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## Local Government Standards Panel

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Complaint Number	SP 54 of 2018
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Stan Scott</b>
<b>Respondent</b>	<b>Councillor Benjamin Bell</b>
Local Government	<b>Shire of Toodyay</b>
Regulation	Regulation 7(1) Regulation 9 Regulation 10 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Mrs Emma Power (Member) Councillor Paul Kelly (Member)
Heard	7 December 2018 Determined on the documents
Finding	One breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 25 January 2019

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 7 December 2018, the Panel found that Councillor Benjamin Bell, a councillor of the Shire of Toodyay (**"the Shire"**):
  - a. did commit a minor breach pursuant to the Local Government Act 1995 (WA) (**"the Act"**) and regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 (**"the Regulations"**);
  - b. did not commit the alleged breaches of the Act in respect to regulation 9 or regulation 10 of the Regulations,when Cr Bell made a Facebook post on the 18 May 2018 relating to inclusion of questions in an Ordinary Council Meeting and Mr Stan Scott the Chief Executive Officer of the Shire (**"the CEO"**) as further described in paragraphs 18 and 21 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 provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. 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>2</sup>
5. 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.
6. 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>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. 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.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.

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

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

<sup>4</sup> Briginshaw v Briginshaw (1938) 60 CLR 336

<sup>5</sup> Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

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



10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Regulation 7**

11. Regulation 7 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:

#### ***“7. Securing personal advantage or disadvantaging others***

- (1) A person who is a council member must not make improper use of the person’s office as a council member —*
    - (a) to gain directly or indirectly an advantage for the person or any other person; or*
    - (b) to cause detriment to the local government or any other person.*
  - (2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*
12. It is not alleged that Cr Bell or any other person received any advantage so the Panel has considered regulation 7(1)(b) in this Complaint.

### **Regulation 9**

13. Regulation 9 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 council 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.”*

### **Regulation 10**

14. Regulation 10 regulates councillor’s interactions with local government employees.
15. The terms of the regulation are as follows:

#### ***“10. Relations with local government employees***

- (1) A person who is a council member must not —*
  - (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person’s 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 person who is a local government employee in the person’s capacity as a local government employee.*



- (2) *Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*
  - (3) *If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means —*
    - (a) *make a statement that a local government employee is incompetent or dishonest; or*
    - (b) *use offensive or objectionable expressions in reference to a local government employee.*
  - (4) *Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”*
16. It is not alleged that any threat or promise of reward was made, so the Panel has only considered Regulation 10(1)(a) and Regulation 10(3) in this Complaint.

### **Jurisdiction and Procedural Fairness**

17. On 6 July 2018 the Panel received an email from Mr Stan Scott, acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form (with attachments) dated 6 July 2018 provided by Mr Stan Scott.
18. In his letter of complaint Mr Scott alleges that Cr Bell has breached regulation 7, regulation 9 and regulation 10 by making a Facebook Post on 18 May 2018 (**“the Post”**) regarding the actions of the CEO in not including various questions submitted by Cr Bell in the agenda for the Ordinary Council Meeting of 22 May 2018 (**“the Agenda”**) as set out in paragraph 21 (**“the Complaint”**).
19. The Panel convened on 7 December 2018 to consider the Complaint.
20. The Panel:
- a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, the Cr Bell was:
    - i. last elected to the Council of the Shire in October 2017 for a term expiring in October 2019;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 7 December 2018;
  - b. was satisfied the Complaint was made within two years after the alleged breach occurred<sup>7</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>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Bell; and
  - e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act



21. The relevant Facebook post the subject of the Complaint is follows:

- a. **The Post**– posted 18 May 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page:

*“ 4 out of 20.*

*That is a fail in any one's language.*

*I submitted 20 questions to the CEO for inclusion in next week's Council Meeting. These are legitimate questions and comply with the Act.*

*But for reasons known only to the CEO, he decided to include only 4 of these questions.*

*That is appalling abuse of power by the CEO and is a clear demonstration on the extreme level of censorship that exists within the Shire of Toodyay.*

*And you know what, I think that he is proud of the fact they he can operate as he wishes with ability no oversight by most the Council (even when he steps outside he delegated responsibility / authority). After all, no valid reason was provided as to why my questions were not included in this month's meeting. It appears that he just decided that he didn't want to answer them.*

*What concerns me too is that the Western Australian Department of Local Government have put in writing that they are of the opinion that the current Toodyay CEO, has a propensity to misinterpret the Act and policies. (the letter was released under FOI so I am not breaching in confidences here). So, it seems we have a CEO that picks and choses which questions he answers at his sole discretion whilst at the same time finding that the State Government Department that oversees local governments has stated in writing that our CEO has a natural inclination to incorrectly apply rules and policies.*

*And whilst on the topic of how out of control things are at the Shire at the moment (or at the very least how misguided the Council is), I note that Cr. [REDACTED] is looking to move a motion at this month's meeting to have the Shire pick holes in the numbers I quoted at last month's meeting. That is fine with me but what this motion clearly shows is that the Council really do not give a damn at all about rate payers.*

*You know what would have been a positive motion by this councillor (instead on seeking to commence a witch hunt?) and one that would have actually showed that Council is there to represent the community? How about a motion asking the Shire to look for savings in the budget that would enable a rate cut? But no – no such motion is being proposed because, let's face it, making life easier for the community is not really the main motivator of many on Council (or the CEO) for that matter.*

*Instead, I would suggest that it's an ego thing of just sitting around that table that it's the main driver for some in Council. Yes, yes, yes – I can hear the threats of “adverse reflection” are going to be levelled at me. That is, after all, the stick that they use to shut down public communication from Councillors. But this is a convenient weapon they use because, let's face it, engaging with the community is perhaps not this Shire's strong point. The Shire of Toodyay doesn't even have a communication policy, for example.*

*My thinking is – the more they seek to avoid answers questions, the more they are hiding.*

*What's the odds of seeing open and accountable government in Toodyay?  
Right now I suspect I have more chance of seeking a black panther."*

22. The Post also included an image of a black panther.
23. In the Complaint, Mr Scott also provided a copy of the Post and the various public comments following the Post.
24. Mr Scott also makes the following assertions regarding the Complaint:
  - a. the Post generated several uncomplimentary comments regarding the CEO;
  - b. Cr Bell admitted in the Post that he was adversely reflecting on the CEO and was unapologetic about this fact;
  - c. Cr Bell failed to acknowledge that 16 of the questions not included in the Agenda had been answered in full at the Council Forum on 8 May 2018. Cr Bell was absent from the forum but should have read the materials;
  - d. Even if the premise was accurate (and it was not) discussion of the CEO's performance does not belong in the public domain and certainly not on Facebook;
  - e. Cr Bell meets the requirements for a breach of regulation 7 as:
    - i. he was a Council member at the time;
    - ii. he made the Post as a Council member;
    - iii. the office of a Council member was used improperly to disadvantage the Local Government and the CEO; and
  - f. the posts caused considerable actual damage to the reputation of the Council and the CEO.
25. Mr Scott also make the following more general comments regarding Cr Bell's conduct:
  - a. Cr Bell is a new councillor elected in October 2017. Since this time he has established his "Ben Bell - Councillor for the Shire of Toodyay" Facebook profile which has had a number of inappropriate posts made with the intent to:
    - i. increase his own profile as a councillor;
    - ii. bring the council and the Shire into disrepute; and
    - iii. put pressure on the CEO and other councillors;
  - b. these posts have dishonestly misrepresented the Shire and fellow Councillors on a range of issues and created significant community angst and backlash;
  - c. Cr Bell has been requested on several occasions to modify his behaviour by the Shire President and other Councillors;
  - d. during WA Local Government Association (WALGA) training he was advised that his Facebook activity may be in breach of the Regulations;
  - e. the Shire participated in the Governance review program provided by the Australian Institute of Company Directors (AICD). As part of this process a special session was held involving AICD, the Shire President and Cr Bell seeking Cr Bell's agreement to modify his behaviour;
  - f. Cr Bell is also the Managing Director of a publicly listed mining company so is well aware of the importance of honesty and clarity in public statements; and



- g. there is no reasonable argument that Cr Bell's actions are the result of inexperience or lack of understanding. This leads to the conclusion his actions are deliberate and calculated.

### Respondent's Response

- 26. By an email dated 21 September 2018, Squire Patton Boggs as legal representative of Cr Bell provided a response to the Complaint as well as to several other current complaints against Cr Bell for similar conduct.
- 27. It is denied that Cr Bell has committed any minor breach.
- 28. In respect to Regulation 7 it is specifically asserted that:
  - a. the allegations of minor breach are not made out and the Panel should dismiss the Complaint;
  - b. there is no evidence in the Complaint that any advantage was obtained or that any detriment occurred;
  - c. Cr Bell considered his statements to be part of a robust public debate;
  - d. Cr Bell at all times had regard to the interests of the Shire's rate payers;
  - e. Cr Bell addressed what he regarded as deficiencies in the existing level of communication between the Council and the ratepayer by providing this information and discussion on an open and accessible social media platform;
  - f. Cr Bell is of the view that this Complaint and other complaints made are a targeted approach by the CEO who is attempting to prevent him from raising legitimate queries and concerns about Shire operations;
- 29. In respect to Regulation 9 it is argued that the Facebook posts do not fall within the prohibitions in regulation 9 and cannot be reasonably considered to be "*a task that contributes to the administration of the local government*". The Post is simply a statement made on an individual's social media site on current matters involving the Council. It is not the intention of regulation 9 to prevent such statements.
- 30. In respect to Regulation 10 it is asserted that there is no evidence of any "*direction*" in the Complaint and the Respondent confirms no "*direction*" took place.
- 31. In addition, it is asserted that the Complaint contains the following errors:
  - a. Cr Bell's Facebook page was not established after his election as a councillor, but prior to this time and was used throughout his election campaign;
  - b. Cr Bell denies that he been requested on several occasion to modify his behaviour by the Shire President and other Councillors; and
  - c. Cr Bell asserts that in WALGA training he was not advised that his Facebook activity may be in breach of the Regulations.
- 32. The Panel notes that the response does not otherwise address the specific comments made by Cr Bell.



## **Panel's Consideration**

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

33. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard:
- a. Cr Bell was a councillor at the time of the alleged breach and the time of the determination; and
  - b. Cr Bell made use of his office as Council member of the Shire;
  - c. when viewed objectively, such use was an improper use of Cr Bell'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 Bell engaged in the conduct in the belief that detriment would be suffered by another person.

### **Cr Bell a Councillor at the relevant times**

34. Cr Bell was a councillor at the time of the alleged breach and at the date the Panel considered the Complaint.

### **Cr Bell made use of his office as Council member of the Shire**

35. The Post and Response have posted and made on Cr Bell's Councillor Facebook profile.
36. Cr Bell is clearly identified as "Benjamin Bell – Councillor for Toodyay Shire" and is commenting on Shire employees.
37. Given the above, the Panel finds, to the required standard, that any reasonable person would conclude that Cr Bell was acting in his role as councillor and therefore making use of his office as a council member.
38. This element is met.

### **Cr Bell's use was improper**

39. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>9</sup>. 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.
40. 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<sup>10</sup>.
41. 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.
42. The Shire has a Code of Conduct adopted 18 October 2007 ("**the Code**") which prescribes guidelines for dealing with others including the following specific provisions:
- a. **"1.3 Exercise Fairness and Impartiality**

<sup>9</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>10</sup> *Chew v R* [1992] HCA 18



*We will perform all our duties impartially and in the best interests of the Shire, uninfluenced by fear or favour. .... We will conduct our business respectfully, courteously and fairly. We will refrain from any form of conduct which may cause any reasonable person unwarranted offence or embarrassment...."*

**b. "3.1 Our Shire Relationships**

*We will all work together courteously and effectively as part of the Shire team. Our teamwork will be based on our mutual respect for each other and our committed co-operation to achieve the Shire's goals and implement its strategies. In all our official dealings with each other we will be frank and honest and always endeavour to resolve any serious conflict through discussion. If necessary, this can be facilitated by either the Shire President, Deputy Shire President and/or the Chief Executive Officer. To achieve this teamwork, all elected members will:*

*.....*

*c) refrain from publicly criticising staff in a way that casts aspersions on their professional competence and credibility;*

*.....*

*At the same time, staff will recognise that elected members' views and opinions often reflect valid community viewpoints that should be considered in conjunction with professional opinion. Staff will therefore make every effort to assist elected members in the performance of their role, and to achieve the satisfactory resolution of issues that may arise in the performance of their official role. "*

**c. "3.6 Avoid Derogatory Statements**

*We will not make any allegations that are derogatory or improper. We will always act in the best interests of the Shire and refrain from any type of communication, in our public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment. When we are uncertain about the probable impact of our communications we should seek access to legal advice."*

43. The role of a councillor includes "representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district"<sup>11</sup>.
44. Cr Bell asserts that he at all times had regard to the interests of Shire ratepayers and that the Post was part of "robust public discussion". This is not a persuasive argument.
45. Although rate payers are mentioned in passing, the contents and tone of the Post indicate that Cr Bell was unhappy with the CEO's actions and wished to "vent" on Facebook.
46. There are several phrases used that are unnecessarily accusatory and inflammatory and include derogatory comments regarding the CEO, another Councillor ("Cr T") as well as the Council in general.
47. In particular, the phrases "appalling abuse of power", "extreme level of censorship", "no valid reason", "I would suggest that it's an ego thing", "the more they seek to avoid

<sup>11</sup> Treby and Local Government Standards Panel [2010] WASAT 81 at [27] and Hipkins and Local Government Standards Panel [2014] WASAT 48 at [8] to [11]

- answers (sic), the more they are hiding.*” are provocative in nature and appear to be seeking an outraged response.
48. It is possible to provide information to community members in a manner which does not outright criticise the Shire or Shire employees, is not inflammatory and not in breach of the Code.
49. The very negative and specific assertions regarding the actions of the CEO can be seen to cast aspersions on the CEO’s competence and credibility in breach of clause 3.1 of the Code.
50. The comments regarding the CEO and Cr T can also be seen as being derogatory and improper in breach of clause 3.6 of the Code.
51. Further, Cr Bell’s comment of “*yes, yes, yes – I can hear the threats of adverse reflection*” clearly indicate that he is aware that such language and comments were not appropriate and demonstrate his unwillingness to comply with the Code and the Regulations.
52. There is no acknowledgement by Cr Bell that there may have been a reasonable explanation for not including several of his questions in the Agenda, the implication being that Cr Bell is being personally persecuted and censored.
53. The overall tone of the Post is negative, critical and derogatory and does not reflect the standards of behaviour expected of an Elected Member in a public forum. Public Facebook posts are not an appropriate forum to criticise the CEO, other Councillors or the Shire in such specific and derogatory terms. The Post goes beyond simple disagreement or public discussion.
54. In this case, the Panel finds to the required standard that the Posts by Cr Bell are improper in that they:
- are in breach of the Code;
  - are of such a nature that a reasonable individual would consider the same to be inappropriate and not in keeping with the conduct that would be expected of a councillor; and
  - are deserving of a penalty.
55. This element is therefore met.
- Cr Bell intended detriment to be suffered by another person
56. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
57. It is not necessary to find whether any detriment was actually suffered<sup>12</sup>, but an intent to cause such detriment must be established.
58. The Post specifically mentions the CEO in a negative manner several times and takes an aggressive stance which accuses the CEO of:
- operating outside his delegated authority;
  - having a propensity to misinterpret the Act and policies; and
  - having a natural inclination to incorrectly apply rules and policies.

<sup>12</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



59. The Panel finds to the required standard that the only reasonable interpretation of such comments was an intention to denigrate and cause humiliation to the CEO.
60. Further, when discussing Cr T Cr Bell states that:
  - a. such councillor's actions indicate that the Shire is "*out of control*" and does not "*give a damn at all about rate payers*"; and
  - b. such councillor was being negative and was commencing a "*witch hunt*"; and
  - c. such councillor was not representing the community by his actions.
61. A reasonable person would infer that the intention of such comments was to denigrate or embarrass Cr T by suggesting he was not acting properly in his capacity as an elected member.
62. The Panel finds that it is more likely than not that the Post was intended by Cr Bell to cause a detriment to the CEO and Cr T.
63. This element is met.

#### Conclusion

64. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

#### **Regulation 9**

65. To make a finding of a minor breach of regulation 9 of the Regulations the Panel must be satisfied that:
  - a. Cr Bell was a councillor at the time of the alleged breach and at the time the determination was made; and
  - b. it is more likely than not that:
    - i. Cr Bell 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. that such taking on, involvement or participation contributed something to the administration of the local government;
    - iii. that such taking on, involvement or participation was not done as part of the deliberations at a council meeting; and
    - iv. that the Shire or CEO did not authorise such taking on, involvement or participation<sup>13</sup>.

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

66. Cr Bell was a councillor at the time of the alleged breach and at the time the Panel considered the Complaint.

#### Did Cr Bell take on the performance of an administrative function of the Shire

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



67. The Act distinguishes between the roles of council and the staff employed by the local government, or the “administration”. Local governments are bodies corporate<sup>14</sup> of which the council is the governing body.<sup>15</sup>
68. The role of council includes making local laws, overseeing the allocation of the local government’s finances and resources and determining its policies.<sup>16</sup> The role of councillors is to represent the interests of electors, ratepayers and residents of the district.<sup>17</sup> The administration advises councillors to assist in their decision-making and implements policies determined by council and council’s other decisions.
69. The Complaint does not specify how Cr Bell’s Facebook Post could constitute an administrative function of the Shire.
70. The Panel finds to the required standard that nothing in the Post can be properly construed as an attempt by Cr Bell to perform an administrative function of the Shire.
71. This element is not met.

Did any taking on, involvement or participation contribute to the administration of the Shire

72. In order to “contribute” the action must “play a part in the achievement of a result”<sup>18</sup>.
73. Cr Bell’s Facebook Post cannot be reasonably said to be contributing anything to the administration of the Shire or to achieving any particular result.
74. The Panel finds to the required standard that Cr Bell did not contribute to the administration of the Shire.
75. This element is not met.

Was the taking on, involvement or participation undertaken as part of the deliberations at a council meeting AND was the taking on, involvement or participation authorised by the Shire or the CEO

76. As the above elements are not met, it is unnecessary to consider these elements of regulation 9.

Conclusion

77. Given the above, the elements required to find a breach of regulation 9(1) of the Regulations have not been met.

**Regulation 10(1)(a)**

78. To make a finding of a minor breach of regulation 10(1)(a) of the Regulations the Panel must be satisfied that it is more likely than not that:
  - a. Cr Bell was a councillor at the time of the alleged breach;
  - b. Cr Bell gave or tried or made an effort to give a direction, order or command to another person, who is an employee of his or her local government; and
  - c. such a direction or an order or command was:

<sup>14</sup> Section 2.5(2) of the Act

<sup>15</sup> Section 2.6(1) of the Act

<sup>16</sup> Sections 3.51 and 2.7(2) of the Act

<sup>17</sup> Section 2.10(a) of the Act

<sup>18</sup> Yates and Local Government Standards Panel [2012] WASAT at 56



- i. to do or not to do something in the other person's capacity as a local government employee; and
- ii. not part of anything that the councillor did as part of the deliberations at a council or committee meeting.

#### Capacity of Cr Bell as Councillor

79. It is established that Cr Bell was a councillor at the time of the incident.

#### Cr Bell gave or tried or made an effort to give a direction or an order or command to another person, who is an employee of his or her local government

80. The posts in question are public Facebook posts open to any person following Cr Bell's Facebook pages.
81. No comments in the Post can reasonably be seen to be a "*direction, order or command*" to any employee of the Shire to undertake any task.
82. The Panel finds to the required standard that Cr Bell did not give or attempt to give "*direction, order or command*" to any employee of the Shire to undertake any task.
83. This element is not met.

#### Any direction or an order or command was to do or not to do something in the other person's capacity as a local government employee and was not part of anything that the councillor did as part of the deliberations at a council or committee meeting

84. As no direction took place it is unnecessary to consider the further elements of regulation 10(1)(a).

#### Conclusion

85. The elements required to find a breach of regulation 10(1)(a) of the Regulations have not been met.

#### **Regulation 10(3)**

86. To make a finding of a minor breach of regulation 10(3)(a) of the Regulations the Panel must be satisfied that:
  - a. Cr Bell was a councillor and was acting in his capacity as a councillor at the time of the alleged conduct;
  - b. Cr Bell was attending a council meeting, committee meeting or other organised event at the time of the alleged conduct;
  - c. members of the public were present when the alleged conduct occurred; and
  - d. Cr Bell made comments that state or imply that the government employee was incompetent or dishonest.
87. The regulation is intended prevent councillor from using their position to publicly criticise local government employees<sup>19</sup>. The nature of the Regulation is that the public must hear, or be otherwise aware of, the criticism.

<sup>19</sup> *Hargreaves and Local Government Standards Panel [2008] WASAT 300*



Capacity of Cr Bell as Councillor

88. As noted above, Cr Bell was a councillor at the time of the alleged breach and was acting in his capacity as a councillor when making the Posts.

Cr Bell was attending a council meeting, committee meeting or other organised event in front of the public

89. The conduct in question did not occur while attending a council meeting, committee meeting or other organised event as required by this sub-regulation.

90. This element is not met.

The comments made state or imply that the government employee was incompetent or dishonest

91. As the above element cannot be met it is not necessary to consider this element.

Conclusion

92. Given the above, the elements required to find a breach of regulation 10(3) of the Regulations have not been met.

**Panel's Finding**

93. Cr Bell did commit one breach of Regulation 7(1)(b).

94. Cr Bell did not commit a breach of Regulation 9 or Regulation 10.

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)