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## Local Government Standards Panel

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Complaint Number	SP 65 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 24 July 2018 relating to rate rises 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 24 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 24 July 2018 provided by Mr Stan Scott.
18. In his letter of complaint the Mr Scott alleges that Cr Bell has breached regulation 7, regulation 9 and regulation 10 by making a Facebook Post on 24 July 2018 (**“the Post”**) regarding proposed rate rises of the Shire and the CEO’s involvement in such rate rises 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.

<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

## The Specifics of the Complaint

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

- a. **The Post**– posted 24 July 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page

*“WARNING: The following post contains information that most people in the Shire of Toodyay may find offensive.*

*The CEO is about to screw you over and he appears completely unapologetic about it.*

*Despite all Councillors agreeing at last month’s Council Meeting that the MAXIMUM rate increase required this year to fund everything the Shire wanted to do (including building the pool AND multi-use courts, new cars for staff etc etc) was 0.9%, at tonight’s meeting the CEO is proposing that rates rise by 2.2%.*

*2.2%*

*Oh, and I should point out now that the CEO is misleading you in this matter too.*

*For those of you who live in town, the CEO is actually seeking to have your rates rise by 2.6% this year.*

*And for people living on rural residential blocks, the CEO is seeking to increase your rates this year by an unbelievable 3.4%*

*Let’s be absolutely clear – any, and I mean any, increase in rates this year is not being driven by economic factors but rather by the Shire’s desire to rake in more cash.*

*This is a cash grab by the CEO. Pure and simple.*

*And they can’t say that this proposed increase has anything to do with the Rec Centre grant because the cost of building the Rec Centre was factored into the 0.9% rate increase proposed at last month’s meeting.*

*So, the entire Council agreed last month that we can deliver all the Shire services AND build the pool and multi-use courts via a rate rise of not more than 0.9%.*

*You can see the game the Shire administration is playing here, can’t you? How does one get a 0.9% rate rise through Council? Easy – propose a 2.2% increase but then appear to compromise by agreeing that you can scrape by with a 0.9% rate rise.*

*That way Councillors feel happy that they have delivered for the people of Toodyay by voting down the 2.2% rate increase and, instead, approving a modest 0.9% rate increase instead. So, it’s a win for the people, yes?*

*No – sorry, but any increase in rates is not a win at all because it will only place further financial pressure on the household budgets of our community at a time when many can least afford it.*

*Remember, the Shire only spends about \$1 million on community services each year, and the Shire is not proposing to increase its spending on community services by any significant amount this year either. That means that*

*more than 80% of the rates you pay to the Shire this year will be spent on areas other than community services.*

*So where is the extra money the CEO is asking you to pay in rates going?*

*I can tell you that is not for the Shire's spending to keep pace with inflation, as the Shire's costs are anticipated rise by less than 1% this year according to the Local Government Agency. And it's not related to the Rec Centre funding because that was already in the budget when councillors like Cr. Welburn and Chitty spoke passionately at last month's meeting in support of a 0.9% rate rise.*

*And the thing that annoys me almost as much as the Shire looking to sting rate payers with an unjustified rate rise this year is that under the "Financial Implications" section in the Agenda related to this proposed rate rise it completely ignores that implications any rate rise may have on the community.*

*For example, there is no acknowledgement by the CEO that many people haven't had a pay rise for quite some time now or that the Western Australian economy is stagnate or in recession. Nor does the CEO acknowledge that other governments at all levels in Australia are desperately seeking to reduce their spending because they know that times are tough and money is tight.*

*In proposing the rate rises include in this month's council agenda, the CEO appears to be completely ignoring the Western Australian Minister of Local Government's statement to he expects that all local governments show restraint this year in terms of rate rises given, in the Minister's own words, the current tough economic climate.*

*The shadow local government minister echoed this sentiment by stating that "councils are obviously not in tune with the difficulties of ratepayers if they're increasing rates more than inflation".*

*So, my response the CEO's proposal of a 2.6% rate rise this year for those living in town and a 3.4% rate for those living on rural residential block? In the words of Darryl Kerrigan in The Castle, "tell him he's dreaming" "*

22. The Post also included a meme image of Darryl Kerrigan of the Castle with the caption "Tell him he's dreaming".
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. 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;
  - c. 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 Posts as a Council member;
    - iii. the office of a Council member was used improperly; and
    - iv. he used his office improperly to disadvantage the Local Government and the CEO.



- d. the posts caused considerable actual damage to the reputation of the Council and the CEO; and
  - e. due to the prior complaints lodged against Cr Bell he should have been fully aware that the same was a breach of the Regulations and of the likely consequences.
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 provided 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; and
  - 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 as other current complaints 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 Post does 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 same 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 in the Post.

### **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 was made on Cr Bell's Councillor Facebook profile.
36. Cr is clearly identified as "Benjamin Bell – Councillor for Toodyay Shire" and is commenting on Shire matters and a Shire employee.
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**

*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*

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

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

*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. Although the issues of rates and potential rate rises is of great importance and interest to community members, it is difficult for the Panel to consider this Post as anything but intentional public criticism of the Shire and the CEO.
45. In particular, the following phrases disparage the motives of the CEO and cast aspersions on his competence:
  - a. *“The CEO is about to screw you over and he appears completely unapologetic about it.”;*
  - b. *“... the CEO is misleading you in this matter too.”;*
  - c. *“.....any increase in rates is not being driven by economic factors but rather by the Shire’s desire to rake in more cash.”;*
  - d. *“This is a cash grab by the CEO. Pure and simple.”*
  - e. *“You can see the game the Shire administration is playing here...”*
46. Further, there are several comments that suggest that the CEO is ignoring the financial implications of a rate rise in the community and the directives of the Minister in relation to rate rises.
47. The Post must also be considered in the context that, although the CEO and Shire administration may propose a certain level of increase in rates, it is the Elected Members who vote on the same.
48. The Post appears to be deliberately drafted in a manner that is misleading and is intended to create community outrage and a public backlash, in particular against the CEO.
49. The very negative and specific assertions regarding the actions of the CEO can be regarded as casting aspersions on the CEO’s competence and credibility in breach of clause 3.1 of the Code. Further, such comments are likely to cause unwarranted embarrassment or offence in breach of clause 3.6 of the Code.
50. The Panel considers that the Post is inappropriate, derogatory and does not reflect the standards of behaviour expected of an Elected Member.
51. In this case, the Panel finds to the required standard that that the Posts by Cr Bell are improper in that they:

<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]



- a. are in breach of the Code;
- b. 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
- c. are deserving of a penalty.

52. This element is therefore met.

Cr Bell intended detriment to be suffered by another person

- 53. "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.
- 54. 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.
- 55. The Post specifically accuses the CEO of wrongdoing in a public and inflammatory manner.
- 56. Cr Bell's argument that his posts were part of robust public debate are not convincing. The Post constitutes a very public accusation and condemnation of the CEO and the Shire administration. It does not invite discussion or consideration.
- 57. 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 by suggesting he was acting in an unethical manner.
- 58. 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.
- 59. This element is met.

Conclusion

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

**Regulation 9**

- 61. 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;

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



- 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

62. 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

63. 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>
64. 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.
65. The Complaint does not specify how the Post could constitute an administrative function of the Shire.
66. 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.
67. This element is not met.

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

68. In order to “contribute” the action must “play a part in the achievement of a result”<sup>18</sup>.
69. Cr Bell’s Facebook Post cannot be reasonably said to be contributing anything to the administration of the Shire or in achieving any particular result.
70. The Panel finds to the required standard that Cr Bell did not contribute to the administration of the Shire.
71. 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

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

Conclusion

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

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

<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



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

74. 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:
    - 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

75. 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

76. The Post is public and open to any person following Cr Bell's Facebook page.
77. 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.
78. 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.
79. 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

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

#### Conclusion

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

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

82. 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.



83. 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.

Capacity of Cr Bell as Councillor

84. 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

85. The conduct in question did not occur while attending a council meeting, committee meeting or other organised event but by Facebook post.

86. This element is not met.

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

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

Conclusion

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

**Panel's Finding**

89. Cr Bell did commit one breach of Regulation 7(1)(b).  
90. Cr Bell did not commit a breach of Regulation 9 or Regulation 10.

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)

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