



Local Government Standards Panel

Complaint Number	SP 37 of 2018 [DLGSC 20180332]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Paul Sheedy Chief Executive Officer
Respondent	Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Mark Beecroft (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	19 September 2018 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 10 October 2018

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 a minor breach 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 made comments on his own Facebook post on 24 May 2018 in relation to a set of graphics regarding proposed rate changes that had been added to the Shire's Facebook page in preparation for the council meeting held on 23 May 2018 ("Council Meeting").

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 1 June 2018 the Panel received a Complaint of Minor Breach Form dated 25 May 2018 ("Complaint") containing two allegations of breaches of regulation 7(1)(b), signed by Mr Paul Sheedy, the Shire's CEO, with copies of two posts on Facebook made by Cr Southwell to his Councillor Facebook page on 24 May 2018.
4. In a letter dated 13 June 2018, the Department advised Cr Southwell of the Complaint and invited him to respond. The Department sent Cr Southwell a copy of the original Complaint and all the supporting documents provided by the Complainant.
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.² On 19 September 2018 the Panel convened to consider the Complaint.
6. The Panel:
 - (a) 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 19 September 2018;
 - (b) was satisfied the Complaint had been made within two years after the alleged breaches are said to have occurred³;
 - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴; and
 - (d) was satisfied that the Department had provided procedural fairness to Cr Southwell.

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.

7. 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.⁵ Although Cr Southwell had previously committed six minor breaches, the Panel did not find that the Complaint ought to be sent to the Chief Executive Officer of the Department and the Panel dealt with the Complaint as the reports had yet to be published.
8. Based on the information referred to in paragraphs 2 to 7 above the Panel found it had jurisdiction to determine whether Cr Southwell had breached regulation 7(1)(b) in connection with the Complaint.

Panel's role

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. 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).⁶
11. 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.⁷
12. 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)

13. Regulation 7 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 –

(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."

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

⁵ Sections 5.110(2)(b), 5.111(1) of the Act.

⁶ Section 5.106 of the Act.

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

14. 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 Complaint

15. The Complainant alleges that Cr Southwell made two posts on his Councillor Facebook page on 24 May 2018 and the comments he made in those posts are a breach of Regulation 7(1)(b). The Complaint contains two allegations of breaches of regulation 7(1)(b) by Cr Southwell in respect of the two separate posts. The first allegation of breach ("First Allegation") relates to Cr Southwell's main Facebook Post ("Facebook Post") itself in which Cr Southwell discusses questions asked by members of the public at the previous day's Council Meeting about proposals to increase rates and the answers given. The second allegation ("Second Allegation") relates to follow-up comments ("Follow-up Comments") Cr Southwell made on his Facebook Post in relation to graphics ("Graphics") added to the Shire's Facebook Page by Shire staff to explain the impact of the proposed rate changes in preparation for the Council Meeting.

First Allegation

16. The Complainant's First Allegation relates to Cr Southwell's main Facebook Post that he added to his Councillor Facebook page on 24 May 2018, the day after the Council Meeting at which proposed changes in rates had been discussed. The Facebook Post is as follows, with markings added by the Complainant:

Councillor Michael Southwell Facebook 24/5/2018



Councillor Michael Southwell

Debate on Rates rises for 2018/19 deferred to a Special Council meeting at 5.30pm on Tuesday June 5 at the Council Offices in Capel.

Please come along and ask questions, or request permission to give a presentation on the issue.

Some great questions were asked by members of the gallery last night about the Council officer's proposal to increase Rates by an average of 9.9%.

For more than 500 home owners in special rural zones, this proposal would see their rates rise by 28 per cent. (The rubbish charge is coming down, but I am talking about Rates)

A ratepayer pointed out that the radical proposal to change to an equal Rate in the Dollar of GRV in all areas does not meet the fairness test, as areas with larger blocks do not have parks, ovals, footpaths or street lighting and some do not have curbs on roads.

Another lady pointed out families in some areas do not have equal access to community facilities due to no footpaths or connectivity, so access is only by car on road.

* **The answers given to these questions did not satisfy me, for one.**

I'm glad the others councillors agreed with my Motion that we should delay consideration to a Special Meeting so we can have a really close look at the justifications given for this proposal, and get some more feedback from ratepayers and residents in the meantime.

17. The comment in the Facebook Post which the Complainant makes particular reference to, is highlighted in bold above by the Complainant and states:

"The answers given to these questions did not satisfy me, for one".

18. The Complainant states that this comment relates directly to comments made by the Chief Executive Officer and Executive Manager Corporate Services in response to questions from community members during Public Question Time at the Council Meeting.

Second Allegation

19. The Complainant alleges that in addition to Cr Southwell's main Facebook Post, he also went on to make the Follow-up Comments and that these comments breach Regulation 7(1)(b). Cr Southwell's Follow-up Comments are as follows, with markings added by the Complainant:



Councillor Michael Southwell 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.

20. The Complainant in particular refers to the following comments in Cr Southwell's post:

(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'.

21. The Complainant states that these comments relate directly to:

- (a) Graphics provided by staff on the Shire Facebook page prior to the Council Meeting and following substantial negative comment on the Council agenda item. The Graphics were posted with the intention of providing the community with information on the net rate impact after a reduction in rates related charges was also taken into consideration. The Complainant submits that it was clearly indicated on the Shire's Facebook page that the graphics were based on the Officer's recommendation as the matter had not yet been considered by Council; and
- (b) The Officers Agenda report to the Council Meeting on 23 May 2018 in relation to determining the level of rate increases for the 2018/2019 financial year.

Summary

22. The Complainant alleges that by making the comments in the Facebook Post (First Allegation) and the Follow-up Comments (Second Allegation), in public on a social media page, Cr Southwell endeavoured to embarrass Council officers and cause them detriment in relation to the community members who read those comments.

Councillor Southwell's Response

First Allegation

23. Cr Southwell denies that he has breached Regulation 7(1)(b) in that:



- a) the Complainant is totally wrong in his assertion that he endeavoured to embarrass Council officers and cause them detriment; the Complainant does not produce any evidence to support his claim as to what Cr Southwell's motivation was;
- b) he did not identify any "officer" in his posts;
- c) he was simply fulfilling his role as a councillor under the Local Government Act which is (in part) to:
 - represent the interest of electors, ratepayers and residents;
 - provide leadership and guidance to the community; and
 - facilitate communication between the community and Council.
- d) in carrying out these functions by reporting on matters and communicating with electors, ratepayers and residents via Facebook, he is at liberty to state whether or not he was satisfied with answers given to questions asked at a Council Meeting;
- e) the Complainant appears to believe that Cr Southwell, as a councillor, only has the option of:

"slavish acceptance and celebration of any words which may drop from the lips of a Council officer, in any forum including public ones".
- f) being a councillor does not deprive him of the right to express a genuine opinion, especially when that opinion is not directed at any individual; and
- g) the Complainant's assertion that his comments relate to two staff members cannot be correct, as the person responsible for answers to questions during public question time at Council meetings is the presiding officer.

Second Allegation

24. Cr Southwell denies that he has breached Regulation 7(1)(b) in that:

- a) he is entitled to express confusion at the use on the Council website of material outlining the impact of rate changes, before these changes were put to or voted on by Council;
- b) it is not "heresy" to suggest that Council officers may be responsible for actions that can fairly be described as "spin" or "cherry picking of facts". These actions are practised in a wide variety of organisations to a greater or lesser degree and are not crimes; and
- c) Cr Southwell's comments and suggestion for more helpful explanation of the facts surrounding the rates proposals was in the interests of better communication with electors, ratepayers and residents, in line with his responsibilities as a councillor under the Act.

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 both Allegations; 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 Allegation and the Second Allegation.

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.”⁸ The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”⁹

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?¹⁰ “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.”¹¹
30. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹² 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.¹³ 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 the circumstances and context of the case.¹⁴ 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.¹⁵

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

34. “Detriment” means loss, damage or injury.¹⁶ 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.¹⁷

⁸ Macquarie Dictionary, Revised Third Edition.

⁹ Shorter Oxford English Dictionary, Sixth Edition.

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

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

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

¹³ Regulation 3.

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

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

¹⁶ Macquarie Dictionary Revised Third Edition, 2001.

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

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.¹⁸ 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.¹⁹
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.²⁰ 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.²¹

Findings in relation to the First Allegation

Whether Cr Southwell acted improperly (fourth element)

37. The Panel is not satisfied that the fourth element has been established in relation to the First Allegation and finds that Cr Southwell did not act improperly. The Panel makes this finding because it is not 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 making the Facebook Post:

- (a) The Facebook Post was added on 24 May 2018 following the Council Meeting the previous day at which there had been a discussion on the proposed changes to rates. Further debate was deferred to a Special Council meeting to be held on 5 June 2018.
- (b) In his Facebook Post, Cr Southwell refers to comments made by members of the public at the Council Meeting:

“Some great questions were asked by members of the gallery last night about the Council officer’s proposal to increase Rates by an average of 9.9%.

.....

A ratepayer pointed out that the radical proposal to change to an equal Rate in the Dollar of GRV in all areas does not meet the fairness test, as areas with larger blocks do not have parks, ovals, footpaths or street lighting and some do not have curbs on roads.

Another lady pointed out families in some areas do not have equal access to community facilities due to no footpaths or connectivity, so access is only by car on road”.

- (c) It was in relation to these questions and comments by members of the public that Cr Southwell stated in his Facebook Post that “The answers to these questions did not satisfy me, for one”.
- (d) The Panel finds that it is reasonable to expect that councillors and other individuals or parties may not on occasion be wholly satisfied with answers

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

¹⁹ *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.

²⁰ *Chew* 2010.

²¹ *Treby* 2010.

given at council meetings; this is especially so when the topic being debated is of such importance to the local community as rates increases and the extent of information required to be communicated is extensive. This is reflected in Cr Southwell's Facebook Post.

(e) While expressing his point of view, Cr Southwell does not use any disrespectful or derogatory language in his post and there is no clear personal attack on any particular individual.

(f) Cr Southwell goes on to state in his post:

"I'm glad the other councillors agreed with my Motion that we should delay consideration to a Special Meeting so we can have a really good look at the justifications given for this proposal, and get some feedback from ratepayers and residents in the meantime".

(g) It is important that the local government listen to electors' enquiries and ensure they receive appropriate responses. Taken in the context of the seriousness of the issues being discussed, the Panel finds that Cr Southwell did not act improperly by stating in his Facebook Post that he was not satisfied with certain answers given at the Council Meeting.

38. The Panel is not satisfied to the required standard of proof that Cr Southwell acted improperly when making the Facebook Post. It is therefore not necessary to consider the fifth element in relation to this allegation.

39. The Panel finds Cr Southwell did not breach regulation 7(1)(b) in relation to the First Allegation.

Findings in relation to the Second Allegation

Whether Cr Southwell acted improperly (fourth element)

40. Applying the tests for impropriety referred to earlier, the Panel finds that Cr Southwell acted improperly and did not meet the standards of conduct expected of a councillor by making the Follow-up Comments to his Facebook Post in that:

(a) The Follow-up Post relates to the Graphics on the Shire's Facebook page. The Graphics were intended to provide further information to the community on the proposed rates changes prior to the Council Meeting.

(b) Cr Southwell describes the Graphics as "very confusing" and he comments that he is "confounded as to why they are even there, considering this has not been voted on yet by Council;"

(c) Cr Southwell goes on to imply that the Graphics do not accurately or fairly represent the whole picture regarding the rates proposals to the community. Cr Southwell suggests the Graphics have been used as propaganda resulting in a distortion and misrepresentation of the facts:

"Less spin, less cherry picking, and even more hard facts on proposed Rates – noting separately changes to fees and charges – would be helpful."

- (d) Cr Southwell publicly shows a lack of respect for Shire staff that legitimately published the Graphics as part of their duties by describing the Graphics in such terms.
- (e) Cr Southwell may disagree with what exactly the Graphics represent, but by attacking them in such a manner, he potentially damages the community's perception of an open and transparent local government and undermines the position of Council.
- (f) Cr Southwell states he finds the Graphics confusing; but rather than offer assistance or an explanation to the community as to what the Graphics mean, he decides to publicly criticise them on social media instead. 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.

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

41. The Panel is satisfied to the required standard that the fifth element has been established and that Cr Southwell posted the Follow-up Comments with the intended result that detriment would be suffered by the local government and its staff in that:

- (a) Cr Southwell publicly criticises the reliability of the Graphics and raises questions as to the integrity of Shire staff that posted them on the Shire's Facebook page. In doing so, Cr Southwell potentially damages the effective relationship between himself as councillor and Shire staff;
- (b) the Graphics were posted to the Shire's Facebook page which is used as a means of communication by the Council with the local community. By openly attacking the legitimacy of the Graphics, and without explaining the background as to why they were posted, Cr Southwell undermines the position of local government.
- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to post his Follow-up Comment to publicly embarrass Shire staff who posted the Graphics to the Shire's Facebook page and undermine the position of Council by suggesting the Graphics were biased and misleading;
- (d) a reasonable person would expect the Follow-up Comment to cause the community to question the legitimacy of the Graphics causing the community to looking less favourably on local government and Shire staff who were responsible for posting the information.



Panel's finding

42. The Panel finds that Cr Southwell committed one breach of regulation 7(1)(b) in relation to the Follow-up Comments.

Mark Beecroft (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)

Date of Reasons –10 October 2018



Local Government Standards Panel

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Complainant	Mr Paul Sheedy
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Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs S Siekierka (Presiding Member) Ms Elanor Rowe (Member) Ms R Aubrey (Member)
Heard	24 October 2018 Determined on the documents
Outcome	Training

SANCTION DECISION AND REASONS FOR DECISION

Published: 14 March 2019

DEFAMATION CAUTION

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Introduction

1. On 19 September 2018 the Panel found that Councillor Michael Southwell ("Cr Southwell"), a member of the Shire of Capel ("Shire"), committed one breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) when he made comments on his own Facebook post on 24 May 2018 in relation to a set of graphics regarding proposed rate changes that had been added to the Shire's Facebook page in preparation for the council meeting on 23 May 2018.
2. On 10 October 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:

"40.

- (d) Cr Southwell publicly shows a lack of respect for Shire staff that legitimately published the Graphics as part of their duties by describing the Graphics in such terms.
- (e) Cr Southwell may disagree with what exactly the Graphics represent, but by attacking them in such a manner, he potentially damages the community's perception of an open and transparent local government and undermines the position of Council.
- (f) Cr Southwell states he finds the Graphics confusing; but rather than offer assistance or an explanation to the community as to what the Graphics mean, he decides to publicly criticise them on social media instead. 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.

41.

- (a) Cr Southwell publicly criticises the reliability of the Graphics and raises questions as to the integrity of Shire staff that posted them on the Shire's Facebook page. In doing so, Cr Southwell potentially damages the effective relationship between himself as councillor and Shire staff.
- (b) The Graphics were posted to the Shire's Facebook page which is used as a means of communication by the Council with the local community. By openly attacking the legitimacy of the Graphics, and without explaining the background as to why they were posted, Cr Southwell undermines the position of local government.
- (c) On the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Southwell chose to post his Follow-up Comment to publicly embarrass Shire staff who posted the Graphics to the Shire's Facebook page and undermine the position of Council by suggesting the Graphics were biased and misleading.
- (d) A reasonable person would expect the Follow-up Comment to cause the community to question the legitimacy of the Graphics causing the community to look less favourably on local government and Shire staff who were responsible for posting the information.

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).¹
7. In a letter dated 10 October 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 15 October 2018, in which he submitted:
 - A penalty of no action be imposed.
 - The Panel stated that Cr Southwell should have tried to help the community understand the graphics. However, Cr Southwell's comment was that he found the graphics confusing and lacking facts. It would have been impossible for Cr

¹ Section 5.110(5) of the Act.

Southwell to help explain the graphics because they were incomprehensible and councillors had not been presented with the background proposal at the time.

- It is a fact that the information in the graphics was incorrect and misleading. Council eventually voted to approve a completely different set of rates and charges with outcomes vastly dissimilar to those portrayed in the graphics.
- Cr Southwell's urging of Council staff to "stick to facts, rather than spin", was simply meant to be helpful.
- It is not he who should apologise to the former CEO (who was responsible for publishing the graphics prematurely); it is the CEO who should apologise to the community for misleading them.
- Any further punishment of Cr Southwell would send a message that councillors cannot intervene, even mildly, to discourage officers from misleading ratepayers and instead encouraging them to represent factual information.

Panel's consideration

9. Cr Southwell had previously been found to have committed six minor breaches; on 21 August 2018 the Panel made a finding that Cr Southwell had committed four minor breaches in relation to SP 26 of 2018 and two minor breaches in relation to SP 27 & 28 of 2018. The sanctions for the breaches were considered by the Panel at its meeting on 24 October 2018.
10. In the current matter, the Panel found that Cr Southwell committed one breach of regulation 7(1)(b) in relation to a set of graphics regarding proposed rate changes that had been added to the Shire's Facebook page in preparation for the council meeting held on 23 May 2018.
11. While Cr Southwell states he has taken on board the comments made by the Panel in the Findings, he also takes the opportunity when responding to criticise the decision of the Panel and further justify his actions by again criticising Shire staff.
12. The Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that Cr Southwell's conduct was so minor that no penalty is warranted.
13. Nor does the Panel consider it is appropriate to make an order for censure for Cr Southwell's actions in this matter. When the Panel makes an order that a Notice of Public Censure be published, that Notice is to be published by the local government's CEO; the expense is borne by the local government and such expense is significant where the Notice is to be published in a newspaper or newspapers.
14. The Panel has weighed up the option of ordering training or a public apology. In all the circumstances the Panel decides that training in the area of fulfilling elected members' responsibilities to act within the processes and procedures of local government whilst leading and supporting their community, is appropriate.



Panel's decision

15. 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)(iii) of that section, Cr Southwell is ordered to undertake training.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



ATTACHMENT

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Heard	24 October 2018 Determined on the documents
Outcome	Training

AMENDED ORDER FOR TRAINING

Published 14 March 2019

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. By 30 April 2019, 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 (WALGA) 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.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



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."

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

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.