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## Local Government Standards Panel

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Complaint Number	SP 2018-092
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 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 posts on 30 September 2018 relating to the allegation of Mr Stan Scott, the Chief Executive Officer of the Shire (**"the CEO"**) commencing legal actions on behalf of the Shire as further described in paragraph 17 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act 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 10**

13. Regulation 10 regulates councillor’s interactions with local government employees.
14. 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.”*



15. 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**

16. On 2 October 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 2 October provided by Mr Stan Scott.
17. In his letter of complaint Mr Scott alleges that Cr Bell has breached regulation 7 and regulation 10 by making a Facebook Post on 30 September 2018 (**“the Post”**) regarding the CEO’s alleged involvement in initiating legal actions on behalf of the Shire as set out in paragraph 20 (**“the Complaint”**).
18. The Panel convened on 7 December 2018 to consider the Complaint.
19. 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**

20. The relevant Facebook posts the subject of the Complaint is as follows:
- a. **The Post** – posted 30 September 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page:

“ *FIVE . . .*

*that is the number of separate legal actions the CEO of Toodyay has initiated against me personally over the past 3 months, all designed to shut down my Facebook page and to prevent me from being able to communicate to the community.*

*What was the outcome of these five separate legal actions? We don’t know yet – it is still in the hands of the Department.*

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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



*It should be remembered that the CEO has spent something approaching \$800,000 of rate payer's money over the past few years initiating legal action that ultimately failed.*

*So, if you have wondered why I may have been a little quiet on Facebook over the past month or so, it is because I have been spending my days addressing the frivolous legal actions against me from the CEO.*

*Legal paperwork now done – I can continue to focus on serving the Toodyay community including keeping people informed via this Facebook page. ”*

21. In the Complaint, Mr Scott also provided a copy of the Post and the various public comments following the Post.
22. Mr Scott also makes the following assertions regarding the Complaint:
  - a. in the Post Cr Bell seeks to denigrate the CEO in performing his role as complaints officer and fulfilling his obligations under the Act;
  - b. the Post elicited over 20 replies from the community including references to the CEO's impending performance review and potential contract renewal;
  - c. Cr Bell deliberately sought to misrepresent complaints to the Standard's Panel as legal actions and falsely suggested or inferred that this will result in legal costs to be paid by the Shire of Toodyay;
  - d. Cr Bell appears to have no respect for either the Complaints process or the Standards Panel;
  - e. 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 in relation to the CEO's employment, performance review and contract;
  - f. 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;
  - g. the posts caused considerable actual damage to the reputation of the Council and the CEO; and
  - h. 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.
23. 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 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**

24. By an email dated 23 October 2018, Squire Patton Boggs as legal representative of Cr Bell provided a response to the Complaint.
25. It is denied that Cr Bell has committed any minor breach.
26. In respect to Regulation 7 it is specifically asserted that:
  - a. the Complaint largely replicates the prior 5 complaints against Cr Bell;
  - b. the Complaint is without foundation and does not establish breaches of Regulations 7 and 10;
  - c. the statements in the complaint are of a generic, vague and ambiguous nature with no actual basis or evidence provided for the accusations made; and
  - d. the Panel should find that the allegation is not substantiated and dismiss the Complaint;
27. In regard to Regulation 7 the following arguments are made:
  - a. there is no evidence that any advantage was obtained or that any detriment occurred in the Complaint;
  - b. at no time was there any intention by Cr Bell for any "advantage" or "detriment" to be secured;
  - 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. specifically, 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; and
  - f. Cr Bell is of the view that this is a targeted approach by the CEO who is attempting to prevent him from raising legitimate queries and concerns about Shire operations;
28. In respect to Regulation 10 it is asserted that:
  - a. it cannot be determined what allegations are made in respect to Regulation 10;



- b. there is no evidence of any “*direction*” in the Complaint details or attachments and, further, no such direction took place; and
  - c. the Post does not contain any statement which:
    - i. is “*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*”. No statement requests or requires the employees to take, or not to take an action; or
    - ii. contains any “threat or promise of a reward”.
29. 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.
30. The Panel notes that the response does not otherwise address the specific text of the Post and following comments/responses made by Cr Bell in regard the public comments on the Post.

### **Panel’s Consideration**

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

31. 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;
  - 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**

32. 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**

33. The Post was made on Cr Bell’s Councillor Facebook profile.
34. Cr Bell is clearly identified as “Benjamin Bell – Councillor for Toodyay Shire” and is commenting on matters directly concerning the Shire.



35. 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.

36. This element is met.

Cr Bell's use was improper

37. 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.

38. 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>.

39. 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.

40. 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 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*

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

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



*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.”*

41. 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>.
42. The Post itself clearly implies that:
  - a. a complaint to the Department regarding Cr Bell is a “legal action”;
  - b. that such actions/complaints are unnecessary, frivolous and will fail; and
  - c. that the CEO has spent \$800,000 on similar failed legal action.
43. Following the Post there are substantial community comments as well as several additional comments by Cr Bell. Of interest are the following comments by Cr Bell:
  - a. **Comment 1** – *“Make that 6 . . . the CEO just started the sixth action against me this week.”*
  - b. **Comment 2** – *“...it's is indeed a rare event that a CEO commences action against a councillor. I understand that our current CEO did do a similar thing to another councillor when he was the CEO of other Shire.”*
  - c. **Comment 3** – *“I am not sure if the CEO is using shire funds for this, as Council only gave him about \$35,000 to use in legal fees for the entire year. There are a number of other legal actions underway by the Shire at present so I suspect this amount of \$35k may be burned through in quick time.”*
  - d. **Comment 4** - *“Actually, the CEO is unable to move funds between items. The Council approves a budget and the CEO can only spend money in strict accordance with this budget. Any overspend by more than \$5,000 (or 10% of the approved budgeted amount) needs to come to council for approval BEFORE the CEO can spend it. To the best of my knowledge, Council has not been asked to approve a legal costs in excess of that contained in the original budget”;*
  - e. **Comment 5** – *██████████ - I was a little surprised (disappointed) that things are heading down this path. The CEO is also the Shire's official Complaint's Officer - that means if the CEO has an issue, he sends his complaint to himself. (I trust that he gives himself a good hearing). I honestly don't think that the other Councillors were aware that the CEO has commenced action against me .....*”
44. The Post is misleading in relation to complaints made pursuant to the Regulations being classified a “legal action” undertaken by the Shire. A complaint is not a legal action as that term is commonly understood. Further, it is not the Shire undertaking the complaint.
45. A complaint may be made by *any* person. Upon receipt of a complaint the complaints officer (in this case the CEO) must deal with the same pursuant to the provisions of the Act. The CEO is entitled to make a complaint against Cr Bell for referral to the Panel in the same manner as any person.
46. The cost of any consideration of a Complaint by the Panel is dealt with in accordance with the terms of the Act and not at the discretion of any local authority.

<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]

47. Cr Bell is encouraged to familiarise himself with the terms of the Act and the Regulations in this regard.
  48. It is also noted, as clarified by members of the public following the Post and eventually conceded by Cr Bell, that the CEO does not have the power to arbitrarily allocate Shire monies to “legal actions” without the Councillors voting for the same in the budget. As such, the Post is also misleading in its implication that the CEO is responsible for choosing to spend such monies.
  49. Further, in Comment 3, Cr Bell confirms he is actually unsure as to whether Shire funds are in fact used in relation to complaints to the Standards Panel.
  50. Given this context, a reasonable person would assume that Cr Bell knew, or ought to have known in his position as an elected official, that the implications that the CEO was:
    - a. undertaking “legal actions” against him; or
    - b. using Shire funds in an unauthorised manner,were false, or at least very misleading, and that Cr Bell was trying to impute that the CEO had an adverse motive for making this Complaint and prior complaints.
  51. Comment 5 is also derogatory in tone and misrepresents the function of the complaints officer of a local authority.
  52. It is hard to see that there is any reasonable argument that Cr Bell was simply attempting to provide information to the community and had the interests of rate payers as his primary concern when such information was incorrect and misleading.
  53. The Panel finds that the Post and several of the subsequent Comments were made in order for Cr Bell to vent his frustration over being the subject of so many complaints, not to provide the community with information. In doing so Cr Bell was in breach of the Code by criticising the CEO and casting aspersions on the CEO’s honesty, competence and credibility.
  54. Although in Comments 3 and 4 Cr Bell does somewhat modify his initial position, he does not go so far as to remove or amend the offending Post.
  55. The Panel considers that the Post is improper as it was knowingly misleading, implies that the CEO is incompetent or acting wrongfully and does not confirm to the standards of behaviour expected of an Elected Member.
  56. In this case, the Panel finds that 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.
  57. This element is therefore met.
- Cr Bell intended detriment to be suffered by another person
58. “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.



59. 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.
60. Given the fact that much of the Post was misleading or incorrect in nature, it is likely that the same was made for the purpose of retaliating against the CEO for making various complaints against Cr Bell.
61. The Panel finds to the required standard that the only reasonable interpretation of the Post was an intention to denigrate and cause humiliation to the CEO by suggesting he was acting in an unauthorised manner.
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.
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 10(1)(a)**

65. 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

66. 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

67. The Post is public and open to any person following Cr Bell's Facebook page.
68. 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.
69. 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.
70. 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

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



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

Conclusion

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

**Regulation 10(3)**

73. 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.

74. The regulation is intended prevent councillor from using their position to publicly criticise local government employees<sup>13</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

75. 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

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

77. This element is not met.

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

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

Conclusion

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

<sup>13</sup> *Hargreaves and Local Government Standards Panel [2008] WASAT 300*



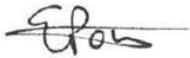
### Panel's Finding

- 80. Cr Bell did commit one breach of Regulation 7(1)(b).
- 81. Cr Bell did not commit a breach of Regulation 10.



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Sheryl Siekierka (Presiding Member)



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Emma Power (Member)



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Paul Kelly (Member)