SPECIAL COUNCIL MEETING

Thursday 12 & 19 March 2020

MINUTES
# M I N U T E S

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1 DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS

Acknowledgement of Country

The President made the following acknowledgment of Country

The Shire of Capel acknowledges the Traditional Custodians, the Wardandi people, and their continuing connection to the land, waters and community. We pay our respects to members of all communities and cultures; and to Elders, past, present and emerging.

2 RECORD OF ATTENDANCE/APOLOGIES/LEAVE OF ABSENCE (PREVIOUSLY APPROVED)

PRESENT: President M Southwell
Councillor D Clews
R Mogg
K Noonan
MT Scott

Chief Executive Officer I McCabe
Acting Director Community and Corporate A Mattaboni
Director Infrastructure and Development J Gick
Manager Human Resources and Executive Services B Macmillan
Executive Services Officer T Richards

LEAVE OF ABSENCE: Nil

APOLOGIES: Councillors DJ Kitchen
D Radisich
S Schiano

MEMBERS OF PUBLIC: 30

DECLARATION OF INTERESTS

Item 4 - Chief Executive Officer Report - Ian McCabe – in that he is the CEO and an Employee of the Shire of Capel.

Item 5 – Motion by Presiding Officer – Ian McCabe – in that he is the CEO and an Employee of the Shire of Capel.

3 PUBLIC QUESTION TIME

B Hastie – Stratham

Question 1 - If the Councillors are actively pursuing legal representation through the president’s motion to engage the services of:

Of Erica Harley of HWL Ebsworth to:
a. provide legal advice regarding the recently issued Worksafe improvement notice; and
b. investigate claims of bullying at the Shire and prepare a report;

2. authorizes the President to provide ongoing instructions and assistance to HWL Ebsworth;
3. invites the CEO to participate and assist the investigation

4. instructs the CEO to terminate any instructions to McLeods for legal advice on these or related matters

Doesn’t this amount to bullying and a breach of the Worksafe order and who is paying for the proposed legal representation proposed by the president to defend the bullying or bad behaviour of some councilors, as it should be by no means paid by the ratepayers. Councillors should seek their legal own legal representation if they want to defend the alleged bullying type of behaviour and I ask the president to withdraw his request and other councillors not support the president’s motion.

President’s response:
Mr Hastie you should refrain from using the question time to make statements. I think there was a question in there, can you leave aside the statements you’re making and just ask a question.

B Hastie Response:
Doesn’t your motion tonight amount to bullying and a breach of the Worksafe order, and, who is paying for the proposed legal representation proposed by the President to defend the bullying or the bad behaviour of some councilors?

President’s response:
Okay so there is two questions there. To the first question, no.
To the second question, who’s paying? The Shire’s paying, the Shire Council is paying, well isn’t paying because we haven’t made a resolution yet. It won’t be paid until we make a resolution to do something.
4 CHIEF EXECUTIVE OFFICER REPORT

4.1 Chief Executive Officer’s Report

Location: Whole of Shire
Applicant: Not Applicable
File Reference: CM.IU.1
Disclosure of Interest: Not Applicable
Date: 11.03.2020
Author: Chief Executive Officer, I McCabe
Senior Officer: Not Applicable
Attachments: WorkSafe Improvement Notices

IN BRIEF

This report is prepared by the Chief Executive Officer (CEO) to provide Council and the Community with information in relation to this meeting of Council.

RECOMMENDATION

That Council receives the Chief Executive Officer’s report as presented.

COMMENT:

In this report I will address the core issues related to the purpose of the meeting. For reasons of privacy and to ensure there is no compromise to any legal position I will not address the identity of complainants or incidents.

Councillors are required to adhere to a Code of Conduct and a set of regulations that form part of the Local Government Act 1995. The Code of Conduct requires all councillors and staff to behave with (among other things) reasonable care and diligence, honesty and integrity, avoid damage to the reputation of the Shire, avoid bias, treat others with respect and fairness and meet all the requirements of the law and Council policy.

The Local Government (Rules of Conduct) Regulations 2007 sets standards for Council behaviour in regard to the proper use of information, avoidance of securing an advantage or disadvantage of others, ensuring proper use of local government resources, maintaining appropriate relations with staff and making declarations where an interest may exist.

All councillors have received induction, copies of the Code of Conduct and Regulations and have access to training or internal briefings on the Code, regulations or other expectations of councillors.

Councillors are not employers or employees under workplace law; councillors fill what is essentially a voluntary role with compensation for meetings or travel. Councillors are technically ‘members of the public’ in relation to workplace safety – which means that they are external to the day to day business and are elected to perform the role of councillor.

Just as a member of the public should meet reasonable requests to comply with safety requirements of the business, so Councillors must also meet reasonable requests in respect of safety. These include meeting expectations to treat staff with respect and fairness and assisting with compliance with the relevant law, the Occupational Safety and Health Act 1984 (‘OSH Act’).

A range of workplace safety concerns that relate to councillor behaviour have been raised by staff and other members of Council in the last three years. There is evidence that this has escalated in the past year.
The undesirable behaviours have been raised with the person or persons concerned and have been dismissed by those same individuals.

During January 2020 a number of complaints were lodged by members of staff of the Shire of Capel about the behaviour of Council.

Council were advised that a significant workplace safety issue existed and a confidential briefing was arranged for 30 January 2020. The briefing was delivered by a legal practitioner with significant experience in workplace law. That briefing is legally privileged and was prepared to advise Council of their rights and responsibilities in regard to workplace safety. That briefing also provided a concrete example of a recent incident which was prima facie a breach of the OSH Act 1984 as well as the Shire’s Code of Conduct and the Local Government (Rules of Conduct) Regulations 2007. The briefing was delivered to provide legal advice to Council on a set of proven facts, which councillors could receive and then ask questions or seek further advice from officers.

This advice has proved insufficient as there have been continued and avoidable incidents which may result in further complaints or action.

Consequently, state government agency WorkSafe conducted an investigation 25 February 2020, interviewing a number of staff and reviewing documentation including minutes and emails. That investigation found that the Shire of Capel is contravening safety regulations by workplace bullying and occupational violence and aggression.

WorkSafe issued two workplace safety Improvement Notices that identifies the health of employees is subject to harm due to the behaviour of councillors.

The Improvement Notices require the Shire of Capel to do things which limit the interaction of Councillors with staff and to create systemised processes to ensure employees are not exposed to workplace bullying as far as is practicable. Initial responses include ensuring two staff are present when meeting a councillor and to reduce access for councillors to the administration building and other worksites.

The notices require a response by 27 March 2020; however, as CEO, it is my intention to apply for an extension to this period as I am not able to advise WorkSafe that Council has understood their role in respect of the maintenance of a safe workplace.

Council, as a group, does not require further legal advice. The CEO will implement the WorkSafe Improvement Notices as the business manager of the Shire in accordance with section 5.41 of the Local Government Act 1995. Where legal advice is required, that will be obtained in line with normal business practice by the CEO so as to implement Council Decisions.

I would advise Council that legal advice is not required for the Shire of Capel as administration intend to comply with the Orders. However, the OHS Act 1984 may have implications for individual councillors who are proven to contravene the Act; in those cases, each individual councillor should consider their own legal advice.

The proposed Motion seeks to engage the services of a particular legal practitioner and firm; the Shire does not have a relationship to this practitioner and the engagement of a particular practitioner in this form would be contrary to Council’s procurement policy.

The proposed motion seeks to conduct an investigation into the complaints; an investigation has been conducted by WorkSafe and there is a response underway that is regulated by an external body. The CEO has advised Council that internal, informal meetings between staff and Council could identify opportunities for improvement. This invitation has not yet been accepted. Enforcement of an investigation of this kind may breach the WorkSafe notices and moreover would constitute a breach of privacy for employees, as well as interference in administration, requiring a formal response from the Shire of Capel.
The motion proposes the President be given authority to instruct the legal advisor which he recommends to Council; this would be improper as Cr Southwell is conflicted due to being a councillor who is subject of the Improvement Notices. Further, Cr Southwell as mover seeks to be a proponent and implementer placing the presiding member on both sides of the Local Government Act 1995, creating a further conflict with regulations (regulation 10).

Further, the motion attempts to direct the CEO in his functions under the Local Government Act 1995 by dictating what advice is acceptable and from whom it should be sought. This is not appropriate and would again provide a breach of the Local Government Act 1995 (regulation 10).

I’d like to now address the ‘Reasons’ for this motion. Cr Southwell asserts legal advice was sought without the permission of Council. The role of CEO is directed by the law and delegations from Council to manage the affairs of the local government – if a Council directive were required in each case, the President or Council would be placing themselves in the role of CEO. The CEO would not be performing his role, applying his delegations, or making use of his experience and skills. This appears to portray the CEO in a negative light and ignores my legal responsibility to my staff. It is normal and reasonable for the CEO to seek legal advice where appropriate without reference to Council where the CEO is acting within the requirements of his role.

The CEO did not summon councillors to the briefing; it was made clear there was a safety issue of importance and the date and time were negotiated with the full council. It is in the interests of Council to be fully informed and that was the purpose of the briefing. The individual actions of individual councillors is not specified in a document to protect the privacy of the employees and those individual councillors; this also recognises the legal status of councillors and the fact Council has collective responsibility for decisions and the need for Council to adopt a singular position on safety.

The Shire President then makes a statement that identifies me as a complainant. I have made no such public statement and public discussion of me as an employee is improper and unacceptable.

In closing, my advice to Council is this motion increases risk to Council and does not allow the WorkSafe notices to be properly addressed. This may create contraventions.

The CEO has provided advice to Council that the motion contravenes regulations, Council policy and will likely contravene the Improvement Notices.

The CEO has specifically requested the President to agree to the withdrawal of the motion and suggested the cancellation of the meeting in favour of other mechanisms.

The CEO has advised Council that this meeting and the primary motion will raise the level of risk for Council, the local government and individual elected members.

**STRATEGIC IMPLICATIONS**

All key indicators of the Strategic Community Plan 2018 – 2028.

**VOTING REQUIREMENTS**

Simple majority

**OFFICER’S RECOMMENDATION – 4.1**

That Council receives the Chief Executive Officer’s report as presented.
**Governance Note** - This Item was not voted on.

The Officer Recommendation was Moved Cr Scott, Seconded Cr Noonan.

**PROCEDURAL MOTION**

 Moved Cr Noonan

That the meeting be closed to members of the public in accordance with Shire of Capel Standing Order Local Law 12.1(g).

The Motion Lapsed for want of a seconder.

<table>
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<tr>
<th>SC009/2020 PROCEDURAL MOTION</th>
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<td>Moved Cr Clews, Seconded Cr Noonan</td>
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To defer the Motion to accept the report to the next general meeting of Council in accordance with Shire of Capel Standing Orders Local Laws 12.1(a), to allow a roundtable discussion.

Lost 2/3

**PROCEDURAL MOTION**

 Moved Cr Noonan, Seconded Cr Southwell

That the meeting be closed to members of the public in accordance with Shire of Capel Standing Order Local Law 12.1(g).

Carried 4/3

The President stated to the gallery: You are being too unruly, so I’m going to close the meeting now anyway before we get to vote on that Procedural Motion because you are becoming unruly so I’m declaring this meeting now closed to the public – can you please leave us. – 6.18pm.

Cr Scott left the room 6.18pm.

It was noted that a quorum now did not exist. 6.19pm

Cr Noonan left the room at 6.20pm

The President suspended the meeting at 6.22pm for 15 minutes to enable a quorum to be re-established in accordance with Shire of Capel Standing Orders Local Laws 3.10(1).

The Meeting resumed at 6.37pm with the following Councillors in attendance; Cr Southwell, Cr Mogg, Cr Noonan and Cr Clews.

As a quorum was not re-established, the President adjourned the Meeting to a later date being Thursday 19 March 2020 at 6.00pm as per the Shire of Capel Standing Orders Local Law 3.10(2).
In accordance with Shire of Capel Standing Orders Local Laws 3.10(3), Councillors who have spoken on the matter at the time of adjournment are; Cr Scott & Cr Southwell.

The Meeting was adjourned 6.37pm and remains closed to the public.
SPECIAL COUNCIL MEETING

Thursday 19 March 2020

MINUTES
1  DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS

The President declared the meeting open at 6pm.

2  RECORD OF ATTENDANCE/APOLOGIES/LEAVE OF ABSENCE (PREVIOUSLY APPROVED)

PRESENT:  President
          Councillor
          M Southwell
          K Andrew
          D Clews
          D Kitchen
          R Mogg
          K Noonan
          MT Scott

Chief Executive Officer
Acting Director Community and Corporate
Director Infrastructure and Development
Manager Human Resources and Executive Services
Executive Services Officer

LEAVE OF ABSENCE:  Nil

APOLOGIES:  Councillors
            D Radisich
            S Schiano

The following Procedural Motion was originally raised at the Special Council Meeting of the 12 March 2020, but was not voted on.

SC010/2020 - PROCEDURAL MOTION

Moved Cr Noonan, Seconded Cr Southwell

That the meeting be closed to members of the public in accordance with Shire of Capel Standing Order Local Law 12.1(g).

Carried 4/3
4  CHIEF EXECUTIVE OFFICER REPORT

4.1 Chief Executive Officer’s Report

Location: Whole of Shire
Applicant: Not Applicable
File Reference: CM.IU.1
Disclosure of Interest: Not Applicable
Date: 11.03.2020
Author: Chief Executive Officer, I McCabe
Senior Officer: Not Applicable
Attachments: WorkSafe Improvement Notices

IN BRIEF

This report is prepared by the Chief Executive Officer (CEO) to provide Council and the Community with information in relation to this meeting of Council.

VOTING REQUIREMENTS

Simple majority

OFFICER’S RECOMMENDATION – 4.1

That Council receives the Chief Executive Officer’s report as presented.

SC011/2020 - COUNCIL DECISION

Moved Cr Scott, Seconded Cr Noonan

That Council receives the Chief Executive Officer’s report as presented.

Carried 6/1
5 MOTION BY PRESIDING OFFICER

Moved Cr Southwell, Seconded Cr Noonan

That Council;
1. engages Erica Harley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying at the Shire and prepare a report;
2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;
3. invites the CEO to participate and assist the investigation
4. instructs the CEO to terminate any instructions to McLeods for legal advice on these or related matters.

Reason: The CEO last month engaged and briefed a partner from McLeods lawyers, without the knowledge of Council, regarding claims he and other (unidentified) staff members may have been bullied by a number of (unidentified) councillors. This led to councillors being summoned last month by the CEO to a secret briefing where they were advised of various unspecified and unsubstantiated allegations and warnings from the McLeods partner.

Because the CEO himself has claimed to be the subject of bullying by councillors, this process involved an obvious conflict of interest.

Worksafe have since been called in to investigate claims of bullying within the Shire workplace, but it remains unclear to Council why, and what ramifications this may have.

The Council therefore urgently needs independent legal advice.

SC012/2020 - AMENDMENT

Moved Cr Clews, Seconded Cr Noonan

That Council;
1. engages Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;
2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;
3. invites the CEO to participate and assist the investigation
4. instructs the CEO to terminate any instructions to McLeods for legal advice on these or related matters.

Carried 5/2

Cr Scott requested his vote against be recorded in the Minutes.
SC013/2020 - AMENDMENT

Moved Cr Clews, Seconded Cr Noonan

That Council;

1. engages Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;

2. authorises Councillors to provide ongoing instructions and assistance to HWL Ebsworth;

3. invites the CEO to participate and assist the investigation

4. instructs the CEO to terminate any instructions to McLeods for legal advice on these or related matters.

Lost 2/5

SC014/2020 - AMENDMENT

Moved Cr Clews, Seconded Andrew

That Council;

1. engages Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;

2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;

3. invites the CEO to participate and assist the investigation

4. instructs the CEO to terminate any instructions to McLeods for legal advice on these or related matters.

Carried 7
SC015/2020 - AMENDMENT

Moved Cr Noonan, Seconded Cr Southwell

That Council;

1. engages Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;
2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;
3. invites the CEO and Councillors to participate and assist the investigation.

Carried 5/2

Cr Clews left the room 6.47pm.

Cr Southwell adjourned the meeting in accordance with Standing Orders Local Law 8.5 (1) for 10 minutes for the purpose of preserving or regaining order. Meeting adjourned 6.47pm.

Meeting resumed at 6.54pm with all Councillors present at the beginning of the meeting now in the room.

SC016/2020 – COUNCIL DECISION

Moved Cr Kitchen, Seconded Cr Scott

Point of order 12.1 (h) – That the ruling of the Presiding Member be overruled.

Lost 5/2

SC017/2020 - AMENDMENT

Moved Cr Southwell, Seconded Clews

1. That Council instruct the CEO to engage Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;
2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;
3. invites the CEO and Councilors to participate and assist the investigation.

Carried 5/2

The Amendment then became the Substantive Motion.
SCC018/2020 - COUNCIL DECISION

1. That Council instruct the CEO to engage Erica Hartley of HWL Ebsworth to;
   a. provide legal advice regarding the recently issued Worksafe improvement notice; and
   b. investigate claims of bullying by Council and prepare a report;

2. authorises the President to provide ongoing instructions and assistance to HWL Ebsworth;

3. invites the CEO and Councilors to participate and assist the investigation.

Lost 4/3 – Absolute Majority required s.6.8 (1) (b) Expenditure not included in the annual budget.

6  MEETING CLOSURE

Governance Note: The meeting was not reopened to the public (SC010/2020).

There being no further business, the President declared the meeting closed at 7.16pm.