that it is open for the Tribunal to infer from the surrounding context of the circumstances of this case, and in particular the actual words and phrases used in the particular communications by Cr Southwell, that it was his intention to cause detriment to either the Shire, to his fellow councillors, to Shire employees or to other people or that his conduct was done with reckless indifference that detriment was a probably or likely consequence of his conduct.

20           Finally, counsel for the intervener submitted that issues 8 and 9 should be answered in the affirmative and that the decision of the Panel in relation to SP 26, 27, 28 and 37 of 2018 (complaints 1 through to 6) should all be affirmed by the Tribunal and that the sanctions imposed by the Panel remain appropriate.

21           In summary, counsel for Cr Southwell contended that issues 8 and 9 should be answered in the negative and that the decision of the Panel in relation to SP 26, 27, 28 and 37 of 2018 (complaints 1 through to 6) should all be dismissed by the Tribunal.

22           It was submitted that if any of the complaints are not dismissed by the Tribunal, then no sanction should be imposed on the basis that there is a lack of gravity as well as the well-intentioned nature of Cr Southwell's statements. In the alternative, counsel for Cr Southwell submitted that if a penalty is to be imposed, then a public apology should be considered as the appropriate penalty for any of the complaints found to be made out.

23           Before turning to consider issues 8, 9 and 10 in detail, it is convenient to set out the relevant statutory provisions and principles to be applied.

***The relevant statutory provisions***

24           The role of a councillor is set out in s 2.10 of the LG Act. It relevantly provides:

A councillor -

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

25        Part 5 Div 9 of the LG Act legislates the conduct of certain officials operating in local government, including local government councillors and provides for sanctions when it is found that councillors have committed either minor or major breaches of the LG Act. These proceedings concern allegations of minor breaches of the LG Act.

26        Section 5.103 of the LG Act provides:

**5.103. Codes of conduct**

- (1) Every local government is to prepare or adopt a code of conduct to be observed by Council members, committee members and employees.

*[(2) Deleted]*

- (3) Regulations may prescribe codes of conduct or the content of, and matters in relation to, codes of conduct and any code of conduct or provision of a code of conduct applying to a local government under subsection (1) is of effect only to the extent to which it is not inconsistent with regulations.

27        Section 5.105(1) of the LG act sets out when a council member commits a minor breach. It provides:

**5.105. Breaches by Council members**

- (1) A council member commits a minor breach if he or she contravenes -
  - (a) a rule of conduct under section 5.104(1); or
  - (b) a local law under this Act, contravention of which the regulations specify to be a minor breach.

28           Section 5.106 of the LG Act outlines the standard of proof in relation to findings of a breach and provides:

**5.106. Deciding whether breach occurred.**

A finding that a breach has occurred is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur.

29           Section 5.110 of the LG Act provides that the Panel may deal with a minor breach in the following manner:

**5.110. Dealing with complaint of a minor nature**

(1)    The member of the primary standards panel who receives a complaint from a complaints officer under section 5.107(3)(c), 5.108(2)(c) or 5.109(1)(c) is to -

- (a)    allocate that complaint to a standards panel; and
- (b)    send the complaint and anything received from the complaints officer to the member of that standards panel who is appointed under Schedule 5.1 clause 2(a).

(2)    After receiving a complaint allocated to it under subsection (1), a standards panel is required to -

- (a)    make a finding as to whether the breach alleged in the complaint occurred; or
- (b)    send the complaint to the Departmental CEO under section 5.111.

...

(6)    The breach is to be dealt with by-

- (a)    dismissing the complaint; or
- (b)    ordering that -
  - (i)    the person against whom the complaint was made be publicly censured as specified in the order; or
  - (ii)   the person against whom the complaint was made apologise publicly as specified in the order; or

- (iii) the person against whom the complaint was made undertake training as specified in the order;

...

or

- (c) ordering 2 or more of the sanctions described in paragraph (b)[.]

30       Section 5.104(1) of the LG act enables regulations to be made prescribing rules of conduct for Council members:

**5.104. Other regulations about conduct of Council members**

- (1) regulations may prescribe rules, to be known as the rules of conduct for Council members, that Council members are required to observe.

31       Regulation 3 of the Regulations sets out general principles to guide the behaviour of council members which includes that a person in their capacity as a council member should:

- (a) act with reasonable care and diligence; and

...

- (d) avoid damage to the reputation of the local government; and

- (e) be open and accountable to the public;

- (f) base decisions on relevant and factually correct information; and

- (g) treat others with respect and fairness[.]

32       Regulation 4 of the Regulations under the heading 'Contravention of certain local laws' provides:

- (1) In this regulation -

*local law as to conduct* means a local law relating to conduct of people at Council or committee meetings.

- (2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.

33       Regulation 7(1) of the Regulations states:

- (1) A person who is a council member must not make improper use of the person's office as a council member -
- (a) to gain directly or indirectly, an advantage for the person or any other person; or
  - (b) to cause detriment to the local government or any other person.

34 Clause 2 of the Shire's Code of Conduct (endorsed on 26 July 2017) sets out values, principles and behaviour expected of councillors, committee members and employees of the Shire including the following:

- Act with reasonable care and diligence.
- Act in the best interests of the Shire and the community.
- Avoid damage to the reputation of the Shire of Capel.
- Be polite and treat others with respect and fairness.
- Make no allegations which are improper or vexatious.
- Avoid causing any reasonable person unwarranted offence or embarrassment.
- Respect decisions made by Council.
- Refrain from publicly criticising either a Councillor, Committee Member or employee in a way that casts aspersions on their competence or credibility.
- Be mindful of their behaviour in public, particularly where it is easy to ascertain the person is associated with the Shire of Capel.

...

35 Part 7 of the Shire's *Standing Orders Local Law 2016* (**Standing Orders**) (adopted on 26 November 1997) deals with the conduct of members of the council.

36 Section 5.125 of the LG act allows a review by the Tribunal of decisions made by the panel to dismiss a complaint or to make an order.

37 The Tribunal's powers on review are contained in s 27 and s 29 of the SAT Act as follows:

**27. Nature of review proceedings**

- (1) The review of a reviewable decision is to be by way of a hearing de novo, and it is not confined to matters that were before the decision-maker but may involve the consideration of new material whether or not it existed at the time the decision was made.
- (2) The purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review.
- (3) The reasons for decision provided by the decision-maker, or any grounds for review set out in the application, do not limit the Tribunal in conducting a proceeding for the review of a decision.

**29. Tribunal's powers in review jurisdiction**

- (1) The Tribunal has, when dealing with a matter in the exercise of its review this jurisdiction, functions and discretions corresponding to those exercisable by the decision-maker in making the reviewable decision.
- (2) Subsection (1) does not limit the powers given by this act or the enabling act to the Tribunal.
- (3) The Tribunal may -
  - (a) affirm the decision that is been reviewed; or
  - (b) vary the decision that is been reviewed; or
  - (c) set aside the decision that is being reviewed and -
    - (i) substitute its own decision; or
    - (ii) send the matter back to the decision-maker for reconsidering in accordance with any directions or recommendations that the Tribunal considers appropriate,

and, in any case, make any order the Tribunal considers appropriate[.]

***The principles to be applied***

38 His Honour Judge Sharp recently considered the principles concerning minor breaches under the LG Act in ***King and Local Government Standards Panel*** [2018] WASAT 42 (***King***) at [32]-[36] relying on the often quoted decision by her Honour Judge Pritchard (as her Honour then was) in ***Treby and Local Government Standards Panel*** [2010] WASAT 81 (***Treby***). The principles are:



*The principles to be applied*

- 32 The meaning of the phrases 'improper use of the person's office as a council member' and 'to cause detriment to ... any ... person' as they appear in reg 7(1) of the Regulation has been previously considered by this Tribunal in *Treby and Local Government Standards Panel* (2010) 73 SR (WA) 66; [2010] WASAT 81 (*Treby*). The conclusions drawn in *Treby* are set out below.
- 33 These conclusions continue to reflect the Tribunal's interpretation of the meaning of the expression 'improper use of a person's office as a council member' and the word 'detriment'.

**Improper use**

- 34 In *Treby*, Pritchard DCJ (as her Honour then was) referred to the *Shorter Oxford English Dictionary* meaning of 'improper' and noted that it includes 'unsuitable' and 'inappropriate'. Her Honour then went on, at [29]-[33], to summarise what the case law is in the context of similar provisions to reg 7(1) of the Regulations suggested as to the meaning of 'improper'. She drew the following conclusions in relation to the meaning and application of the term 'improper use of the person's office' within the context of reg 7(1) (citations omitted):
- 29 First, impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the [councillor] by reasonable person with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case.
- 30 Secondly, impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.
- 31 Thirdly, impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from the office or employment. Alternatively, impropriety will arise from the doing or an act which a councillor knows or ought to know that he has no authority to do.
- 32 Fourthly, in the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in

exercising the power will be important factors in determining whether the power has been abused.

- 33 Fifthly, a councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council.

**To cause detriment to any person**

- 35 In *Treby*, her Honour discussed the meaning of the word 'detriment' under reg 7(1)(b) of the Regulations. It was concluded that the word 'detriment' should be given its ordinary and natural meaning: *Treby* at [103]. Her Honour noted that ordinary and natural meaning of 'detriment' is loss or damage done or caused to, or sustained by, any person or thing: *Treby* at [94].

- 36 In *Treby* at [96] her Honour then went on to say (citations omitted):

A contravention of reg 7(1)(b) does not depend on actual detriment being suffered by a person. However, it must be established that the councillor believed that the intended result of his or her conduct would be that the other person would suffer detriment.

- 39 In *King*, His Honour Judge Sharp considered the 'context of the conduct in question' in *Hipkins and Local Government Standards Panel* [2014] WASAT 48 (*Hipkins*) which also concerned minor breaches of the LG Act. His Honour concluded at [46]-[48]:

- 46 To the extent that *Hipkins* is authority for the proposition that what is improper will depend on the context of the conduct in question, then I agree. However, I do not intend to take anything more from *Hipkins* and I rely on *Treby* for the meaning of the expression 'improper use of the person's office as a council member'.

- 47 However, while context is relevant, when the context in question amounts to a clear breach of the Code of Conduct, the context is of little assistance to the applicant.

- 48 Further, while the applicant submits that at [56] in *Treby*:

... regulation 7 of the regulations does not prohibit a council member from discussing council business, to question and, in some cases no doubt, to criticise the actions of others which impact on matters relevant to the affairs of a local government and the community it serves[.]

The Tribunal draws attention to the remainder of this paragraph in *Treby*, where her Honour Judge Pritchard, as she then was, quoted at [56]-[57]:

...

In dealing with the finding made by the Panel of a breach of cl 11.9 of the Standing Orders in *Treby*, Senior Member Parry observed (at [19]):

A councillor is able to meaningfully participate in the good government of the persons in the district and to duly, faithfully, honestly and with integrity fulfil the duties of the office for the people in the district according to his or her best judgment and ability, without reflecting adversely upon the character or actions of, or imputing any motive to, another member or an officer of the local government. Indeed, good government requires courtesy amongst those elected to govern.

The sentiment behind that observation is equally apt to reg 7(1)(b).

- 40       The Tribunal turned, next, to explain why it was satisfied that Cr Southwell's conduct in respect of each of the six complaints constitutes an improper use of his office as a council member.

### **Issue 8 - Cr Southwell's conduct constituted an improper use of his office**

- 41       As set out earlier in these reasons, reg 7(1)(b) of the Regulations provides:

A person who is a council member must not make improper use of the person's office as a council member -

...

- (b)     to cause detriment to the local government or any other person.

### **Intervener's submissions**

- 42       Counsel for the intervener relied on the test set out in *Treby* at [26] where Her Honour Judge Pritchard (as she then was) noted the adjective 'improper' in reg 7(1)(b) is used to describe the use of a councillor's office. The test is an objective one. It was submitted that the test requires an assessment as to whether a reasonable person with the knowledge of the powers, duties and authority of the councillor and the particular relevant circumstances would conclude Cr Southwell's

conduct fell short of the required standard in that it was unsuitable or inappropriate. Impropriety does not depend on a councillor's consciousness of impropriety. It does not involve an element of intent. However, conduct can still be improper, even though a councillor, by their conduct, had the intention of benefiting the Shire or the Council.

43 Further, it was submitted that what is improper in a particular situation, is context driven. This requires consideration of the statutory and formal context of a councillor's duties and responsibilities and also of the unique factual circumstances of the case. It was stated in *Hipkins* at [27] that the standard of conduct expected of a councillor is high. It was submitted that the standard of conduct by which Cr Southwell's is to be measured against is guided by reference to a councillor's fiduciary obligations; the LG Act and in particular s 2.10, the role of a councillor, the Regulations and in particular reg 3, the Shire's Code of Conduct (cl 2) and the Shire's Standing Orders (part 7). In addition, it was submitted that these collectively provide that Cr Southwell must act with reasonable care and diligence, avoid damage to the reputation of local government, base decisions on relevant and factually correct information, avoid causing any reasonable person unwarranted offence or embarrassment, make no allegations which are improper or vexatious, be mindful of their behaviour in public, particularly when it's easy to ascertain the person is associated with the Shire or the Council, and to refrain from publicly criticising either a councillor or committee member or any employee in such a way that casts aspersions on their competence and credibility. Counsel for the intervener submitted that the following particular circumstances of Cr Southwell, uncontradicted, are relevant:

- (a) He is a former journalist where words and phrases and meanings which they convey are part of his profession.
- (b) He is a reasonably experienced councillor and he is familiar with his duties and responsibilities as a councillor under the LG Act and Regulations, having completed a number of local government training modules.
- (c) He is aware of the Shire's Code of Conduct.

44 Counsel for the intervener submitted, relying on *Treby* at [87] and [89] and *King* at [47], that it is against this background or particular circumstances that Cr Southwell is to be assessed. It was submitted that

the terms and phrases used by Cr Southwell in each of the six complaints, even within the context that he says they were meant to be conveyed, fell short of the standard expected of a councillor and this conduct amounted to an improper use of his office.

### **Cr Southwell's submissions**

45 Counsel for Cr Southwell also relied on the test in *Treby* where at [27] Her Honour Judge Pritchard (as then she was) stated that the 'meaning of improper includes unsuitable and inappropriate' and that 'it is clear that the meaning of the word "improper" cannot be considered in isolation, but rather will take its flavour from the surrounding context, which includes an assessment of what is involved in the role of the councillor' and that 'the role of the councillor includes representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district, and participating in the Council's decision making processes at Council and committee meetings'.

46 It was submitted that Her Honour's statement in *Treby* at [29] that 'impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case' is of considerable significance because the reasonable person on the Capel (but not the Clapham) omnibus is to be considered to be someone with knowledge of the duties, powers and authority of the position of a councillor, and that can be discerned by reference to the duties of a councillor as well as the Shire's Code of Conduct and the like. Therefore, in assessing each complaint, counsel for Cr Southwell submitted that it is necessary to consider the reasonable person who knew what Cr Southwell knew at the relevant time and what the duties of a councillor are.

47 In regards to the duties of a councillor, counsel for Cr Southwell submitted that a councillor undertakes an onerous office on behalf of the community, is faced with a considerable amount of written material, has to try to have regard to a range of competing interests within the community as well as considering the pros and cons, the merits and otherwise of any particular proposal and consider if there are any possible alternatives to the proposal. In doing all of this, it was submitted that the councillor must act carefully, and takes a reasonably robust and practical and a common sense approach to what standards a

councillor is expected to adhere to, the result being that perfection is seldom achieved in daily life by councillors or by others, and perfection is not the standard by which behaviour is to be judged.

- 48           Finally, counsel for Cr Southwell submitted that the role of a councillor is of great importance.

### **Consideration of Issue 8**

- 49           There is no contest between the parties as to what constitutes impropriety. The parties correctly acknowledged the principles as they apply to impropriety as set out by Her Honour Judge Pritchard (as then she was) in *Treby*.

- 50           When applying the principles set out in *Treby*, the Tribunal finds that Cr Southwell has contravened the standard of conduct that would be expected of a person in Cr Southwell's position by a reasonable person with knowledge of the duties, powers and authority of a councillor and the circumstances of the case in regards to each of the posts on his Councillor Facebook page, in the reasons given in support of the motion moved by him for a Council meeting and in regards to the Question on Notice which was submitted as part of the agenda for the Shire's OCM.

- 51           It is not necessary for the Tribunal to find that Cr Southwell was aware of his impropriety when making the posts on his Councillor Facebook page, or in giving reasons in support of the motion moved by him or in relation to the Question on Notice. This is because it is clear from *Treby* at [33] that a councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council. In this case, the Tribunal finds that Cr Southwell's use of his office was improper even though it was done with the stated intention of having a better and more open processes which would be of advantage to the Shire and to the residents.

- 52           The Tribunal accepts that Cr Southwell has a Councillor Facebook page which is about news and views from the Shire. Further, the Tribunal understands that Cr Southwell invites feedback, comments and suggestions on his Councillor Facebook page. Cr Southwell stated that some residents of the Shire follow his Councillor Facebook page.

- 53           The Tribunal finds that Cr Southwell in making the posts to his Councillor Facebook page failed to meet the standards of conduct expected of a councillor of the Shire, as reflected in reg 3 of the

Regulations and in cl 2 of the Shire's Code of Conduct. Cr Southwell fell short of the standards of conduct expected of a councillor for the following reasons.

54 In regards to complaint 1, Cr Southwell failed to give adequate consideration to the consequences of his post and failed to show respect to the Shire's senior staff. As a decision had already been made by the Council on 24 January 2018 with regards to his motion (seating arrangements), if Cr Southwell was not satisfied with how meetings were held, he could have raised his concerns directly with the CEO and senior staff.

55 For complaint 2, while Cr Southwell may disagree with the CEO, he publicly showed a lack of respect for the CEO and the decision-making process of the Council by making his Councillor Facebook post on 25 March 2018 including the post that 'The CEO has recommended that Council simply 'Note the content of the Motions, but take no action' and that he feels 'sorry about the way these have been dealt with by the Shire'. Further, Cr Southwell failed to include in his post the reasons given by the CEO either by way of summary or in full to support his recommendations as evidenced by the minutes. Cr Southwell's explanation for not providing the reasons, being that 'the minutes are on the Shire's website', is not accepted by the Tribunal. As an elected councillor, the community will assume that Cr Southwell has a high level of knowledge about what happens at Council meetings and would trust his statements as being fact and therefore it is incumbent on him to accurately report on his Councillor Facebook page.

56 Complaint 3 concerns Cr Southwell's Councillor Facebook post where he stated the he was the only councillor to support the peoples' motions whereas the minutes reflect that a second councillor also voted against the majority with respect to one of the motions. He specifically set out the names of the councillors who he says voted for the CEO's recommendations. It is incumbent on Cr Southwell, as a councillor when making statements publicly on his Councillor Facebook page, to ensure all statements are accurate. Failure to do so is misleading and reflects a lack of integrity. The suggestion that Cr Southwell did not have the minutes of the meeting when he made the post is no excuse.

57 Turning to complaint 4, the Tribunal finds that Cr Southwell in his post of 28 March 2018 used the words 'no good reason', 'secret', 'fait accompli', 'workshopped', behind the scenes', 'suspicion' and 'without debate' to undermine the process of local government by insinuating

there was something wrong with the Council's decision-making process.

58 In regards to complaint 5, it is appropriate for Cr Southwell to ask questions in his role as a councillor, however, Cr Southwell made the Question on Notice personal by naming Cr Scott and Mr Scott, referring to them as relatives and querying whether it was only these two people who received payments for their services, in order to raise doubts about the legitimacy of the payments. The Tribunal finds that Cr Southwell showed a lack of respect for Cr Scott in both his role as President and as Deputy Chief Fire Control Officer. The Question on Notice was offensive to both Cr Scott and Mr Scott.

59 Finally, complaint 6 concerns graphics about proposed rates changes on the Shire's Facebook page and Cr Southwell's post where he describes them as 'very confusing' and is 'confounded as to why they are even there, considering this has not been voted on yet by Council'. Cr Southwell may disagree with the graphics, however, attacking them publicly on his Councillor Facebook page by using the terms 'less spin, less cherry picking, and even more hard facts on proposed Rates - noting separately changes to fees and charges - would be helpful', shows a lack of respect for, and undermines the Council.

60 In conclusion, the Tribunal finds that when Cr Southwell made the posts to his Councillor Facebook page on 6 February 2018, 25 March 2018, 29 March 2018 and 25 May 2018, in giving his reasons for the motion he moved for the Council meeting on 28 March 2018, and for the Question on Notice he submitted as part of the Shire's OCM on 28 March 2018, that it is more likely than not that these were an improper use of his office.

61 The Tribunal turns, then, to explain its conclusion that Cr Southwell used his office to cause detriment to the Shire or any other person.

### **Issue 9 - Cr Southwell use of his office was to cause detriment**

62 Counsel for the intervener referred to *Treby* at [105] and in *Re and Local Government Standards Panel* [2017] WASAT 84 at [49] to make the observation that the Tribunal did not reject the intervener's submission in those cases and that in the absence of any admissions by the councillor that they intended to cause detriment, a finding of intention is open if the only reasonable inference open was that it was more likely than not, that the councillor intended to cause detriment or



that their conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct.

63 In closing submissions, counsel for the intervener submitted that despite Cr Southwell's denial that it was not his intention to cause detriment to anyone or, indeed, to the Shire, when considering the evidence for each of the six complaints, it is more likely than not that Cr Southwell had intended the result would be that detriment would be caused or that his conduct was done with reckless indifference that detriment was a probable and likely consequence of his conduct. It was submitted that the only reasonable inference which is open on the evidence, particularly in relation to his Councillor Facebook posts, is that Cr Southwell intended for the CEO, the President of the Shire and the Shire employees to be viewed by the ratepayers and others, in a negative light. Cr Southwell's intention by his conduct was to embarrass and to highlight what were, in his view, incompetencies or improper practices occurring in the Council all under the guise of what he asserts was his attempt to improve transparency and accountability within the Shire.

64 Counsel for Cr Southwell relied on *Treby* at [89], [91] and [94] to submit that the general principles found in reg 3 of the Regulations are of relevance and of assistance but they are not rigid or in black and white terms; rather they are for the guidance of councillors. It was submitted that the ultimate question is, whether, in the eyes of the reasonable observer, that is, the reasonable person with knowledge of the duties of a councillor and knowledge of all the relevant circumstances of the case, whether the conduct of Cr Southwell was improper and that the intended result of that conduct was to cause detriment.

65 The Tribunal considered each complaint in turn.

## **Complaint 1**

66 It is useful here to repeat Cr Southwell's Councillor Facebook post of 6 February 2018, which is the basis of complaint 1.

Also at the January Council meeting I moved the following motion:

'That Council instructs the CEO to change the seating arrangements at Council meetings so that only elected members are seated at the Council table, with the only exception of the CEO being seated near the Presiding Member to give advice and answer questions when asked by the Presiding Member. Any other staff who attend Council meetings

are to remain in the public gallery and only come forward, if invited by the Presiding Member to do so, to answer questions elected members may have which the CEO cannot answer.'

The motion was Lost with only me in favour and everyone else against, with Cr Schiana absent.

My reasons were that under the Local Government Act, Council meetings should be held, run and conducted by elected Councillors only, not senior staff. At Capel, all the senior staff sit at the Council table during all the meetings.

The CEO is at these meetings to answer questions and provide advice. I said having so many staff at these meetings for long periods while not involved is unproductive use of their paid time. It is also confusing for visitors and members of the public attending meetings as to who is and is not a Councillor, when they all sit together at the Council table.

Of course, I respect Council's decision for things to remain as they are.

67 Counsel for the intervener submitted that the wording of the motion put by Cr Southwell regarding the seating arrangement at the Council table says nothing about his concern that the Shire's senior staff were, in his view, holding, running or conducting those meetings. Rather, Cr Southwell in his Councillor Facebook post used the words 'not senior staff' at the end of the sentence, which, when read in its ordinary sense, infers that the Shire's senior staff were improperly exceeding their position; they were running, holding and conducting meetings, when that was the role of the elected councillors as provided for by the LG Act.

68 Counsel for Cr Southwell submitted that no implication is open or should be drawn from this post because Cr Southwell properly moved the motion in accordance with the set procedures seeking to change the seating arrangements. According to counsel for Cr Southwell, the motion sought to change what apparently was the standard procedure (set up by the councillors) at that time involving staff other than the CEO sitting at the table with elected councillors and therefore it was inevitable that Cr Southwell in moving a motion would propose reasons for the change.

69 Further, it was submitted that the intervener's submission rests on that part of the Councillor's Facebook post by Cr Southwell that 'Council meetings should be held, run and conducted by elected councillors only, not senior staff' which implies that up to the point of his motion, meetings of the Council were not being properly conducted

because senior staff were involved in holding, running or conducting them.

70           Counsel for Cr Southwell submitted that it is only the person who is finely attuned to finding fault wherever fault can be found or finding criticism wherever criticism can be found who is going to hear or read the motion in that way. The motion as a whole must be considered, submitted counsel for Cr Southwell. The plain meaning of the motion is that up until that time, the seating arrangements were that staff of the Shire beyond the CEO were seated at the Council table with elected councillors and that should change.

71           In addition, it was submitted that there was no assertion that the meetings were being run or conducted or held by the Shire's senior staff, but simply an observation of fact of how meetings should be held, run and conducted under the LG Act. The next sentence sets out the fact that senior staff sit at the Council table. That is not in dispute. Cr Southwell was highlighting the fact that the Shire's senior staff sit at the Council table. It was accurate and does not contain any implication of impropriety and in particular there was no implication that the senior staff were holding, running or conducting the meetings. Cr Southwell then goes on to suggest that having so many staff at the meetings for long periods of time while not involved is unproductive of their paid time which Counsel for Cr Southwell submitted is a very reasonable and sensible proposition. From there the statement 'it's confusing for visitors and members of the public as to who is and is not a councillor' was unremarkable and a reasonable observation, submitted counsel for Cr Southwell.

72           In conclusion, counsel for Cr Southwell submitted that it is the over-sensitive and/or the over-defensive person who would conclude that the Councillor Facebook post suggests that Council meetings are not being run and conducted by the councillors but instead by the Shire's senior staff. If such an implication is open, counsel for Cr Southwell submitted it is but one of a number of competing possible implications and that there is nothing compelling about this particular contended implication which requires it to be drawn or given primacy that impropriety is involved. This is because the motion and the reasons expressed in support of the motion were aimed at changing a practice established by the Council and did not express criticisms or even doubts about the conduct of senior staff.

### *Conclusion on complaint 1*

73 Cr Southwell refuted that he was of the view that the Shire's senior staff were holding and conducting the Council meetings. Further, he refuted that his comments inferred that senior staff, or unelected members, had too much involvement in the meetings. In addition, he denied that the effect of his criticism was to lower the credibility and the competency of the senior staff. In making the statement '[w]e don't need the senior staff at the Council table' Cr Southwell said he was explaining to the people who might read his Councillor Facebook post that those senior staff are superfluous on the Council table.

74 The Tribunal does not accept Cr Southwell's explanation. Cr Southwell's Councillor Facebook post of 6 February 2018, in its ordinary meaning, was designed to cause detriment to the reputation of the Shire employees by publicly criticising the Shire's senior staff who attended these meeting in a way that casts aspersions on their competency and credibility.

75 The Tribunal finds that the post called into question how Council meetings are run with senior staff sitting at the Council table. Also, the post called into question the level of involvement and roles of the Shire's senior staff in Council meetings and the use of senior staff's time. Finally, the Tribunal finds that the post was designed to infer that senior staff were improperly exceeding their position.

76 In the Tribunal's view, therefore, the only reasonable inference open to be drawn from Cr Southwell's Councillor Facebook post on 6 February 2018 is that he intended to raise doubts about the role of senior staff of the Shire and thereby cause detriment to their reputation.

77 The Tribunal concurs with the observation of the Panel at para 44 of its 'Finding and Reasons for Findings' for SP 26 of 2018 dated 25 September 2018 as follows:

- (c) ... A decision has already been reached in Council chambers with regards to his motion and it was wrong to raise it again in such a manner; if Cr Southwell was still not satisfied with how meetings were being conducted, he should have pursued other official methods of reporting his concerns.

### **Complaint 2**

78 It is useful here to repeat Cr Southwell's Councillor Facebook post of 25 March 2018, which is the basis of complaint 2.

To all those people who attended the recent Capel Shire Electors Meeting and voted in favour of the Motions passed overwhelmingly by that meeting, I feel sorry about the way these have been dealt with by Shire in this week's Council meeting Agenda (available on-line at Shire site).

Hopefully, my fellow councillors have enough respect for the electors and democratic processes to support me in rejecting the proposal to simply brush these aside and instead have them properly considered, individually, as the Local Government Act intends.

The CEO has recommended that the council simply 'Note the contents of the Motions, but take no action'.

The Motions deal with making information the Shire has about the toxic waste dump at Dalyellup available to the public, limiting Rates increases, investigating conduct of the CEO and making open to the public secret workshops between councillors and staff on issues like Rates.

I think at least some of these proposals are worthy of taking some action so we can make Council more open and accountable.

79        Counsel for the intervener contended that Cr Southwell's post regarding the CEO's recommendation was misleading as it did not represent the entire picture. The intervener submitted that while at its simplest, as contended by Cr Southwell, the agenda reveals that the CEO did recommend to note the contents of the motions and take no action, the agenda and their minutes also clearly reveal that the CEO provided extensive reasons of some seven pages to support his recommendations. The CEO was also the only person who commented on the electors' motions in the agenda which can be inferred from the documents which provide 'The CEO's comments'. Cr Southwell failed to mention this in his Councillor Facebook post.

80        Further, it was submitted that the use by Cr Southwell of the phrase 'brush these aside' was clearly designed to infer that the CEO was simply advising councillors to brush the motions aside without debate or without adequate consideration. This leads to the conclusion, submitted counsel for the intervener, that by selectively only indicating part of what the CEO had provided to the councillors in the agenda, the only reasonable inference open, was that Cr Southwell sought to publicly criticise the CEO in a way that casts aspersions on his competency and credibility in that he failed in his duty to provide reasons and complete recommendations for the Council to consider. In short, it was submitted that Cr Southwell's Councillor Facebook post

was designed to cause the ratepayers and the public to think less favourably of the CEO.

81        Counsel for Cr Southwell submitted that Cr Southwell's concluding comment in his post that 'I think at least some of these proposals are worth of taking some action so we can make Council more open and accountable' appears prominently as the motivation for the comment being made. The language of the Councillor Facebook post, seen in the context of the entire post, is not such as to lead to any reasonable conclusion that there was impropriety on the part of Cr Southwell in posting the comment.

82        Further, it was submitted that a CEO will often reach a view about the recommendations coming from the AEM. He is not expected to be impartial in the sense of not forming a view about whether he agrees with or would support any one or more of the motions from the AEM. It is open to the CEO to express his views as recommendations of the Council and accordingly, it is very hard to make sense of a proposition that either the CEO should, or would be, or was impartial.

83        Cr Southwell rejected that the language used in his post would cause detriment to either his fellow councillors or Shire employees.

84        Counsel for Cr Southwell submitted that this post was to exhort Cr Southwell's fellow councillors to support him in rejecting the proposal to simply brush aside motions passed overwhelmingly by an AEM. It was submitted that it was not a surprising proposition that the motions should be considered carefully. Cr Southwell used the word 'individually' in his Councillor Facebook post, that is each motion should be considered individually as that is what the LG Act intends.

85        In reply to the complaint that the reasons advanced by the officer who constructed the recommendations were not reiterated or summarised in the Councillor Facebook post, counsel for Cr Southwell submitted that it was not necessary for Cr Southwell to set out holus-bolus the various reasons advanced because the minutes which included the reasons are available on the Shire's website. Further, it is not reasonable to suggest that Cr Southwell as the person making the Facebook post has to set out the recommendations either in detail or even in summary. In any event some of the recommendations of the 'no action' recommended are not easily summarised.

86        Counsel for Cr Southwell submitted that it is to Cr Southwell's credit that he made the call to councillors and to the public to do their

best to ensure that light is shone upon these issues because the electors have asked for that light to be shone.

87 Further, counsel for Cr Southwell rejected the intervener's submissions that Cr Southwell's comments in his Facebook post implied that the CEO acted incompetently as it was the officer's recommendations and, in any event, it is not clear that the CEO was the author. Even if the CEO was the author, Cr Southwell's post was a call for more action, that is to say some substantive action in response to the electors' call. There was no suggestion of incompetence by anyone.

88 Cr Southwell's comment that he disagreed with the recommendation did not imply that the CEO acted inappropriately. Counsel for Cr Southwell submitted that it is an inappropriate use of the adverb 'to try' to convey something more sinister than mere disagreement. The reference to 'secret workshops' implied that the councillors and staff were engaging in inappropriate conduct was opposed by Cr Southwell. It was submitted that it is an accurate adjective to use 'secret' when workshops are held which are not advertised to the community; they are not open to the members of the community to attend; and what passes between attendees at these workshops is not recorded by minute and is not conveyed to the community.

89 Finally, Cr Southwell accepted that his statement about 'secret' workshops implied that the behaviour was inappropriate but submitted that the statement was a well-placed and well-founded observation and it was one that is not just open for him to make but was a reasonable one to make in view of his obligations as a councillor to act in the public interest.

### *Conclusion on complaint 2*

90 It is common ground that Cr Southwell is a competent communicator in the English language and is familiar with the meaning of most commonly used words. It is also common ground that he is a former journalist and that he uses his Councillor Facebook page as a means of communication with the ratepayers and other persons in the Shire.

91 By posting on public media, such as Facebook, there is potential for causing detriment.

92       The Tribunal finds that while Cr Southwell might disagree with the CEO, his post showed a lack of respect for the CEO and the decision-making process of the Council. He discredited the CEO in his handling of important Council matters including management of the democratic process by stating '[h]opefully, my fellow councillors have enough respect for the electors and democratic processes to support me in rejecting the proposal to simply brush these aside and instead have them properly considered, individually, as the Local Government Act intends. The CEO has recommended that Council simply '[n]ote the content of the Motions, but take no action'.

93       The Tribunal does not accept Cr Southwell's explanation for using the phrase 'brush these aside' where he stated it was to infer that the CEO was recommending to the councillors to simply dismiss or ignore the electors' motions. He explained the Facebook post was made:

... in a period between the production of the agenda and the council meeting. And in that period one of the - some of the people that are most considering the options and the agenda are the councillors themselves. So this is, you know, in some ways the beginning of the debate. So the period for debate about an issue is between the production of the agenda and the vote taken at council. There's a period where those issues are aired publicly, councillors have, obviously, opportunity to consider them. And in writing this it's as much aimed at my fellow councillors as it is at anyone else. And it's not aimed at characterising anything or causing anyone any harm. It's aimed at, hopefully, arriving at a decision at a council meeting that I - that I think is the appropriate decision[.]

(ts 40, 24 September 2019)

94       The Tribunal accepts counsel for the intervener's submission that Cr Southwell made selective statements that are not reflective of the actual situation in that the CEO had given reasons to support his recommendations as evidenced in the minutes. The Tribunal rejects Cr Southwell's view that Facebook is not a place where you can put seven pages of information and what he was doing was summarising, and in any event the minutes of the meeting were on the Shire's website page.

95       The Tribunal finds that Cr Southwell's reference to 'secret workshops between councillors and staff' undermined the CEO's position and reputation as well as the decision-making process of the Council.



96           In conclusion, the Tribunal finds that the only reasonable inference open to be drawn from Cr Southwell's post is that he intended to offend or embarrass the CEO by others thinking less favourably of him as CEO in that he acted inappropriately and had not given proper consideration to the matters at hand and therefore intended to cause him detriment.

### **Complaint 3**

97           It is useful here to repeat Cr Southwell's Councillor Facebook post of 29 March 2018, which is the basis of complaint 3.

At last night's council meeting, the CEO recommendation was passed although I voted in favour of most of the people's Motions I was the only councillor who supported any of them. Crs Scott, Scott, Kitchen, Bell, Schiano, Radisich, Hearne and McCleery all voted against. I accept the majority vote even though I still don't understand the reasons.

98           Counsel for the intervener contended that Cr Southwell's Facebook post inaccurately recorded the voting results. It was submitted that while Cr Southwell's view was that this was a minor and frivolous complaint, it is important that if a councillor is going to comment on a Council decision, that it is done accurately to fairly reflect the decision made. Failing to do so, misleads the public and does not accurately represent the position of other councillors or the Council's. Further, it was submitted that Cr Southwell had already agreed in his statement (Exhibit E) at paras 6 and 7 that in relation to the electors' motions 1, the motion carried by the Council to vote the contents of the motion but take no action was carried with seven councillors voting in favour of the motion and two voting against.

99           Counsel for Cr Southwell submitted that to express a lack of understanding which equates to a lack of agreement with the reasons does not amount to a failure to show respect as to the decision and as far as the apparent error is concerned as to the decision and as to the number of councillors who voted contrary to Cr Southwell's motion, it is quite fanciful or farfetched to suggest that detriment would be caused to the Shire or the councillors by recording, apparently incorrectly, one particular vote. Counsel for Cr Southwell stated it is impossible to imagine how detriment could be caused to any particular councillor or to the Council as a whole or to the Shire by the public being informed that the vote was 8:1 when it was 7:2.

100        It was also submitted that Cr Southwell's evidence, uncontradicted, is that voting decisions were taken simply by a show of hands and that he observed the show of hands in response to the various motions on the relevant night and that he believed that he observed that only one person, and no more than one person voted against any of the motions. In giving his oral evidence, Cr Southwell did not dispute that it was possible that two people may have voted against one motion. To that extent counsel for Cr Southwell challenged the accuracy of the minutes and therefore it is open to the Tribunal to find that Cr Southwell was correct in his observation and the accuracy of his recollection given that his Facebook post was made the following day.

101        Counsel for Cr Southwell submitted that even if it is not accepted that no more than one councillor voted against any of the motions and that in one instance, two councillors voted against one of the motions, the proposition or submission that Cr Southwell failed to act with reasonable care and diligence is not made out because he was at the meeting and he saw how many hands went up and he made the Facebook post the following day. If Cr Southwell was wrong in his count, that did not mean he failed to act with reasonable care and diligence.

102        Finally, counsel for Cr Southwell submitted that the names of those who voted for or against were not included in the Facebook post, and even if they were, it is fanciful to suggest that some detriment is going to be caused to either individual councillors or the Shire as a whole by perhaps a mistaken suggestion that one councillor voted for rather than against the motion. Cr Southwell's Councillor Facebook post conveyed that he was the only councillor who voted in support of the various motions and that no others supported him. If he was wrong, and in one of the motions he had one councillor support him, then he has wrongly painted himself as a 'lone ranger' who is isolated in the Council.

### *Conclusion on complaint 3*

103        Even though Cr Southwell stated at hearing that he still believed the vote was 8:1 (and not 7:2), he had previously agreed as set out in the agreed facts in these reasons that the vote was 8:1.

104        Cr Southwell stated he was aware that councillors have a duty to act with reasonable care and diligence in respect of Council decisions in a public forum. He acknowledged that he had not checked with anyone

regarding the voting result before posting his comments. He explained that when he made his post, he did not have the minutes (as the post was done before the release of the minutes) and that he did not check with the minute taker or anyone else the result of the voting. He explained he based his statements in his post from looking around the room at the meeting to see how people had voted and which he had closely monitored. Despite the minutes, he said he still believed that his motion was voted 8:1 (and not 7:2) as votes are registered or conveyed by the raising of the hand and names are not recorded.

105        In the Tribunal's view, Cr Southwell undermined the processes of local government by insinuating that something was wrong with the decision-making process which has the potential of causing damage to the relationship between the community and the Council. Even though Cr Southwell claimed that what he was doing was attempting to cause an improvement to the Council and that he was fulfilling his duties as a councillor, the Tribunal finds that the only reasonable inference open to be drawn is that Cr Southwell knew that his post would undermine the position of the other councillors by telling the community in a public forum that he was the only one who supported their motions. This could lead the community to think less favourably of the other councillors. This is because it is reasonable for the community to expect that Cr Southwell has knowledge of what happens at Council meetings and they would accept his statements as being true.

106        In conclusion, the Tribunal finds the only reasonable inference open to be drawn on the post is that Cr Southwell intended to offend his fellow councillors, and in particular the councillor who voted contrary to how Cr Southwell stated, by publicly posting to the community that he was the only one who supported the motions and that such a post could easily lead to the community thinking less favourably of the other councillors.

#### **Complaint 4**

107        It is useful here to repeat the motion put forward by Cr Southwell at the OCM on 28 March 2018 and the reasons given for the motion, which is the basis of complaint 4.

That the CEO take steps needed to ensure that, except when a confidential issue is to be discussed, council forums, including the so-called 'round table discussion' held prior to Council meetings, and so-called 'budget workshops' are in the future open to the public, with

Agendas published prior to the meetings and Minutes of the meetings taken and published.

...

Reasons: This is another measure aimed at making Council more open and accountable to ratepayers, electors and residents. There is no good reason to hold these meetings in secret. Many people in the Shire feel and express the view that at times they do not comprehend Council decision-making processes and it seems officer recommendations brought to Council are in many cases a 'fait accompli' which must already have been discussed or 'workshopped' in private, behind the scenes. This suspicion is enhanced by Council Minutes which show many officer recommendations on sometimes contentious issues have been decided by Council with a unanimous vote of Councillors, and without any debate. According to the Local Government's Operational Guidelines, the decision-making processes of Council should be transparent and where possible take place in public.

108        Counsel for the intervener submitted that there are legitimate reasons as to why some forums are not held in public, not least of all that this can make the OCM far more efficient. In his statement (Exhibit E) at para 4, Cr Southwell stated that that in order to convince the Council of the merit of his motion he naturally had to explain in his reasons what potential negatives were inherent in the current practice of the Council. It was submitted that if the intention of Cr Southwell, was as stated that if he thought something would be improved and that in bringing the item he was fulfilling his role as a councillor, there was no need to use negative and emotive language such as 'secret', 'workshopped in private', 'behind the scenes', 'decisions already workshopped' and 'fait accompli' in his post.

109        Counsel for the intervener submitted that:

- 'secret' means, amongst other things, 'conducted without knowledge of others';
- 'private' means among other things 'not open or accessible to people'; and
- 'fait accompli' means 'a fact; a thing already done'.

110        Finally, counsel for the intervener submitted that the use of negative and emotive language by Cr Southwell was intended to criticise and to cause detriment to the reputation of the councillors and the Shire.

111        Counsel for Cr Southwell submitted that Cr Southwell was seeking for events such as budget workshops to be, in the future, open to the public because until that time, they were not. It was submitted that Cr Southwell set out his reasons fully and in particular stated, '[d]ecision-making processes should be transparent, and where possible, take place in public', a proposition which Cr Southwell stated comes from the local government's operational guidelines. It is far-fetched and not at all open to suggest that there is an implication available from Cr Southwell's words that councillors were not properly exercising their responsibilities when voting.

112        As far as the implication that the decision-making processes were inappropriate is concerned, Cr Southwell was in disagreement with what was going on, and that a better and more preferable format should be adopted involving open discussion in front of the public, except where secrecy was necessary. Counsel for Cr Southwell submitted this is the job of the councillor, that is, to represent the ratepayers and to put proper and reasonable proposals up for discussion.

113        Counsel for Cr Southwell submitted that the criticism was necessary in setting out the reasons for such a motion to assert that things could be done better. However, there was no criticism of the competency and integrity of the councillors. Finally, it was submitted that nothing stated by Cr Southwell suggested that integrity was lacking on the part of any councillor.

#### *Conclusion on complaint 4*

114        Cr Southwell explained that phrases such as 'secret' and 'in private' were words used by people expressing their views to him. He said they were not necessarily his views. Cr Southwell rejected the suggestion that by using such phrases that people would think that the Council's decision-making process was somehow dubious or flawed or behind closed doors, or in secret. He explained that if he was taking action by moving a motion to try to improve processes that were generally used by the Council, he could not simply say that the processes they were using were perfect but to change them anyway. Rather, Cr Southwell asserted that it logically flows that there has to be a reason for wanting the change and so the reasons given were his chance to justify change and for consideration by other councillors. He said he was highlighting that many people spoke with him and were uneasy or uncomfortable with the current situation. In regards to the word 'suspicious', Cr Southwell explained that people felt and expressed the view that

they sometimes could not see how Council decisions have been arrived at. He said there is nothing suspicious about the meetings.

- 115        Despite Cr Southwell stating the views expressed were not necessarily his views, the Tribunal finds Cr Southwell used negative language in his post including the following, 'no good reason', 'secret', 'fait accompli', 'workshopped', 'behind the scenes', 'suspicion', 'without debate' to describe the Council decision-making process. By using such language, it is the view of the Tribunal that the only reasonable inference that is open to be drawn is that Cr Southwell intended for the community to question the transparency and accountability of the Council's decision-making process and thereby would look less favourably on the other councillors and the Shire.

### **Complaint 5**

- 116        It is useful here to repeat Cr Southwell's Question on Notice prior to the OCM of the Shire held on 28 March 2018 which is the basis of complaint 5.

In regard to the Council Policy which sees annual payments made by the Shire to the Council's President, Cr Scott and one of his relatives Mr Chris Scott, of \$830 and \$2,453 respectively, for their roles as volunteer firefighting officers, are any similar payments made to other volunteers in senior firefighting roles, or to any other volunteers in the Shire who may offer significant commitments in terms of time, effort and personal expense?

- 117        Counsel for the intervener contended that the only reasonable inference that could be drawn from Cr Southwell bringing a Question on Notice in which he named Cr Scott as President of the Shire and one of his relatives Mr Chris Scott as recipients of payments from the Shire in their roles as volunteer firefighters, was that something improper had occurred in the payments and that these people were somehow benefiting financially from their volunteer roles when others were not.

- 118        Further, it was submitted by counsel for the intervener that Cr Southwell was not seeking to find out whether other volunteers were receiving payment. If he was, the intervener asked, why then did Cr Southwell specify the names and familial relationship in his question. Finally, it was submitted that the only reasonable inference which could be drawn from the Question on Notice was that Cr Southwell intended to cause detriment to the reputation of the President of the Shire and to Mr Chris Scott by casting negative aspersions on their honesty and credibility.

119        Counsel for Cr Southwell submitted that the question asked by Cr Southwell, in essence, was whether any similar payments were made to other volunteers in senior firefighting roles, was an appropriate question to ask. No implication could be drawn that the President of the Shire receives or was receiving payment for his role as a volunteer firefighter because of his position. This is because the question included a fact, that payments were made to two people, one who happened to be a councillor and the other not. It is proper for a councillor to find out what payments are being made by the Shire to volunteer firefighting officers and also to other volunteers doing work for the Shire. Further, it was submitted that such information about payments is to be revealed for reasons such as budgetary constraint.

120        Further, counsel for Cr Southwell submitted that on a plain and a balanced reading of the Question on Notice by an uninterested but informed reasonable observer, Cr Southwell was simply asking whether there were any similar payments made to other volunteers in either senior firefighting roles or other voluntary roles as he prefaced the question properly by positing a particular fact so that one could understand where the operative part of the question came from. The positing of the fact was a reference to Council policy. It was submitted that it appears common ground that there is such a Council policy where annual payments are made by the Shire to two people, Cr Scott and his brother Mr Chris Scott for their roles as volunteer firefighting officers. That was not an implication of impropriety on the part of anyone, rather it was the identification of the fact that two payments were paid by the Shire to two people and the question goes on to ask about whether any similar payments were made to other people, be it in a firefighting role or another voluntary role.

121        It was also submitted that there was no implication open that the payment was received by Cr Scott because of his position as President of the Shire. Similarly, there was no implication open in relation to Cr Scott's brother that he received payment because he is related to the President of the Shire. Because of this, counsel for Cr Southwell submitted that it was not open on a simple and open reading of the Question on Notice for the intervener to submit, that Cr Southwell did not have to state the names of two people receiving the emolument or the payment from the Shire. In any event, it was submitted by counsel for Cr Southwell that the uncontradicted evidence of Cr Southwell was that that it is a small community and everyone knows in any event who occupies the two senior roles in the firefighting organisation and therefore who received payment. There was nothing in the question

that suggested they received payments because of one of them is a councillor and the other is a relative. Further, Cr Southwell's uncontradicted evidence was that he exclusively rejected that he made mention of Cr Scott and his brother in order to highlight and cause damage or detriment to their reputations.

#### *Conclusion on complaint 5*

122 Cr Southwell explained that his purpose in bringing the question was to try and ascertain whether similar payments had been made to other volunteers in the Shire. He said he named the President of the Shire and his brother because he was looking for comparable payments. He refuted the suggestion that he used the President's title and name and the fact he was related to Mr Chris Scott because he was trying to indicate some sort of impropriety or that they were getting kickbacks. Cr Southwell said the Shire is quite a small community and he thinks everyone knows who the Chief and Deputy Chief fire officers are and so there was no reason to shy away from their identities.

123 In the Tribunal's view, Cr Southwell called into question why payments were made to the Cr Scott and to his brother because of Cr Scott's position as President of the Shire and the fact that the two are related, in order to raise doubts in the community about the legitimacy of the payments being made to certain individuals and causing the community to look less favourably on them, the Shire and the system of volunteers.

124 The Tribunal finds that the only reasonable inference open to be drawn is that Cr Southwell intended that his Question on Notice would cause Cr Scott and Mr Scott embarrassment and damage to their reputation as Shire President and Chief Bush Fire Control Officer respectively and thereby cause each of them detriment.

#### **Complaint 6**

125 It is useful here to repeat Cr Southwell's Councillor Facebook post of 24 May 2018, which is the basis of complaint 6.

The graphics from the Council website are very confusing. (I'm confounded as to why they are even there, considering this has not been voted on yet by Council). Less spin, less cherry picking, and more hard facts on proposed Rates - noting separately changes to fees and charges - would be helpful.



126 Counsel for the intervenor referred to the post where Cr Southwell described the Shire's graphics as 'very confusing', 'less spin', 'less cherry-picking', 'more hard facts', and submitted that the only reasonable inference that could be drawn from the use of these words and phrases is that he intended detriment in the form of casting aspersions on the competency and credibility of Shire employees. The intervenor referred to the Oxford Dictionary for the following definitions:

- 'Confusing' as a verb, amongst other things means 'to be perplexed, to be bewildered'.
- 'Spin' figuratively means 'a bias or slant on information intended to create a favourable impression when it is presented to the public, an interpretation or viewpoint'.
- 'Cherry-picking' amongst other things means 'to choose selectively the most beneficial or profitable items or opportunities from what is available'.

127 Further, it was submitted that Cr Southwell could have raised his concerns in a less public forum, for example by speaking with the CEO or the Shire staff. Rather, by consciously posting the comments on his Facebook, Cr Southwell intended to raise doubts about the competency of the Shire employees, essentially to embarrass them.

128 Counsel for Cr Southwell submitted that the above post is expressed in a reasonable fashion, which calls for more hard facts and the like. Further, it was submitted that the intervenor assumed that the Shire's staff were responsible for producing the graphics. That is not an agreed fact. Even if the intervenor's contention that Cr Southwell's post casts aspersions on the competency and credibility of Shire employees, there was no damage caused to the Shire's reputation or unwarranted embarrassment to anyone in calling for, in effect, harder facts, less spin and less confusion. The graphics were not included in the hearing book and apparently are not available and therefore the reasonableness of Cr Southwell's comments is most difficult to determine on the balance of probabilities that his comments were not open and reasonable and genuine.

129 Also, it was submitted by counsel for Cr Southwell that Cr Southwell gave constructive criticism which should be welcomed and not denigrated or rejected and not painted as causing members of the community to think less highly of the competence and

professionalism of a Council staff member. Further, it was submitted that standards of competency and professionalism of everyone in every occupation vary from time to time and among members of that profession and therefore constructive criticism which is appropriately worded, measured and constructive is to be welcomed and not to be categorised as improper. This is because it is necessary at times to have a shortfall in standards highlighted and a call made for improvement to occur. The comments made by Cr Southwell were reasonable, measured and constructive comments.

130        In addition, counsel for Cr Southwell submitted that 'spin' in common usage does not have a wholly negative connotation or meaning. 'Spin' is something that is put on things by some people. Cr Southwell was asking that 'less spin' be applied and less 'cherry-picking'. The meaning of 'cherry-picking' is clear, that is, selection of some facts above others and highlighting those to advance an argument.

131        Counsel for Cr Southwell submitted that Cr Southwell did not imply that the graphics did not accurately or fairly represent the effect of the proposed rate changes. Rather, Cr Southwell called for better graphics that would have more accurately or more fairly represented that effect. That is, Cr Southwell was not saying they did not accurately or fairly represent the effect, but rather, they could do so, more fully or more effectively. If the Shire employees produced the graphics, counsel for Cr Southwell submitted that the comments did not publicly cast aspersions on their competency and credibility. Rather, it was a request for a better produced set of graphics. That is not something that can rise to the level of impropriety or amount in some way to detriment to the reputation of anyone, Shire employee or not.

132        In conclusion, counsel for Cr Southwell submitted that if Cr Southwell's comments amounted to aspersions on competence and credibility and in that way could be said to amount to impropriety and to cause detriment, this would be a desperate situation in which there will be a truly chilling and constricting effect on the proper discharge by councillors of their duties if they cannot even in a public setting make comments of this kind.

#### *Conclusion on complaint 6*

133        Cr Southwell said he thought the graphics were confusing but did not call any of the Shire staff or the CEO to discuss his concerns. He said he saw his post as a positive suggestion to improve the level of

information being disseminated. He refuted that the words 'less spin, less cherry picking' are derogatory. He explained:

[S]pin. There are people who proudly call themselves spin doctors. People hire them for their skills. Spin is not a bad thing. Spin is what you do when you want to put out a positive message about something and you want to get the maximum bang for your buck, if you like. Cherry-picking is something that people do all the time in all - all walks of life. They're not derogatory terms[.]

(ts 48, 24 September 2019)

134 Cr Southwell refuted that he was trying to cast aspersions on the competency of the Shire employees.

135 Even though there does not appear to be a clear personal attack on any particular individual, the Tribunal finds that Cr Southwell's Councillor Facebook post shows a clear lack of respect for the Shire and its employees by describing the graphics as 'very confusing' and 'I am confounded as to why they are even there, considering this has not been voted on yet by Council' and using disrespectful language of '[l]ess spin, less cherry picking and more hard facts on proposed rates'.

136 Cr Southwell may disagree with what the graphics represent, however attacking them in the manner he did, potentially damaged the community's perception of an open and transparent local government and undermined the position of the Shire and its employees.

137 The Tribunal finds that the only reasonable inference that was open to be drawn is Cr Southwell's intended result was that detriment would be suffered by the Shire and its employees in that he publicly attacked the legitimacy of the graphics without explaining the background as to why they were posted and in doing so, undermined the position of the Shire and its employees.

138 Further, the Tribunal finds that the only reasonable inference open to be drawn is that Cr Southwell's made his Councillor Facebook post to publicly embarrass the Shire and its employees and undermine the position of the Council by suggesting the graphics were biased and misleading as a reasonable person would expect the post to cause the community to question the legitimacy of the graphics and thereby cause the community to look less favourably on the Shire and its employees.

139       The Tribunal concurs with the statement of the Panel at para 40 of its 'Findings and Reasons for Finding' dated 10 October 2018 as follows:

- (f)       ... It is Cr Southwell's duty to exercise diligence and assist the community in understanding information published by council. By acting as he did, Cr Southwell failed in his duty to facilitate further communication and explanation between the community and council.

***Conclusion on issues 8 and 9***

140       In conclusion, counsel for the intervener submitted that this was not a case where Cr Southwell should not question or seek to clarify issues or to engage in robust debate. Cr Southwell was not being dissuaded from bringing motions or putting forward questions on notice on local government issues. Rather, what Cr Southwell, was being dissuaded from is, (by reg 7(1)(b) of the Regulations) the way in which he raises issues. It was submitted that this view is supported by *Treby* at [56] where it is clearly stated that Standing Orders, codes of conduct and Regulations provide a variety of means by which councillors can engage in raising local government issues and engaging in robust debate about those issues to fulfil their elected duties. Regulation 7(1)(b) is designed to ensure that these communications, debates, discussions or comments are conducted in a fair, orderly and courteous fashion without reflecting negatively on persons or on the Shire or the credibility of people.

141       In conclusion, counsel for Cr Southwell submitted that Cr Southwell presented as a witness of truth and a person of considerable balance as well as integrity who acts carefully in his role as a council member. It is incumbent on councillors to use communications, debates, discussions or comments in a fair, orderly and courteous fashion without reflecting negatively on persons or on the Shire or the credibility of people.

142       The Tribunal respectfully agrees with the conclusion submitted by counsel for the intervener.

143       The Tribunal is satisfied that its findings on the evidence is that it is more likely than not that Cr Southwell, when making the various Facebook posts, the Question on Notice and the reasons for motion, was making an improper use of his office as a Council member to cause detriment to the Shire, fellow Council members, shire employees or others and thereby contravened reg 7(1)(b) of the Regulations.

144 As all of the six contraventions relate directly to the six complaints set out in SP 26, 27, 28 and 37 of 2018, the six contraventions, therefore, also constitute a finding that Cr Southwell has committed six minor breaches under s 5.105(1)(a) of the LG Act. The result is that the Tribunal will affirm the decisions of the Panel of 25 September 2018 and 10 October 2018 in relation to the finding of the six minor breaches.

145 Finally, the Tribunal turns to explain how the six minor breaches of reg 7(1)(b) of the Regulations are to be dealt with under s 5.110(6) of the LG Act.

### Issue 10 - Sanctions to be imposed

146 Counsel for the intervener relied on *Treby* at [123] where Her Honour Judge Pritchard (as then she was) outlined that the purpose for imposing a sanction is to generally reflect the community's disapproval of a contravention of reg 7(1)(b) of the Regulations and in that case for standing orders to dissuade councillors from other local governments from engaging in similar conduct in the future, and thereby to maintain appropriate standards of behaviour by councillors. Finally, it was submitted by counsel for the intervener that the sanctions imposed by the Panel for all six complaints should be affirmed.

147 Counsel for Cr Southwell submitted that if the complaints are not dismissed, then no sanction should be imposed (s 5.110(6) LG Act), in consideration of the gravity and well-intentioned nature of any of the actions that might form the basis of upholding any of the complaints. Otherwise, if a penalty is to be imposed, counsel for Cr Southwell submitted that a public apology should be considered as the appropriate penalty for any of the complaints found to be made out.

148 The Tribunal does not accept Cr Southwell's assertion as set out in his application that the complaints are trivial, and the penalty is unfair and unjust.

149 In this case, the Tribunal does not consider that dismissal of any of the six complaints is appropriate as this would suggest that the breaches were so minor that no penalty is warranted.

150 The Tribunal agrees with the penalties as ordered by the Panel on 20 November 2018 apart from the option of publishing the apologies in the local newspaper and with a modification to include the relevant

posts made by Cr Southwell to better reflect the conduct that is being sanctioned.

151 Therefore, the Tribunal will order Cr Southwell to make the separate apologies at the next available Council meeting following 28 days from the date of this decision, and within four months undertake further training regarding his role as an elected Council member. The terms of the orders are attached to these reasons and marked 'Annexure A'. The terms will also be attached to the orders provided to the parties.

### ***Orders***

The Tribunal orders:

1. The decisions of the Local Government Standards Panel made on 25 September 2018 and 10 October 2018 in respect of SP 26, 27, 28 and 37 of 2018, that Councillor Michael Southwell committed six minor breaches of the *Local Government Act 1995* (WA) by six times contravening reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA), are affirmed.
2. The orders of the Local Government Standards Panel made on 20 November 2018 in relation to the sanctions to be imposed on Councillor Southwell for the six minor breaches in SP 26, 27, 28 and 37 of 2018 are varied as attached to this order and marked 'Annexure A'.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS R PETRUCCI, MEMBER

9 DECEMBER 2019

## Annexure A

The State Administrative Tribunal orders:

### SP 26 of 2018

1. Councillor Michael Southwell, a Councillor for the Shire of Capel (Shire), publicly apologise to Shire staff, CEO Mr Paul Sheedy, his fellow councillors and the Shire as specified in paragraph 2 below.
2. At the Shire's first ordinary Council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him Cr Southwell shall:
  - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to Shire staff, CEO Mr Paul Sheedy, his fellow councillors and the Shire;
  - (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
  - (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

I advise the meeting that:

- (i) A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* (WA) on four occasions when making statements in Facebook posts on 6 February 2018, on 25 March 2018, and on 29 March 2018 and in the reasons

section given in support of a motion moved by me for a Council meeting on 28 March 2018:

- (a) firstly, when I made a post on 6 February 2018 on my Councillor Facebook page as follows:

Also at the January Council meeting I moved the following motion:

'That Council instructs the CEO to change the seating arrangements at Council meetings so that only elected members are seated at the Council table, with the only exception of the CEO being seated near the Presiding Member to give advice and answer questions when asked by the Presiding Member. Any other staff who attend Council meetings are to remain in the public gallery and only come forward, if invited by the Presiding Member to do so, to answer questions elected members may have which the CEO cannot answer.'

The motion was Lost with only me in favour and everyone else against, with Cr Schiana absent.

My reasons were that under the Local Government Act, Council meetings should be held, run and conducted by elected Councillors only, not senior staff. At Capel, all the senior staff sit at the council table during all the meetings.

The CEO is at these meetings to answer questions and provide advice. I said having so many staff at these meetings for long periods while not involved is unproductive use of their paid time. It is also confusing for visitors and members of the public attending meetings as to who is and is not a Councillor, when they all sit together at the Council table.

Of course, I respect Council's decision for things to remain as they are.



- (b) secondly, when I made a post on 25 March 2018 on my Councillor Facebook page as follows:

To all those people who attended the recent Capel Shire Electors Meeting and voted in favour of the Motions passed overwhelmingly by that meeting, I feel sorry about the way these have been dealt with by Shire in this week's Council meeting Agenda (available on-line at Shire site).

Hopefully, my fellow councillors have enough respect for the electors and democratic processes to support me in rejecting the proposal to simply brush these aside and instead have them properly considered, individually, as the Local Government Act intends.

The CEO has recommended that the council simply 'Note the contents of the motions, but take no action'.

The Motions deal with making information the Shire has about the toxic waste dump at Dalyellup available to the public, limiting Rates increases, investigating conduct of the CEO and making open to the public secret workshops between councillors and staff on issues like Rates.

I think at least some of these proposals are worthy of taking some action so we can make Council more open and accountable.

- (c) thirdly, when I gave reasons for Motion 2 to be considered at the Council Meeting on 28 March 2018 as follows:

At last night's Council meeting, the CEO recommendation was passed although I voted in favour of most of the people's Motions I was the only councillor who supported any of them. Crs Scott, Scott, Kitchen, Bell, Schiano, Radisich, Hearne and McCleery all voted

against. I accept the majority vote even though I still don't understand the reasons.

- (d) fourthly, when I made a post on 29 March 2018 on my Councillor Facebook page as follows:

Reasons: This is another measure aimed at making Council more open and accountable to ratepayers, electors and residents. There is no good reason to hold these meetings in secret. Many people in the Shire feel and express the view that at times they do not comprehend Council decision-making processes and it seems officer recommendations brought to Council are in many cases a 'fait accompli' which must already have been discussed or 'workshopped' in private, behind the scenes. This suspicion is enhanced by Council Minutes which show many officer recommendations on sometimes contentious issues have been decided by Council with a unanimous vote of Councillors, and without any debate. According to the Local Government's Operational Guidelines, the decisionmaking processes of Council should be transparent and where possible take place in public.

- (ii) The State Administrative Tribunal has found that by behaving in this manner I made improper use of my office as Councillor with the intention of causing detriment to the Shire staff, the CEO Mr Paul Sheedy, my fellow councillors and the Shire, thereby committing a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA).
- (iii) I accept that I should not have acted in such a manner towards the Shire staff, Mr Sheedy, my fellow councillors

and the Shire and I apologise to the parties concerned for having done so.

**SP 27 and 28 of 2018**

1. Councillor Michael Southwell, a Councillor for the Shire of Capel (Shire), publicly apologise to Shire staff, CEO Mr Paul Sheedy, his fellow councillors and the Shire as specified in paragraph 2 below.
2. At the Shire's first ordinary Council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him Cr Southwell shall:
  - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to Shire staff, CEO Mr Paul Sheedy, his fellow councillors and the Shire;
  - (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
  - (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

I advise the meeting that:

- (i) A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* (WA) when I submitted a Question on Notice as part of the agenda for the Shire of Capel's

Ordinary meeting on 28 March 2018 as follows:

In regard to the Council Policy which sees annual payments made by the Shire to the Council's President, Cr Scott and one of his relatives Mr Chris Scott, of \$830 and \$2,453 respectively, for their roles as volunteer firefighting officers, are any similar payments made to other volunteers in senior firefighting roles, or to any other volunteers in the Shire who may offer significant commitments in terms of time, effort and personal expense?

- (ii) The State Administrative Tribunal has found that by behaving in this manner I made improper use of my office as Councillor with the intention of causing detriment to the Shire President Councillor Murray Scott and to Mr Christopher Scott, thereby committing a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA).
- (iii) I accept that I should not have acted in such a manner towards the Shire President Councillor, Murray Scott and Mr Christopher Scott, and I apologise to the parties concerned for having done so.

### **SP 37 of 2018**

1. Within four months of the date of this order, Councillor Michael Southwell, a member of the Shire of Capel, shall undertake:
  - (a) the training course for Elected Members 'Serving on Council' provided by WA Local Government Association (WAGLA) for a period of 7.5 hours; or

- (b) a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least 4 hours.