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## Local Government Standards Panel

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Complaint Number	SP 2021-029
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Robert Stewart - Acting CEO for the Shire of Capel</b>
<b>Respondent</b>	<b>Shire President Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 20 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mrs Emma Power (Presiding Member) Cr Peter Rogers (Member) Mr Gordon MacMile (Member)
Heard	8 April 2021 Determined on the documents
Finding	1 x Breach Regulation 20

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### FINDING AND REASONS FOR FINDING

**Delivered 18 May 2021**

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#### DEFAMATION CAUTION

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



## Summary of the Panel's decision

1. On 8 April 2021, the Panel found that Shire President Councillor Michael Southwell, the Shire President of the Shire of Capel (**"the Shire"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**) when he breached regulation 20 of the Regulations when he allegedly approached a Shire employee in an abusive and threatening manner as further set out in paragraph 17 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>1</sup>
7. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
8. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.
9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>4</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)



presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.

10. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

13. On 16 March 2021 the Panel received a complaint from Mr Tom Kettle acting as complaints officer of the Shire (**"the Complaints Officer"**). The same enclosed a Complaint of Minor Breach Form dated 16 March 2021.
14. In the complaint form and further response, the Complainant contends that President Southwell has breached Regulation 20 of the Regulations when he allegedly approached a Shire employee in an abusive and threatening manner as set out in paragraph 17 (**"the Complaint"**).
15. The Panel convened on 8 April 2021 to consider the Complaint.
16. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**"the Department"**) that, based on information published on the Western Australian Electoral Commission's website, President Southwell was:
    - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2021;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 8 April 2021;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;
  - c. was satisfied that the Shire's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>7</sup>;
  - d. was satisfied the Department had provided procedural fairness to President Southwell; and
  - e. found it had jurisdiction to consider the Complaint.

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<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act

<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>7</sup> Section 5.107 and 5.109 of the Act



### The Specifics of the Complaint

17. The Complainant provided the following comments and arguments in respect to the Complaint:
- a. President Southwell's behaviour relates to Division 4 of the Regulations and section 5.105(1)(a) of the Act.
  - b. The Shire Protocol - Councillor/Staff Contact states the accepted protocol for Councillors wanting to contact staff should be:
    - i. all phone calls to CEO or relevant Executive Manager;
    - ii. general emails to CEO or relevant Executive Manager;
    - iii. customer request emails to Records ([info@capel.wa.gov.au](mailto:info@capel.wa.gov.au)); and
    - iv. in person, make appointments (as a preference).
  - c. At the time of the conduct the West Australian Government announced an extension of the State of Emergency Declaration, which included a social distancing requirement of 2sqm.
  - d. On Thursday 4 February 2021, the Shire's Emergency Services Coordinator, Ms Andriena Ciric (**"the Shire Employee"**) attended the Woolworths supermarket at Dalyellup Shopping Centre with her two young daughters.
  - e. While taking a trolley from the trolley bay area, the Shire Employee and one of her daughters were approached by President Michael Southwell.
  - f. President Southwell leaned across a dividing barrier to within 30-50cm of The Shire Employee's face and asked *"Do you have something to say to me?"*
  - g. The Shire Employee responded, "No".
  - h. President Southwell said *"I didn't think so"* before moving away.
  - i. These facts are set out in the Shire Employee's Statutory Declaration dated 9 February 2021.
  - j. The Shire Employee proceeded to call the Acting CEO Robert Stewart's mobile phone and informed him of the incident.
  - k. The Shire Employee also sent an email to the Acting CEO at 8:06pm in relation to the incident, 'Attachment 5.'
  - l. This incident took place in the context of ongoing issues relating to the Shire of Capel Volunteer Bush Fire Brigades (**"VBFB"**) and President Michael Southwell, including:
    - i. 16 December 2020 Ordinary Council Meeting motion to remove Chief Bush Fire Control Officer;
    - ii. 20 January 2021 Ordinary Council Meeting motion to remove Deputy Bush Fire Control Officer;
    - iii. President Southwell publications on Facebook and the Gelorup Gazette to support removal of key VBFB personnel;



- iv. a “silent protest” of 100-200 members of the public in support of the VBFB at the Ordinary Council Meeting 20 January 2021;
  - v. President Southwell's application to join the Gelorup VBFB was refused by the Committee on 22 January 2021; and
  - vi. President Southwell lodged an appeal to the decision to refuse his membership via written correspondence on 2 February 2021.
  - m. President Southwell deliberately invaded the Shire Employee's personal space in a confrontational and intimidating manner, leaving the Shire Employee shaken and feeling threatened.
  - n. The Shire Employee altered her actions to avoid further interaction with President Southwell and reported the incident immediately.
18. The Panel was also provided with the following supporting documentation:
- a. Statutory Declaration of the Shire Employee's dated 9 February 2021 (**“the Statutory Declaration”**) the following extracts of which are relevant:
    - 1. I am employed by the Shire of Capel (**the Shire**) in the role of Emergency Services Coordinator.
    - 2. I have held my current role since September 2019 and was also previously employed by the Shire between November 2017 and January 2018 in the role of Bushfire Compliance Officer.
    - 3. On Thursday 4 February 2021 at approximately 5.20pm I attended the Woolworths supermarket in the Dalyellup Shopping Centre located at 54 Tiffany Centre, Western Australia 6230, along with my two daughters aged 6 and 9.
    - 4. My attendance at Woolworths was after my regular work hours at the Shire had concluded for the day and I was not wearing my Shire clothing which would otherwise identify me as an employee of the Shire.
    - 5. That Thursday was during a five day period of COVID-19 related lockdown ordered by the WA State government which ran from 6pm Sunday 31 January 2021 until 6pm Friday 5 February 2021.
    - 6. I initially entered the store without a trolley as I did not think I would need one as I was only planning on buying a few items.
    - 7. However, I subsequently ended up with some additional items and returned to the trolley bay area located immediately adjacent to the left-hand side of the Woolworths entrance to get a trolley for my purchases.
    - 8. As I returned to the trolley bay area, I thought I saw Cr Michael Southwell, the Shire President, entering Woolworths but at that time I was not 100% sure it was him as he was wearing a blue surgical mask which covered a large portion of his face and I only saw him from an angle.
    - 9. I know Cr Southwell from my previous interactions with him. We both sit on the Shire of Capel Local Emergency Management Committee as a result of our respective positions within the Shire. I do not know Cr Southwell outside of a work setting and I do not socialise with him.
    - 10. As I was taking a trolley from the trolley bay area and placing my purchases in it, I turned and saw Cr Southwell approaching me from inside the supermarket. At that time, I clearly recognised him.



11. Cr Southwell came very close and spoke to me. I recall that he was wearing a long sleeve light blue shirt with a logo on the chest area.
12. The trolley bay area where I was standing and the inside of the supermarket where Cr Southwell was standing were only separated by a low divider about a metre high.
13. Cr Southwell without introduction then quite suddenly leaned over the divider into my personal space and to the best of my recollection asked "Do you have something to say to me?" to which I replied "No". Cr Southwell then said "I didn't think so" and turned and moved away from me.
14. During the interaction Cr Southwell's face came within 30-50cm of my face. I would describe his action in this regard as deliberately invading my personal space.
15. Cr Southwell's tone of voice and body language were unpleasant, confrontational, and intimidating.
16. I was shaken and rattled by Cr Southwell's actions and demeanour and as a result I actively sought to avoid him whilst I completed my shopping.
17. Whilst the interaction with Cr Southwell was very brief and unexpected, at no time did I give him cause or permission to speak and/or act toward me the way he did or say the things to me that he did.
18. As a result of Cr Southwell's actions, I deliberately then waited until he left Woolworths shortly thereafter before I completed my shopping, paid for my purchases (by card) and left the store. I did not want to risk any further interaction with him at that time.
19. Upon returning to my car in the carpark I subsequently telephoned the Chief Executive Officer of the Shire at approximately 5.30pm and informed him of what had occurred.
20. Later the same evening I sent an email to the Chief Executive Officer of the Shire at 8.06pm in relation to this incident.

- b. Email dated 4 February 2021 from the City Employee to the CEO of the Shire reporting the Incident.
- c. Minutes of Meeting of Gelorup VBFB on 22 January 2021 refusing to appoint President Southwell; and
- d. Appeal to the decision by President Southwell to refuse the appointment dated 2 February 2021.

### **The Respondent's Response**

19. By an email dated 23 March 2021, President Southwell provided a response to the Complaint.
20. President Southwell denies that he has committed any minor breach.
21. President Southwell provided the following comments and arguments regarding the Complaint:
  - a. President Southwell is totally mystified by this Complaint.



- b. First, the Complaint has been made by someone (the Acting CEO) who has no involvement in, or direct knowledge of the behaviour complained of. On that basis alone, it should be dismissed.
- c. Second, President Southwell has no reason to doubt the information supplied to the Acting CEO who made the complaint, except for the identification of me as the person who apparently spoke to Shire employee Ms Ciric at Woolworths.
- d. President Southwell did not visit the shopping centre on that day. President Southwell did not see Ms Ciric on that day and doubts he would recognise her if he had.
- e. President Southwell does not know Ms Ciric. To his recollection he has only ever spoken briefly to her once, at a meeting of the Shire's Local Emergency Management Committee, which would have been more than 6 months ago. Other than that, he has never had any contact or interaction with her.
- f. President Southwell wishes the Acting CEO had first asked him about the alleged encounter before filing the Complaint.
- g. President Southwell would have alerted him that he was not at the shopping centre on that day, and this is a case of mistaken identity.
- h. President Southwell notes that in the affidavit supplied to the Acting CEO, Ms Ciric says that the person who she says spoke to her was wearing a mask and she was not sure the person she saw entering Woolworths was President Southwell.
- i. It was not.
- j. President Southwell finds it objectionable and offensive that the complainant outlines background on a Shire issue which was current at the time, as though this is evidence that supports his belief President Southwell would behave inappropriately in the manner alleged.
- k. It should perhaps have occurred to the Acting CEO that, equally, this background may in fact help to explain why Ms Ciric would perhaps react in such a way over what would seem to be an otherwise innocuous encounter, to mistakenly make an allegation against President Southwell.
- l. President Southwell notes from the attachments provided that Ms Ciric told the Acting CEO in writing on February 5 "*I do not wish to lodge a formal grievance...*"
- m. The statutory declaration dated February 9, which indicates that in spite of Mr Ciric's expressed wishes, she has perhaps been encouraged to further document her claims. This suggests the Complaint may be vexatious.

## Regulation 20

22. Regulation 20 regulates councillors' interactions with local government employees:





**“ 20. Relationship with local government employees**

(1) *In this clause —*

***local government employee*** means a person —

(a) *employed by a local government under section 5.36(1) of the Act;*  
*or*

(b) *engaged by a local government under a contract for services.*

(2) *A council member or candidate must not —*

(a) *direct or attempt to direct a local government employee to do or not to do anything in their capacity as a local government employee; or*

(b) *attempt to influence, by means of a threat or the promise of a reward, the conduct of a local government employee in their capacity as a local government employee; or*

(c) *act in an abusive or threatening manner towards a local government employee.*

(3) *Subclause (2)(a) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*

(4) *If a council member or candidate, in their capacity as a council member or candidate, is attending a council or committee meeting or other organised event (for example, a briefing or workshop), the council member or candidate must not orally, in writing or by any other means —*

(a) *make a statement that a local government employee is incompetent or dishonest; or*

(b) *use an offensive or objectionable expression when referring to a local government employee.*

(5) *Subclause (4)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”*

23. In this case it is alleged President Southwell breached Regulation 20(2)(c)

24. To make a finding of a minor breach of regulation 20(2)(c) of the Regulations the Panel must be satisfied that it is more likely than not that:

- a. President Southwell was a councillor at the time of the alleged breach;
- b. President Southwell acted in an abusive or threatening manner; and
- c. the conduct was towards a local government employee as defined in regulation 20(1) of the Regulations.





### **Panel's Consideration**

25. In respect to President Southwell's comments that the Acting CEO made the Complaint and the assertion regarding the same being vexatious:
- any party is permitted to make a minor breach complaint pursuant to the Act, this right is not restricted to the party who the conduct has directly affected;
  - it is in the interests of the local government system in Western Australia that behaviours that are not considered to be in keeping with the role of an elected members are reported in accordance with the Act and Regulations; and
  - a statutory declaration by the relevant party is more than enough evidence for the Panel to proceed on, being a higher level of evidence than a simple statement that is ordinarily made in a complaint as it is a sworn statement made under the *Oaths, Affidavits and Statutory Declarations Act 2005*.

### **Capacity of President Southwell as Councillor**

26. President Southwell was a councillor at the time of the conduct and at the time the Panel considered the matter.
27. This element is met.

### **President Southwell acted in an abusive or threatening manner**

28. It is noted that the President Southwell denies the version of events in the Complaint ("**the Incident**") and asserts he was not at the shopping centre on that day.
29. Where there are conflicting accounts of what has occurred the Panel is required to make a finding that it is "more likely than not" that one version is accurate.
30. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations which all affect the answer to the question whether an issue has been proved to the Panel's reasonable satisfaction.
31. This also applies to the standard of evidence provided to the Panel. As per *Bradshaw v McEwans Pty Ltd*:

*"[In the civil standard of proof in its application to circumstantial evidence] .... you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise."<sup>8</sup>*

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<sup>8</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.



32. In this case the Panel has taken several issues into account when contemplating the evidence provided and the conflicting accounts as provided below.
33. As noted above, the Statutory Declaration is a sworn statement made under the *Oaths, Affidavits and Statutory Declarations Act 2005*. As, when making such a statement a party is required to declare the contents are true and accurate, the Panel is satisfied that the Statutory Declaration is the preferred version of the Incident.
34. In respect to whether President Southwell was correctly recognised:
  - a. In the Statutory Declaration the Shire Employee states that at first she was unsure whether the person was President Southwell:

*“ ....entering Woolworths but at that time I was not 100% sure it was him as he was wearing a blue surgical mask which covered a large portion oof his face and I only saw him from an angle.”*
  - b. President Southwell has noted this response, however, the Shire Employee then states:

*“ ..As I was taking a trolley from the trolley hay area and placing my purchases in it, I turned and saw Cr Southwell approaching me from inside the supermarket. At that time, I clearly recognised him.”* (underlining added)
  - c. The Panel is satisfied that the Shire Employee was familiar with President Southwell as he is a co-member of the Local Emergency Management Committee and is a vocal local councillor, especially with regarding to fire management and emergency issues.
  - d. President Southwell came very close to the Shire Employee during the Incident so, even with a mask on, he would be readily recognisable.
35. President Southwell further states that he “does not know” the Shire Employee, but also confirms he has attended meetings with her and spoken to her (about 6 months prior).
36. The Panel notes that both parties attended the last occurring the Local Emergency Management Committee in December 2020 which occurred less than 2 months before the Incident.
37. The Panel is somewhat incredulous that President Southwell, in his capacity as President of the Shire, and given his close following of Emergency Management and Fire Services issues, did not know who the Shire Employee was, especially in the context of President Southwell stating he felt he was being victimised by the Shire in his letter of 2 February 2021.
38. The Panel has also taken into account the fact that President Southwell has had an excessive number of Minor Breach findings against him. This indicates a pattern of behaviour where President Southwell is likely to engage in impulsive and inappropriate behaviour towards parties he is in disagreement with.
39. Given the above, the Panel finds that there is not an equal degree of probability that both versions are correct, but finds it is more likely than not that the Incident occurred as outlined in the Statutory Declaration.



40. In respect to whether the conduct was “*abusive or threatening*” the definitions of “abusive” and “threatening” are respectively as follows:

**“Abusive:**

1. *a. using harsh, insulting language*  
*b: harsh and insulting*  
*c: using or involving physical violence or emotional cruelty*
2. *characterized by wrong or improper use or action<sup>9</sup>”*

**“Threatening**

1. *expressing or suggesting a threat of harm, danger, etc.*
2. *indicating or suggesting the approach of possible trouble or danger<sup>10</sup>”*

41. In this case the Panel does not consider the Incident to comprise abusive conduct, however, the following aspects of the Incident categorise the same as “threatening”:
- a. the nature of the question “*do you have something to say to me?*” is a phrase that would usually be understood in a colloquial context as the beginning of a dispute and, in particular, a physical altercation;
  - b. the combination of the phrase used and the close physical proximity to the Shire Employee would be designed to intimidate and frighten, especially where a male was confronting a female;
  - c. the tone of voice and body language used is asserted to be unpleasant, confrontational and intimidating; and
  - d. the Shire Employee was upset enough by the Incident that she immediately reported the same to the Acting CEO.
42. The Panel therefore finds that it is more likely than not that President Southwell acted in an abusive or threatening manner towards a local government employee.
43. This element is met.

The conduct was towards a local government employee

44. As the Shire Employee is employed as the Emergency Service Co-ordinator the Panel finds to the required standard that the Shire Employee is a local government Employee as defined in regulations 20(1) of the Regulations.
45. This element is met.

Conclusion

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<sup>9</sup> “Abusive.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/abusive>. Accessed 7 May. 2021.

<sup>10</sup> “Threatening.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/threatening>. Accessed 7 May. 2021.



46. The elements required to find a breach of regulation 20(2)(c) of the Regulations have been met.

### **Panel's Findings**

47. President Southwell did commit a breach of Regulation 20(2)(c) of the Regulations and therefore did commit a minor breach.

A handwritten signature in black ink, appearing to read 'E Power'.

Emma Power (Presiding Member)

A handwritten signature in black ink, appearing to read 'P Rogers'.

Peter Rogers (Member)

A handwritten signature in blue ink, appearing to read 'G MacMile'.

Gordon MacMile (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2021-029
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Robert Stewart</b>
<b>Respondent</b>	<b>Shire President Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 20 of the <i>Local Government (Model Code of Conduct) Regulations 2021 (WA)</i>
Panel Members for	Mr Tim Fraser (Presiding Member)
Penalty Consideration	Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	8 April 2021 Determined on the documents
Penalty Considered	5 August 2021
Outcome	Public Apology

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## DECISION AND REASONS FOR DECISION

Delivered 23 August 2021

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### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 8 April 2021, the Panel found that Shire President Councillor Michael Southwell, a councillor for the Shire of Capel (**“the Shire”**), committed one minor breach under the *Local Government Act 1995 (WA)* (**“the Act”**) and regulation 20 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**“the Regulations”**) when he approached a Shire employee in an abusive and threatening manner (**“the Minor Breach”**).

## Jurisdiction and Law

2. The Panel convened on 5 August 2021 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that on this date there was no available information to indicate that Councillor Southwell had ceased to be, or was disqualified from being, a councillor.
4. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
5. By a letter dated 19 May 2021, Cr Southwell was:
  - a. notified of the Panel's finding of the Minor Breach;
  - b. provided with a copy of the Panel's Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.

## Possible Sanctions

6. Section 5.110(6) of the *Local Government Act 1995 (WA)* (**“the Act”**) provides that the Panel is to deal with a minor breach by:
  - (a) *ordering that no sanction be imposed; 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*
    - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount*

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



*of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*

*(c) ordering 2 or more of the sanctions described in paragraph (b).*

### **Cr Southwell's Submissions**

7. By an email dated 30 May 2021, the Department received a response from Cr Southwell.
8. Cr Southwell provided the following comments and arguments as to penalty, as summarised by the Panel:
  - a. Cr Southwell submits a 'no sanction' is warranted.
  - b. The Panel has found Cr Southwell guilty of something he did not do.
  - c. The Complainant, who it is said did not wish to make the Complaint, says she "clearly recognised" Cr Southwell although he was said to be wearing a mask.
  - d. The Panel then states that because Cr Southwell has previously been found in breach of standards, therefore he must be guilty of this one too.
  - e. This does not reflect the principles of natural justice.

### **Panel's Consideration**

9. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
10. The Panel may order under section 5.110(6)(a), that no sanction be imposed, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
11. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. likelihood or not of the councillor committing further breaches of the Act;
  - g. personal circumstances at the time of conduct, and of imposing the sanction;
  - h. need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
12. The Panel notes Cr Southwell's assertion that he did not engage in the relevant conflict and that the Panel has found him "guilty" due to his prior breaches.

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<sup>2</sup> Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)





13. With due respect to Cr Southwell this is a misinterpretation of the Panel's stated decision.
14. The Panel is required to find that it was more likely than not that the relevant incident occurred. Cr Southwell's prior history of engaging in impulsive and inappropriate behaviour was only one factor in making this decision.
15. Cr Southwell has demonstrated a continuing disregard as to the appropriate standard of conduct as required by the Regulations, which, in his capacity as Shire President, has a particular risk of reducing public confidence in the local government.
16. In these circumstances the Panel considers that the appropriate sanction is that Cr Southwell make a public apology.
17. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing<sup>3</sup>. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>4</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
18. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Southwell recoup to the Shire the costs of the Department incurred with respect to the Complaint.

#### Panel's decision

19. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the two Minor Breaches of regulation 4 of the Regulations, Cr Southwell make a public apology in terms of the attached Order.

#### Signing

Tim Fraser (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)

<sup>3</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 (Pritchard J).

<sup>4</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



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## ORDER

Delivered 23 August 2021

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### DEFAMATION CAUTION

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

### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Shire President Michael Southwell, a councillor for the Shire of Capel **publicly apologise**, as specified in paragraph 2 OR failing compliance with paragraph 2 within the specified timeframe, then paragraph 3 shall apply.

#### Public Apology

2. On the ordinary council meeting of the Shire of Capel first occurring after the expiration of **28 days** from the date of service of this Order on him, Cr Southwell shall:
  - a. attend the relevant ordinary council meeting;
  - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
  - c. 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; and
  - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* when I approached a Shire employee in public in an abusive and threatening manner.
- ii. The Panel found that I breached regulation 20 of the said Regulations.
- iii. I accept that I should not have approached the relevant Shire employee.
- iv. I now apologise to the Shire employee concerned, my fellow Councillors and the public."

3. If Cr Southwell fails to, or is unable to, comply with the requirements of paragraph 2 above in the required time frame THEN, within the next **28 days** following the ordinary



council meeting referred to in paragraph 2 above the Chief Executive Officer of the Shire of Capel shall arrange for the notice of public apology to be published:

- a. on the Facebook Page of the Shire of Capel in no less than 10 point font size; and
- b. in an appropriate place on the website of the Shire of Capel in no less than 10 point font size; and
- c. in the next occurring issue of any Shire of Capel public newsletter (if any) whether in electronic or print copy) in no less than 10 point font size.

**PUBLIC APOLOGY BY SHIRE PRESIDENT COUNCILLOR MICHAEL SOUTHWELL**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* when I approached a Shire employee in public in an abusive and threatening manner.

The Panel found that I breached regulation 20 of the said Regulations.

I accept that I should not have approached the relevant Shire employee.

I now apologise to the Shire employee concerned, my fellow Councillors and the public



## 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."