



---

## Local Government Standards Panel

---

Complaint Number	20240344
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Angus Money</b>
<b>Respondent</b>	<b>Councillor Benjamin Kunze</b>
Local Government	<b>City of Canning</b>
Regulation	Regulation 18 Regulation 19 Regulation 20 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	23 February 2024 Determined on the documents
Finding	1 x Breach Regulation 18 1 x Breach Regulation 19 No Breach Regulation 20

---

### FINDING AND REASONS FOR FINDING Delivered 22 March 2024

---

#### 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 23 February 2024, the Panel found that Councillor Benjamin Kunze a councillor of the City of Canning (**"the City"**):
  - a. did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**);
  - b. did commit a minor breach pursuant to the Act and Division 4 and Regulation 19 of the Regulations; and
  - c. did not commit a minor breach pursuant to the Act and Division 4 and Regulation 20 of the Regulations,when he and another councillor of the City placed signs on the public reserve of the City to *"look out for ducks"* 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

---

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

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



- 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 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 9 January 2024 the Panel received a complaint from Mr Michael Littleton acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 8 January 2024.
14. In the complaint form, the Complainant alleges that Cr Kunze has breached regulation 18, regulation 19 and regulation 20 of the Regulations when he and another councillor of the City placed signs on the public reserve of the City to "*look out for ducks*" as referred to in paragraph 17 below ("**the Complaint**").
15. The Panel convened on 23 February 2024 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, Cr Kunze was:
    - i. elected to the Council of the City in October 2023 for a term expiring in October 2027; and
    - ii. a Councillor when the Panel met on 23 February 2024;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;
  - c. was satisfied that the City'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>;

---

<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)

<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

- d. was satisfied the Department had provided procedural fairness to Cr Kunze; and
- e. found it had jurisdiction to consider the Complaint.

### The Specifics of the Complaint

17. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
- a. Certain councillors have taken it upon themselves to pay for and then installed 2 signs on a public reserve, with photos of the Councillors and a personal message that duplicates existing City of Canning signage to 'look out for ducks' (**"the Signs"**). These Signs remain up outside the local election period.
  - b. Under the guise of protecting ducks, Councillors are unfairly leveraging their position in Office, placing personal promotional signage in public spaces.
  - c. In an email chain with the City's staff confirmed in writing that the administration did not wish to enforce the Code of Conduct or the requirements of the City's Signage local law. They invited the Complainant to not 'look into this too deeply'.
  - d. The Complainant is not aware of the advice or guidance provided by staff to the Councillors but this correspondence demonstrates that the City will openly defend / protect the Councillors' unauthorised actions.
  - e. The Complainant attempted to resolve this matter at a low level, to seek advice, guidance and provide an opportunity for Councillors involved to reflect on the alleged minor breach - however the Complainant received an email from the staff stating that my concerns are 'noted', which was highly unsatisfactory.
  - f. The Complainant did not intend to make a formal complaint however as a resident concerned with the integrity of local democracy the Complainant has been stonewalled and therefore have no other option but to make this complaint.
18. The Complainant also provided:
- a. Images of the Signs as follows:



- b. A copy of an Email chain between the Coty and the Complainant (**"the Email"**).



## The Respondent's Response

19. By an email dated 16 January 2024, Cr Kunze provided a response to the Complaint.
20. Cr Kunze denies that he has committed any minor breach.
21. Cr Kunze provided the following comments and arguments regarding the Complaint:
  - a. It is with great disappointment that Cr Kunze has received this complaint, as the community response to the signs has been exclusively positive up until the Complaint. The signs were installed at the beginning of Spring following concerns raised by local residents regarding the safety of baby bird populations, given the number of bikes, pedestrians and motor vehicles in the location close to the river foreshore and breeding areas.
  - b. The intention of Cr Kunze and Cr Spencer-Teo has solely been about protecting the ducks and other baby birds, and Cr Kunze am unsure why the Complainant has taken such offence to the signs.
  - c. In his correspondence with Canning staff, the Complainant has outlined that he is considering being a candidate at the next Local Government election, which may be fuelling his complaints.
  - d. The Complainant included with his Minor Breach complaint an email exchange with Canning staff, namely Mr Dion Johnson, Manager Parks and Environment, following an official complaint to the City of Canning.
  - e. Below is a further email dated 4 January 2024 that Cr Amanda Spencer-Teo and Cr Kunze were provided with from Mr Johnson in response to the Complainant:

*“ Hi Angus,*

*Thanks for the reply. As I mentioned initially the City doesn't believe that the signs are impinging on any operational aspect of the City, nor is there any impact on City resourcing.*

*The signs you mention are not election or political signage as is defined within our local laws, and*

*they don't require a permit to be within a thoroughfare. The signs themselves are very small and are relaying a community message, that is in the public interest. We are aware of ducks crossing the road in that general area. The signs themselves are not causing an obstruction, they aren't offensive, they are not a hazard to pedestrians or traffic, they don't obstruct lines of sight along the thoroughfare, they haven't damaged infrastructure or the verge itself, and aren't an obstruction to mowing or verge maintenance. There is also no proliferation of signage causing a nuisance.*

*You'll note from our local laws that there are general exemption provisions for signage and a discretionary clause at 5.3 (2). We would utilise these on a case by case basis, for signs within a thoroughfare. The*



*City is acting reasonably and in line with its Compliance and Enforcement Policy, with regard to the decisions it makes on these types of matters and the matter appears trivial in nature.*

*You mention placement of signs within a park or reserve, this is dealt with separately under the Local Laws, as the park or reserve is considered "local government property," again with general discretionary clauses available to be utilised on a case by case basis. As advised, the City doesn't intend to take the matter any further.*

*Dion Johnson*

*Manager Parks and Environment"*

### **Regulation 18 – Securing personal advantage or disadvantaging others**

- f. The signs do not cause an advantage or disadvantage to anyone, other than trying to protect local wildlife.
- g. The Signs were paid for and organised independently of the City of Canning, and as Mr Johnson notes in his email, they are for a community message that is in the public interest. One of the signs was actually on the other side of the road with permission from the adjacent resident, who supported our initiative and was only too happy to facilitate it.
- h. Displaying a message on these Signs would be no different to displaying a message on Cr Kunze's and Cr Spencer-Teo's Councillor social media accounts.
- i. The Signs are owned by the Councillors with no City resources used and convey a simple community message.
- j. It should be noted that in submitting his complaints to both the City of Canning and the Local Government Standards Panel, the Complainant has used his Shire of Mundaring email account despite having his own personal email address.
- k. The Shire of Mundaring email address is a resource and intellectual property of the Shire or Mundaring, and by sending complaints from his official work email account, he has given the impression that the Complaints might have the imprimatur of the Shire of Mundaring.
- l. The Complainant alleges that his Complaint is about maintaining integrity, but he appears to have no issue using Local Government resources to pursue his agenda.

### **Clause 19 – Prohibition against involvement in administration**

- m. The complainant has alleged that the installation of "Duck Crossing" signs are an operational matter, and therefore our conduct is allegedly a breach. Neither the Act, nor does any City of Canning policy prescribe that the City must install "Duck Crossing" signage or any similar signage.
- n. This is not a prescribed function of the administration.





- o. Some Local Governments choose to install this type of signage to help protect local wildlife, however this does not make it a function of the administration, and we have therefore not involved ourselves in the administration of the City.
- p. The Complainant makes no attempt in the Complaint to justify how the Signs are a function of the administration or how Cr Kunze has somehow involved himself in the administration.
- q. As you will see from Mr Johnson's correspondence above, the City's administration does not believe the "*signs are impinging on any operational aspect of the City, nor is there any impact on City resourcing.*"
- r. Furthermore, Mr Johnson outlined why the Signs do not conflict with any of the City's policies or Local Laws, and that the City administration does not take issue with the installation of the signage.
- s. This is why Cr Kunze and Cr Spencer-Teo have not received any direction or complaints from the City's administration regarding the signage – in fact they only speak positively of the signage.

#### **Clause 20 – Relationship with Local Government Employees**

- t. Cr Kunze is at a loss as to why the installation of "Duck Crossing" signage would indicate an improper relationship with Local Government Employees. It appears that the Complainant is simply unhappy that the relevant staff member, being Mr Johnson, has not validated the Complaint, and he has therefore made these unfounded and truly disappointing allegations.

#### **Conclusion**

- u. The creation and installation of the "Duck Crossing" signs was done for a positive purpose - to protect local wildlife and respond to community concern. They were created independently of the City of Canning and have not used any resources of the City.
- v. The signs provide no benefit to neither Cr Spencer-Teo or Cr Kunze, and the City of Canning's administration has absolutely no concern with the design nor the placement of the Signs.
- w. Mr Dion Johnson has detailed in his correspondence why the City's administration has no concern with the signage, from both an operational perspective and according to the City's policies and Local Laws, however Mr Money appears to be unhappy with the decision of the City and escalated the matter to the Panel.
- x. It is extremely disappointing for a positive initiative that is relatively trivial to end up the subject of a formal Standards Panel complaint – pursuing this is not in the public interest. The signs have now been removed given the baby birds have matured, and most moved on.
- y. Cr Kunze would respectfully request the Panel consider this complaint frivolous, trivial, misconceived or without substance under Section 5.110 (3A) of the Act.



## **PANEL'S CONSIDERATION**

### **Regulation 18**

22. Regulation 18 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

**“ 18. Securing personal advantage or disadvantaging others**

(1) *A council member must not make improper use of their office —*

(a) *to gain, directly or indirectly, an advantage for the council member or any other person; or*

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

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

23. To make a finding of a minor breach of regulation 18 of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Kunze was an elected member or a candidate at the time of the alleged breach and the time of the determination;
  - b. Cr Kunze made use of his office as Council member or candidate of the City;
  - c. when viewed objectively, such use was an improper use of Cr Spencer-Teo's office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Cr Kunze engaged in the conduct with the intention of gaining an advantage for himself or another party
24. As the Complainant has not alleged any detriment was intended to be caused, the Panel has only considered regulation 18(1)(a) in this case.

### **Code of Conduct**

25. The City adopted the *City of Canning Code of Conduct for Council Members, Committee Members and Candidates* on 23 May 2021 (“**the Code of Conduct**”) which governs the conduct of elected members.
26. A breach of the Code of Conduct may indicate that an elected member has acted improperly in breach of Regulation 18.





27. The relevant provisions of the Code of Conduct are as follows:

**“ 4. Personal integrity**

- (1) *A council member, committee member or candidate should —*
- (a) *act with reasonable care and diligence; and*
  - (b) *act with honesty and integrity; and*
  - (c) *act lawfully; and*
  - (d) *identify and appropriately manage any conflict of interest; and*
  - (e) *avoid damage to the reputation of the local government.”*

**“ 5. Relationship with others**

- (1) *A council member, committee member or candidate should —*
- (a) *treat others with respect, courtesy and fairness; and*
  - (b) *respect and value diversity in the community.*
- (2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.”*

**“ 8. Personal Integrity**

- (1) *A council member, committee member or candidate —*
- (a) *must ensure that their use of social media and other forms of communication complies with this code; and*
  - (b) *must only publish material that is factually correct.*
- ...”

**“ 9. Relationship with others**

- A council member, committee member or candidate —*
- (a) *must not bully or harass another person in any way; and*
  - (b) *must deal with the media in a positive and appropriate manner and in accordance with any relevant policy of the local government; and*
  - (c) *must not use offensive or derogatory language when referring to another person; and*
  - (d) *must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties; and*
  - (e) *must not impute dishonest or unethical motives to another council member, committee member or candidate or a local government employee in connection with the performance of their official duties.”*



## **Panel Consideration of Elements of Breach – Regulation 18**

### Cr Kunze was an Elected Member or a Candidate at the relevant times

28. Cr Kunze was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
29. This element is met.

### Cr Kunze made use of his office as Council Member of the City

30. In this case the Panel has considered the relevant facts of the matter and comments as follows:
31. The Signs clearly show the faces of both Cr Kunze and Cr Spencer-Teo on them as well as the names “Amanda and Ben”.
32. Cr Kunze asserts that the Signs were erected as they were in the “public interest” and due to the requests of local residents and are no different from Cr Kunze using his Facebook page for a community post.
33. The Panel further considers that placing the Signs is not a matter that Cr Kunze would have undertaken in his personal capacity, but was fundamentally linked to his role as councillor.
34. Therefore, the Panel finds that it is more likely than not that Cr Kunze was acting in his capacity as an elected member and made use of his office as a council member when undertaking the conduct.
35. This element is met.

### Cr Kunze’s use was improper

36. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. It requires an abuse of power or the use of the councillor’s position in a manner that such councillor knew (or ought to have known) was not authorised.
37. 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.
38. Any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor’s formal role and responsibilities.
39. 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 or his purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>8</sup>.

---

<sup>8</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson J]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).



40. In this case the Panel has reviewed the City of Canning *Local Government Property and Public Places Local Law 2021* (“**the Local Law**”) which deals with the placing of signs and advertising on local government property.
41. The applicable section is Part 5 of the Local Law, the relevant portions being as follows:

“ **PART 5—ADVERTISING SIGNS**

**5.1 General prohibitions**

*A person must not erect or place a sign—*

.....

- (c) *on or within 2 metres of a carriageway;*

.....

**5.2 Signs requiring a permit**

- (1) *In this clause—*

**thoroughfare** *does not include a footpath or any other part of a thoroughfare that is specified in clause 5.1.*

- (2) *A person must not, without a permit—*

(a) *erect or place a sign on a thoroughfare; or*

(b) *post any bill or paint, place or affix any advertisement on a thoroughfare.*

**5.3 Exemptions**

- (1)

.....

- (d) *an election sign, provided that—*

(i) *the sign is placed or erected on a thoroughfare not more than 28 days before or more than 7 days after the relevant election day;*

(ii) *the sign is no greater than 2 metres squared in area;*

(iii) *the sign is erected at least 30 metres from any intersection; and*

(iv) *the sign is free standing and is not fixed to any sign, post, power or light pole, or similar structure.*

- (2) *The CEO or an authorised person may exempt a person from compliance with clause 5.2.*

**5.4 Impounding of advertising signs**

*A sign which contravenes clause 5.1 or clause 5.2 may be removed, impounded or disposed of in accordance with Subdivision 4 of Division 3 of Part 3 of the Act and regulation 29 of the Regulations.”*

42. In this case it appears, from the photographs provided that the Signs are located within 2 metres of a carriageway, being in breach of section 5.1(c) of the Local Law.



43. In the relevant context and looking at the content of the Signs, the Panel does not consider that the Signs constitute an election sign for either of the Councillors named.
44. However, the Panel notes the definition of “advertising sign” in the Local Law:

*“ **advertising sign** means a sign used for the purpose of advertisement or to draw attention to a product, business, person or event and includes a home open sign, a garage sale sign, a display e sign, an election sign and a portable sign;”*
45. Due to this definition, it appears likely that, due to the inclusion of Cr Spencer-Teo’s and Cr Kunze’s faces in the Sign, the same would be considered to be an advertising sign.
46. The public should be satisfied that local councillors will uphold all local laws and model the highest level of community behaviour.
47. Further it is a breach of the Code of Conduct to not “act lawfully”, which would include compliance with all local laws.
48. In addition, the Panel refers to its comments below with respect to placement of like signage (not being election material) not being within the scope of the role of a local councillor.
49. Even where a councillor may consider a matter to be “in the public interest” or harmless in nature, this does not diminish the statutory requirements for the strict separation of the roles of elected members and the administrative staff of the local government.
50. Despite the above, the Panel notes that the purpose of the Minor Breach System to identify and discourage the conduct of local councillors which interferes with the proper and usual operation of the local government.
51. Although the nature of the conduct certainly entertained the Panel, the Panel comments that the response from the City was perfectly reasonable and acceptable in the circumstances. The only recourse open to the City was a discretion to remove the Signs. They elected no to do so.
52. The complaint to the Panel therefore appears unnecessary to *protect “the integrity of ducks and local democracy” as the Complainant asserts to be concerned with in his Emails to the City.*
53. The conduct complained of is really only a technical breach and cannot be said to reflect poor governance or to be particularly disruptive to the operation of the City. Certainly, the City employees were not concerned as to the impact of the same.
54. Despite the, and the minor nature of the Complaint, the Panel notes that:
  - a. the Panel is required by statute to review every matter that comes before the it; and
  - b. it is not in the interests of the local government to ignore the strict separation between the strategic role of local councillors from the administrative role of local government employees as is enshrined in the Act.



55. In respect to Cr Kunze's assertion that the Complainant using his work email to make the Complaint may give the impression that the Complaints might have the imprimatur of the Shire of Mundaring, the Panel considers that this argument is not compelling, and that the nature of the Complaint demonstrates that the Complainant is a resident of the City. In any event, this is not material to the outcome of the Complaint.
56. Given the above, the Panel finds that it is more likely than not the Post was improper as:
- a. the conduct was not in breach of a Local Law;
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.
57. This element is met.

Regulation 18(1)(a) – Cr Kunze intended to gain an advantage

58. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6th ed) include: a favouring circumstance; something which gives one a better position, benefit; increased well-being or convenience or pecuniary profit.
59. The Panel considers the term 'advantage' in regulation 18(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.<sup>9</sup>
60. It is not necessary to find whether any advantage actually gained<sup>10</sup> but an intent to gain such advantage must be established.
61. Cr Kunze asserts that the Signs were only trying to protect local wildlife. However, the Panel notes that this could be achieved by placing signs that did not include Cr Spencer-Teo's and Cr Kunze's faces and names or, alternatively, by passing on the request to the appropriate department of the City.
62. The Panel finds that, it is more likely than not, that the signs were used to create exposure for Cr Kunze and Cr Spencer-Teo and to make the local community to think more favourably of them in their capacity as local councillors.
63. This element is met.

Conclusion

64. The elements required to find a breach of regulation 18(1)(a) of the Regulations have been met.

---

<sup>9</sup> Complaint SP 12 and 13 of 2011

<sup>10</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



## Regulation 19

65. Regulation 19 prohibits councillors engaging in conduct that is intended to be undertaken by the administration of a local government and specifically provides as follows:

***“9. Prohibition against involvement in administration***

*(1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the local government or by the CEO to undertake that task.*

*(2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”*

66. To make a finding of a minor breach of regulation 19 of the Regulations the Panel must be satisfied that:

- a. Cr Kunze was a councillor at the time of the alleged breach and at the time the determination was made;
- b. it is more likely than not that:
  - i. Cr Kunze took on, or was involved in, or participated in, the performance, attempted performance, or part performance of a function or responsibility under which the Act or by delegation it is for the local government’s CEO to perform or direct;
  - ii. such taking on, involvement or participation contributed something to the administration of the local government;
  - iii. such taking on, involvement or participation was not done as part of the deliberations at a council meeting; and
  - iv. the Council or CEO did not authorise such taking on, involvement or participation<sup>11</sup>.

## Panel Consideration of Elements of Breach – Regulation 19

### Was Cr Kunze a Councillor at the relevant times

67. Cr Kunze was a councillor at the time of the alleged breach and at the time the Panel considered the Complaint.

68. This element is met.

### Cr Kunze took on the performance of an administrative function of the City

69. The Act distinguishes between the roles of council and the staff employed by the local government, or the “administration”. Local governments are bodies corporate of which the Council is the governing body.

---

<sup>11</sup> Yates and Local Government Standards Panel [2012] WASAT 59





70. A council discharges its role by formulating policy and overseeing the performance of a local government's functions. The day to day management of a local government is entrusted to the CEO<sup>12</sup>.
71. Neither the Act nor the Regulations specifically define what tasks contribute to the administration of the local government, however:
  - a. section 2.7(1) of the Act provides that the role of the Council is to “*govern the local government's affairs*” with section 2.10 setting out the specific role of councillors; and
  - b. section 5.36 of the Act provides for the appointment of a Chief Executive Officer and section 5.41 sets out the Chief Executive Officer's functions which include the following:
    - i. advise the council in relation to the functions of a local government under this Act and other written laws;
    - ii. ensure that advice and information is available to the council so that informed decisions can be made; and
    - iii. be responsible for the employment, management supervision, direction and dismissal of other employees.
72. In this case, it is alleged that Cr Kunze took on an administrative function when he installed signs on local government property regarding a duck crossing.
73. The Panel notes that it is common for local governments to provide safety signs as to local wildlife or animals such as swooping or nesting signs or dog leash signage.
74. It would be wholly within the role of a local councillor to bring an item to Council to create and install duck crossing signage. However, the elected members themselves would never *implement* that decision, that is part of the administrative role of the employees of the City.
75. The fact that the Act does not specify that “duck crossing signage” is an administrative function, or the City does not have any current policy as to the same as to the installation of signage regarding local wildlife, does not mean that installing signage on Council property, can automatically be considered to be part of a councillor's role.
76. Although it appears the conduct was undertaken in good faith and had no adverse impact, it is simply not open for a local councillor to ignore the bounds of their designated role under the Act and elected not to exercise their right to remove the same.
77. It is noted that the City officers that were contacted by the Complainant were not unduly worried about the Signs, confirmed that they did not have any negative impact.

---

<sup>12</sup> *Town of Cambridge v The Hon David Templeman MLA, Minister for Local Government; Heritage; Culture and the Arts [2020] WASC 350 - Tottle J at 91*



78. However, they were incorrect that a City resource had not been used. A government resource includes items under the care, control and management of the local government, which clearly include local reserves and parks.
79. This Complaint is analogous to *Yates and Local Government Standards Panel* [2012] WASAT 23 where it was found that the placing of signage by a local councillor on a fence of an oval under a management order of the local government was considered to be a “*use of a government resource*”.
80. Similarly placing a sign on a local government controlled park or area is a use of that government resource and local councillors should reflect on the appropriateness of placing any signs on local government property, irrespective for what reason.
81. Given the above, the Panel finds it is more likely than not that Cr Kunze did take on, involve himself with or undertake an administrative function of the City when he placed signage to do with local wildlife in a local government reserve/park.

82. This element is met.

The taking on, involvement or participation contributed to the administration of the local government

83. In order to “*contribute*” the relevant action must “*play a part in the achievement of a result*”<sup>13</sup>.
84. In this case, Cr Kunze’s actions resulted in the placement of signs which had a clear and identifiable result to a matter that is generally under the control of the administration of the City.
85. As such, the Panel finds that it is more likely than not that Cr Kunze did contribute to the administration of the local government.

86. This element is met.

The taking on, involvement or participation was not done as part of the deliberations at a council meeting

87. The production and placing of Signs were not undertaken by Cr Kunze as part of deliberations at a Council Meeting.

88. This element is met.

The Council or CEO did not authorise such taking on, involvement or participation

89. Although it is noted that the relevant City officers were not willing to enforce the removal of the Signs (as is permitted under the Local Law), it appears from the Email that the Signs were self-funded and that Cr Kunze and Cr Spencer-Teo of their own volition decided to create and place the Signs, as they were “*passionate advocates*” for local fauna.
90. The Panel therefore finds that it is more likely than not that neither the Council nor the CEO did not authorise the taking on of the relevant involvement.

---

<sup>13</sup> Yates and Local Government Standards Panel [2012] WASAT at 56



91. This element is met.

### Conclusion

92. The elements required to find a breach of regulation 19 of the Regulations have been met.

### **Regulation 20**

93. 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.”*

94. In this case the Panel notes that there is no allegation of Cr Kunze interacting with any City employee in any manner.



95. As such, the essential element required to find a breach of regulation 20 of the Regulations (being an interaction of some kind with, or making a statement relating to, a local Government employee) can possibly be met with respect to the Complaint.
96. Given the above, the Panel finds to the required standard that there is no breach of regulation 20 of the Regulations.



### **PANEL'S FINDINGS**

97. Cr Kunze did commit a breach of Regulation 18 of the Regulations and therefore did commit a minor breach.
98. Cr Kunze did commit a breach of Regulation 19 of the Regulations and therefore did commit a minor breach.
99. Cr Kunze did not commit a breach of Regulation 20 of the Regulations and therefore did not commit a minor breach.

### **Signing**

A handwritten signature in black ink, appearing to be 'T Fraser'.

---

Tim Fraser (Presiding Member)

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

---

Emma Power (Member)

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

---

Peter Rogers (Deputy Member)



---

## Local Government Standards Panel

---

Complaint Number	20240344
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Angus Money</b>
<b>Respondent</b>	<b>Councillor Benjamin Kunze</b>
Local Government	<b>City of Canning</b>
Regulation	Regulation 18 and Regulation 19 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Ms Emma Power (Presiding Member) Ms Suleila Felton (Member) Cr Peter Rogers (Member)
Heard	23 February 2024 Determined on the documents
Penalty Considered	10 June 2024
Outcome	No Sanction

---

### DECISION AND REASONS FOR DECISION

16 July 2024

---

#### 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





## Introduction

1. At its meeting on 23 February 2024, the Panel found that Councillor Benjamin Kunze, a councillor for the City of Canning (“**the City**”), committed a minor breach under the *Local Government Act 1995 (WA)* (“**the Act**”) and regulation 18 and Regulation 19 of the *Local Government (Model Code of Conduct) Regulations 2021* (“**the Regulations**”) when he and another councillor of the City placed signs on the public reserve of the City to “look out for ducks” (“**the Minor Breach**”).

## Jurisdiction and Law

2. The Panel convened on 10 June 2024 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 Cr Kunze 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 22 March 2024, Cr Kunze was:
  - a. notified of the Panel’s finding of the Minor Breaches;
  - 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*.

## Cr Kunze’s Submissions

6. By an email dated 5 April 2024, the Department received a response from Cr Kunze.
7. Cr Kunze provided the following comments and arguments, as substantially summarised by the Panel:
  - a. Cr Kunze requests that the Panel orders that No Sanction be imposed under the *Act*.
  - b. Cr Kunze’s and Cr Spencer-Teo’s intentions were positive and were aimed to reduce harm to local wildlife by protecting the ducks and other baby birds from passing motorists.
  - c. Unfortunately, staff informed the councillors that they had no signage available to install at this location after they received a request from a local resident, which is why the councillors organised the signs themselves.
  - d. Cr Kunze and Cr Spencer-Teo included their names and faces in order to demonstrate who was making the “slow down” request, however, Cr

---

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



Kunze accepts the Panel's finding that it is a form of advertising. The councillors did not however set out to do it in an improper way, or to contravene any statute or policy.

- e. The Panel accepts in the decision that the conduct complained of is really only a technical breach and cannot be said to reflect poor governance or to be particularly disruptive to the operation of the City. Certainly, the City employees were not concerned as to the impact of the same.
- f. Cr Kunze recognise the signs belonged to the councillors and therefore they were ultimately responsible for them; however, whilst the signs were photographed within the road reserve, they did not install them in that location (they were originally on the property of a local ratepayer).
- g. Cr Kunze is unaware of who repositioned them to the road reserve. Cr Kunze did endeavour to install the signs on private property as per Local Planning Policy LP.07.
- h. It was never Cr Kunze's and Cr Spencer-Teo's intention to Breach Regulation 19 or use a Local Government resource.
- i. After the signs were moved onto the road reserve and a complaint was made, the City's Manager Parks and Environment, highlighted that he had used his discretion under clause 5.3 (2) of the *Local Government Property and Public Places Local Law 2021* to approve the signage
- j. Cr Kunze was therefore under the belief that they had acted properly and were not in contravention of any Local Laws/policies, even after the signs had moved.
- k. It was accepted by the Panel that the conduct appeared to be undertaken in good faith and had no adverse impact.
- l. Cr Kunze does not diminish the fact that the Panel found that he has committed 2 breaches of the Act. Cr Kunze accepts it and does not seek to excuse himself. The fact that he will have two breaches marked against his name is truly disappointing and regretful. It is in itself a significant punishment.
- m. Cr Kunze has always endeavoured to be responsible and ensure he does not act improperly. Both Deputy Mayor Spencer-Teo and Cr Kunze sought to act positively in good faith for something they and many in the community care about, and they did not intend to cause harm – in fact they intended the opposite. They did not intend to cause offence to the complainant.

### **Possible Sanctions**

8. 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 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).*

### **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 with respect to the Complaint, 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 in this case that:

---

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



- a. the conduct was very minor in nature and did not cause any harm or disadvantage to any party whatsoever;
  - b. the breach was of a technical nature; and
  - c. the Complaint appeared to have been made for largely personal political reasons, not community benefit or protection.
13. The Panel is satisfied that Cr Kunze has shown insight into his conduct and that his likelihood of re-offending in the same manner is low.
  14. Further there was no intended or actual damage to the local government.
  15. The Panel considers it is not in the interests of the local government to impose a sanction on Cr Kunze for this conduct in this case.
  16. The Panel further reminds the Complainant that every complaint issued to the Panel results in a monetary cost that is borne by the relevant Local Government.
  17. The Panel notes for the future, it would be permissible for:
    - a. Council to vote to allow individual councillors to place duck crossing signage on City land at their own cost; or
    - b. the CEO to expressly permit such action in writing.
  18. Either such method of official authorisation would mean there would be no technical breach of the Regulations for this kind of conduct.
  19. Due to the above the Panel considers it appropriate that no sanction is imposed.
  20. The Panel further considers that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Kunze recoup to the City the costs of the Department incurred with respect to the Complaint.

### **Panel's decision**

21. The Panel orders pursuant to section 5.110(6)(a) of the Act that, in relation to the Minor Breach of regulation 18 and regulation 19 of the *Local Government (Model Code of Conduct) Regulations 2021* that no sanction be imposed upon Cr Kunze as set out in the attached Order.



## Signing

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

---

Emma Power (Member)

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

---

Peter Rogers (Deputy Member)

A handwritten signature in black ink, appearing to read 'S Felton'.

---

Suleila Felton (Deputy Member)



**ORDER**

16 July 2024

---

**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:**

No further sanction be imposed on Councillor Benjamin Kunze.





## 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.”*