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## Local Government Standards Panel

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Complaint Number	SP 2018-083
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

#### 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 the Act and regulation 9 or regulation 10 of the Regulations,when Cr Bell made various Facebook posts on 26 August 2018 relating to the actions of Mr Stan Scott the Chief Executive Officer of the Shire (**"the CEO"**) in relation to answering Cr Bell's questions and the budget of the Shire 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 31 August 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 31 August 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 two Facebook Posts on 26 August 2018 (**“the Posts”**) regarding proposed rate rises of the Shire and the CEO’s alleged 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.

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<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 posts the subject of the Complaint are as follows:

- a. **Post 1** – posted 26 August 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page:

*“ Did you know that under the Shire of Toodyay's Standing Orders, the CEO does NOT have the authority to determine whether a question submitted by a Councillor gets included in the Agenda of a Council Meeting.*

*That's right - the CEO has absolutely no power at all to decide which questions a Councillor may or may not submit to a Council Meeting. And why should a CEO get to make that call anyway - it is a Council Meeting after all, not a CEO meeting.*

*For this coming week's meeting, the CEO refused to include 12 of my 15 questions despite the CEO having no power at all to make that call.*

*Given that the removal of these questions from the Agenda by the CEO is against the Shire' Standing Orders, the only correct course of action is for the Shire President to ensure that my questions be included in the Agenda. Anything less than this by the President would mean that both the Shire President and CEO would be in breach of the Shire of Toodyay's Standing Orders.”*

- b. **Post 2** - posted 26 August 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page:

*“ Did you know . .*

*1. There appears to be \$1 million in last year's budget that currently can't be accounted for at present. I asked the CEO where this money may be, but he ruled my question Out of Order and will not answer it. So, my question to the CEO remains . . . where did this \$1 million go last year?*

*2. There appears to be \$2.35 million that currently can't be accounted for over the past 4 years. Again, when I presented these figures to the CEO last week and asked for his explanation (hoping that I had made a simple mistake with the maths), the CEO ruled the question Out of Order without any further explanation. That's quite a lot of money and Council have no idea where it is at the moment*

*3. The CEO advised Councillors to ignore the petition signed by the Toodyay community regarding this year's rates. Seriously, you want Councillors to ignore the community? The law clearly states that the first role of a Councillor is “represent the interest of rate payers and residents of the district”. So, the CEO's advice to ignore to petition means he is suggesting each Councillor to act contrary to the law. Probably not the best advice I would suggest*

*4. The Strategic Community Plan submitted to Council by the CEO in June 2018 fails to comply with the Local Government Regulations and will need to be redrafted*

*5. The CEO mislead Council at a recent Council meeting by claiming that the draft Communication's Policy that he wanted Council to approve was copied from the City of Joondalup's policy. In fact, the City of Joondalup has no such policy at all*



*6. Not even the Shire President sees (or its told) what the content of the Shire's Newsletter is before it gets sent out to the community.*

*Hmmm . . .”*

22. Post 2 also included an image of a train wreck.
23. In the Complaint, Mr Scott also provided a copy of the Posts and the various public comments following the Posts.
24. Mr Scott also makes the following assertions regarding the Complaint:
  - a. in the Posts Cr Bell goes very close to accusing the administration of fraud and misappropriation. There is no evidence to support these allegations;
  - b. Cr Bell did not attend 2 of the 4 budget forums and did not attend the last occurring monthly forum;
  - c. there are a number of ways in which legitimate concerns and questions may be raised:
    - i. by councillors when they attend budget forums;
    - ii. by councillors during the question and answer session with the CEO that is available every forum; and
    - iii. by referral in an orderly fashion to the audit committee and the Manager of Corporate Services will provide an explanation;
  - d. the term “unaccounted for” suggests that fraud or misappropriation has occurred;
  - e. if there is a genuine belief of fraud or misappropriation then it can be referred directly to the Corruption and Crime Commission;
  - f. Cr Bell attempted to disguise his claims of fraud or misappropriation as a question on notice, so that his claims would form part of the permanent public record in the Shire Minutes;
  - g. when Cr Bell's questions were excluded as not being in compliance with the Shire of Toodyay Standing Orders Local Law, he published his claims on Facebook together with a number of extravagant claims, dressed up as questions that were also properly excluded;
  - h. the purpose of the Posts seems to be to denigrate the CEO and the administration of the Shire and to put pressure on fellow councillors to ignore the CEO's advice;
  - i. Cr Bell meets the requirements for a breach of regulation 7 as:
    - i. he made the Posts as a Council member;
    - ii. the office of a Council member was used improperly; and
    - iii. he used his office improperly to disadvantage the Local Government and the CEO;
  - j. the Posts caused considerable actual damage to the reputation of the Council and the CEO; and
  - k. 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 made 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 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 ratepayers by providing this information and discussion on an open and accessible social media platform; and
  - f. Cr Bell is of the view that this Complaint and other prior 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 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*”. They are simply statements 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 the only paragraph that could be assumed to be a direction is the following:  

*“Given that the removal of these questions from the Agenda by the CEO is against the Shire’ Standing Orders, the only correct course of action is for the Shire President to ensure that my questions be included in the Agenda. Anything less than this by the President would mean that both the Shire President and CEO would be in breach of the Shire of Toodyay’s Standing Orders.”*
31. Such paragraph does not constitute a breach of Regulation 10 as:
  - a. the Shire President is not an employee of the Shire but an elected representative;
  - b. the statement is not “directing a person who is a local government employee to do or not do anything in the person’s capacity as a local government employee”. The statement does not request or require the employees to take, or not to take an action, but alerts them to a particular factual instance; and
  - c. the statement does not contain any “threat or promise of a reward”.
32. 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.
33. The Panel notes that the response does not otherwise address the specific comments made by Cr Bell.

### **Panel’s Consideration**

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

34. 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 was a Councillor at the relevant times

35. 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

36. The Post was made on Cr Bell's Councillor Facebook profile.
37. Cr Bell is clearly identified as "Benjamin Bell – Councillor for Toodyay Shire" and is commenting on Shire matters and employees.
38. 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.
39. This element is met.

Cr Bell's use was improper

40. 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.
41. 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>.
42. 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.
43. 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;*

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

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



.....

*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."*

44. 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>.
45. If a Councillor believes that a question on notice has been incorrectly ruled out of order by the CEO, then Facebook is not the appropriate forum to publicly:
- disagree with that ruling/decision; or
  - restate those questions.
46. Post 1 is also misleading in content. Part 6 of the Shire of Toodyay Standing Orders Local Law 2008 reads as follows:
- "6.1 Questions on notice**
- (1) A Member who wishes to ask a question at a meeting of the Council is to give to the CEO written notice of the text of the question at least 6 clear working days before the meeting.*
  - (2) If the CEO considers that the question breaches or may breach these Standing Orders or any other law—*
    - (a) the CEO is to refer the question to the President;*
    - (b) the President is to exclude the question if he or she concurs with the view of the CEO; and*
    - (c) if the question is excluded, the CEO is to give all Members, as soon as practicable but not later than the next ordinary meeting, the reasons for the exclusion."*
47. This provision clearly allows the CEO to refer questions on notice to the President for exclusion. The CEO provides notice to the councillor as to the exclusion, however, the Shire President actually makes such decision. Despite this, the CEO clearly has a meaningful role in deciding the questions on notice that are to be included in the agenda.
48. As such, the Panel finds that is it more likely than not that Post 1 is misleading and was purposefully drafted to make it appear that the CEO had acted wrongfully.

<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]



49. In addition, the accusations contained in Post 2 are very serious and appear to have been raised with reckless disregard as to any accuracy and without a proper basis.
50. It is especially noted by the Panel that the Shire President has made a comment in response to Post 2 expressly noting that some of Cr Bell's comments were incorrect, provided without evidence and, further, that Cr Bell is a member of the Audit Committee to which he could have forwarded any discrepancies to instigate a full investigation.
51. This comment provoked a substantial number of responses and justifications from Cr Bell as to his questions and actions. This includes the following comments:

*"That's why I asked Stan to review my spreadsheet. Am I missing a cost code (unlikely as that is). Or was money spent on other things but incorrectly included in budget under staff costs.*

*But rather than the CEO helping me try to understand the where the funds may have been spent, he simply stated that he wasn't going to answer my question*

*It is the role of a councillor to oversee how the Shire spends rate payers money yes? Well that is all I am trying to do. I even provided all councillors with a copy of my spreadsheet so that they could review it too. "*
52. The Shire President further responded by noting the correct manner to raise such queries or concerns.
53. The comments referred to in paragraph 51 above indicate that Cr Bell did not have a solid basis for making the accusations as to missing moneys apart from:
  - a. his own calculations, which he admitted may not be correct and was seeking input on; and
  - b. his personal suspicions due to the fact the CEO did not include all his questions.
54. Further, the fact that Cr Bell did not attend several of the relevant budget forums is highly relevant to the context as it indicates that:
  - a. Cr Bell was not necessarily in possession of all the relevant information before making such comments; and
  - b. it was more likely than not that such questions were correctly ruled out of order.
55. The Panel finds that Post 2 was made in such a manner that a reasonable person would assume that money was missing from the Shire, that the CEO was substantially involved in the same, that the CEO was not operating within the Local Government Regulations and, further, that the CEO was misleading the Council and was operating without oversight.
56. The Panel again reiterates to Cr Bell that Facebook is not the forum for raising criticisms and accusations against the CEO or the Shire. Neither is it the place to vent frustrations as to internal administrative matters (such as the process for accepting questions on notice).
57. The Panel finds it is more likely than not that Post 2 casts aspersions on the CEO's honesty, competence and credibility in breach of clause 3.1 of the Code. Further the comments are highly likely to embarrass or offend in breach of clause 3.6 of the Code.
58. The Panel considers that Post 2 is misleading, accuses the CEO and Shire of wrongdoing without sufficient evidence and does not conform to the standards of communication or behaviour expected of an Elected Member.



59. In this case, the Panel finds it is more likely than not that the Posts by Cr Bell are improper in that they:
- 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.

60. This element is therefore met.

Cr Bell intended detriment to be suffered by another person

61. “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.

62. 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.

63. Cr Bell asserts that he at all times had regard to the interests of Shire ratepayers. However, the Panel finds that it is more likely than not that the purpose of the Posts was not to share accurate information but to vent frustrations which Cr Bell considered to be caused by the CEO.

64. Further, Cr Bell’s argument that his posts were part of robust public debate is unconvincing. The Post constitutes public and serious accusations against the CEO which cannot be justified and invite condemnation, not discussion.

65. The Panel finds to the required standard that the only reasonable interpretation of Post 1 and Post 2 was an intention to denigrate and cause humiliation to the CEO by suggesting he was acting in an unethical manner.

66. 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.

67. This element is met.

Conclusion

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

**Regulation 9**

69. 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;

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



- 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

70. 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

71. 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>

72. 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.

73. The Complaint does not specify how the Posts could constitute an administrative function of the Shire.

74. The Panel finds to the required standard that nothing in the Posts can be properly construed as an attempt by Cr Bell to perform an administrative function of the Shire.

75. This element is not met.

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

76. In order to “contribute” the action must “play a part in the achievement of a result”<sup>18</sup>.

77. Cr Bell’s Facebook Posts cannot be reasonably said to be contributing anything to the administration of the Shire or in achieving any particular result.

78. The Panel finds to the required standard that Cr Bell did not contribute to the administration of the Shire.

79. 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

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

#### Conclusion

81. 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)**

82. 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;
  - 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

83. 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

84. Post 1 is public and open to any person following Cr Bell's Facebook page.
85. 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. Post 1 may contain a suggestion to the Shire President. However, this does not constitute a breach of Regulation 10(1)(a).
86. 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.
87. 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

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

#### Conclusion

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

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

90. 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.
91. 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

92. 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

93. The conduct in question did not occur while attending a council meeting, committee meeting or other organised event but by Facebook post.
94. This element is not met.

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

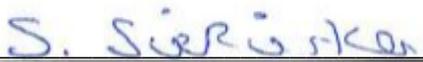
95. As the above element cannot be met it is not necessary to consider this element.

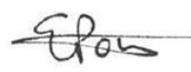
Conclusion

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

**Panel's Finding**

97. Cr Bell did commit one breach of Regulation 7(1)(b).
98. 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*