

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: Local Government Act 1995
File No/s: SP 38 & 39 of 2008
Heard: Determined on the documents
Considered: 8 April 2009
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 38 of 2008

Complainant: Cr Ross Lindsay BROMELL

Council member complained about: Councillor Ian William STUBBS

And

SP 39 of 2008

Complainant: Cr Beverley Joan CLARKE

Council member complained about: Councillor Ian William STUBBS

Regulations allegedly breached: 1 x regulation 7(1)
1 x regulation 10(1)(b)

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SUMMARY OF FINDINGS

The Panel found that Councillor Stubbs committed a breach of regulation 7(1)(b) when he sent the relevant email to the "Busselton-Dunsborough Mail" newspaper and to the "Busselton-Dunsborough Times" newspaper on 12 September 2008

The Panel found that Councillor Stubbs did not commit a breach of regulation 10(1)(b).

FINDINGS & REASONS FOR FINDINGS

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* ("the Act"), and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").

Background to complaints

2. Mr Matthew Smith, the complaints officer of the Shire of Busselton ("Shire") has sent two complaints to the Local Government Standards Panel ("the Panel"). The first complaint (Complaint SP 38 of 2008), dated 24 October 2008, is made by Councillor Bromell. The second complaint (Complaint SP 39 of 2008), dated 31 October 2008, is made by Councillor Clarke.

Information before the Panel

3. The information before the Panel in relation to this matter ("the available information") is described in the following table:

Doc No.	Description
1	Letter from Mathew Smith (the Shire's complaints officer") to the Panel, dated 30 October 2008
2	Complaint SP 38 of 2008, dated 24 October 2008
3	Letter from Mathew Smith (the Shire's complaints officer") to the Panel, dated 3 November 2008
4	Complaint SP 39 of 2008, dated 31 October 2008
5	Panel letter to Councillor Bromell, dated 12 November 2008
6	Panel letter to Councillor Clarke, dated 12 November 2008
7	Councillor Clarke response to Doc No. 6, dated 26 November 2008
8	Councillor Bromell response to Doc No. 5, dated 1 December 2008
9	Panel Notice of Complaints to Councillor Stubbs, dated 9 December 2008
10	Councillor Stubbs response to Doc No. 9, dated 27 January 2009
11	Panel letter to Mathew Smith, dated 19 February 2009
12	Mathew Smith response to Doc No. 11, dated 10 March 2009
13	Copy of pp 54-79 of the minutes of the Shire's OCM of 25 June 2008, including the Shire's Code of Conduct (Policy 037/1) adopted by Council on that date

The available information includes the alleged factual information and the submissions that the Panel has considered before making its findings in this matter.

Preliminary threshold matters

4. The Panel notes that:

- (1) Each of the two complaints is in the form approved by the Minister for Local Government and was made within time.
- (2) There is an allegation or allegations made in or arising under each of the two complaints that Councillor Stubbs, a member of the Shire's council ("Council") at all relevant times, has committed a minor breach under section 5.105(1)(a).
- (3) Accordingly, pursuant to section 5.110(2), the Panel is required to make findings as to whether the minor breach or breaches alleged in each complaint occurred. By virtue of section 5.106, if the Panel makes a finding that a breach has occurred the finding is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur.

Conduct complained about

5. Both of the complainants complain about the same alleged conduct by Councillor Stubbs – that on 12 September 2008 he circulated an email (“the email”) to the other Shire Councillors, the “Busselton-Dunsborough Mail” newspaper and the “Busselton-Dunsborough Times” newspaper. This alleged conduct is referred to in these Reasons as “Councillor Stubbs’s conduct”.

The email consists in effect of 3 emails, being:

- (a) the email itself, being an email sent at 8.01am on 12 September 2008 from Councillor Stubbs to the CEO, with copies sent to “Councillors – Email; MAIL; TIMES”; followed by
- (b) a copy of an email, sent at 9.07am on 11 September 2008 from the CEO to Councillor Stubbs; which followed
- (c) a copy of an email, sent at 8.08am on 11 September 2008 from Councillor Stubbs to the CEO.

The email is now public knowledge. For ease of understanding the events in this matter, the text of these 3 emails follows, in chronological order:

[Text of **email, sent at 8.08am on 11 September 2008** from Councillor Stubbs to the CEO and the other Shire Councillors:]

*“From: Ian Stubbs [mailto:ian.stubbs@busseitonwa.gov.au]
Sent: Thursday, September 11, 2008 8:08 AM
To: Andrew Macnish
Cc: Councillors -- Email
Subject: Jetty*

Hello Andrew,

I reiterate my total dismay at your answer to my question regarding the commencement of work on the jetty.

As you will be aware I have been asking periodically for a report on progress. My objective has been to try and ensure nothing untoward happens to put off (sic) commencement of works this spring/early summer. To hear that works have been put back months because of the state election is quite unbelieveable (sic).

It has always been my belief that the tendered works were being designed so that if the dealings with the state government fell over, the Shire could still go ahead using its contribution and the contribution from BJECA to complete stage 1. This would complete a fair amount of the programmed works and at least get the train up and running. I can recall the estimate for stage 1 was about \$7.6m which coincided with the available funding.

I will try and do some research on this today however my time is limited. I ask if you would check this out with the staff involved and we can make contact again later today or tomorrow.

Ian Stubbs”

[Text of email, sent at 9.07am on 11 September 2008 from the CEO to Councillor Stubbs and the other Shire Councillors:]

"From: Andrew Macnish mailto:Andrew.Macnish@busselton.wa.gov.au]
Sent: Thursday, 11 September 2008 9:07 AM
To: Ian Stubbs
Cc: Councillors - Email
Subject: RE: Jetty

Ian,

I have a full schedule to the end of next week. I will wait until Jenny does the minutes and examine your questions and see what still remains unanswered as I did indicate somewhere amongst your questions (and statements) I would take something on notice as "it could in fact be the case". I suggest if you want researched answers you email the questions well ahead of the Council meetings (you might also care to declare your interests before hand as well as per the standing orders to avoid things like last night). For future reference, I'm not particularly interested in your expressing your total dismay to me when I am half way through my dinner after a Council meeting. Don't do that again.

Andrew"

[Text of email, being the email under consideration, sent at 8.01am on 12 September 2008 from Councillor Stubbs to the CEO, the other Shire Councillors, the "Busselton-Dunsborough Mail" newspaper and the "Busselton-Dunsborough Times" newspaper:]

"From: Ian Stubbs [ian.stubbs@busselton.wa.gov.au]
Sent: Friday, 12 September 2008 8.01 AM
To: Andrew Macnish
Cc: Councillors - Email; MAIL; TIMES
Subject: RE: Jetty

Andrew.....I will do what I like and will completely ignore your threat 'don't do that again'. I have a right to raise issues with you whether at a Councillor's dinner or at any time while I am serving as a Councillor. If you do not like what I have to say... tough! The fact is....you floored me with a reply that was from left field and was totally unexpected As a consequence of your unexpected response to my question, I thought it was quite appropriate to try and generate discussion over dinner. If you did not like it, again I say...tough.

As for your arrogant comments about my declarations of interest, I suggest you read the LG Act. You have inferred I have breached legislation. If you think that way, I am happy to challenge you to take appropriate legal action against me. In other words...put up or shut up.

I also have delight in informing you that I am the only Councillor (I think) that has sent in questions before a Council meeting (since October 2007) so that "researched answers can be given" so please don't get on your high arrogant horse with me.

I note with interest you will examine the jetty issue later rather than sooner. One cannot help but assume you are too focussed (sic) on the Civic Precinct to give proper consideration to other more important issues.

As far as expressing dismay to you.....I would like you to know that I am dismayed about the fact that I get questioned just about every day as to how I can sit back and allow your arrogance and total disrespect for the Busselton community to continue. You only have to read the local papers to realise what the public think of your arrogant comments. Yes

Andrew...I know you don't read Wednesday's paper.... I have heard that several times. I suggest you should...you might learn a thing or two.

Andrew...it saddens me to see the Shire so widely criticized. I am fully aware you have quite a large number of staff that have the Shire at heart. I would sincerely like to see the gap between the Shire (and the Council) and the Community bridged, but I am sorry you do not appear to be doing anything to help make this occur.

I considered asking the Shire President to take disciplinary action against you for your outburst to me through your email. Notwithstanding, I realise this would be a total waste of time so I am sending copies of this email to all Councillors and the local papers. I think it is time your "internal" rudeness was exposed to the public.

*Ian Stubbs
Councillor"*

Each of the complainants was requested to clarify their allegations in this matter, and to provide additional information, and both of them responded.

Complaint SP 38 of 2008 - Councillor Bromell's allegations

6. Three allegations are made by Councillor Bromell in Complaint SP 38 of 2008. They are:

- (1) By circulating the email Councillor Stubbs made improper use of his office as a Council member to cause detriment to the Shire and the CEO, in breach of regulation 7(1)(b) ("allegation (1)").
- (2) By circulating the email Councillor Stubbs attempted to influence, by means of a threat, the CEO's future conduct as the Shire's Chief Executive Officer, in breach of regulation 10(1)(b) ("allegation (2)").
- (3) By circulating the email Councillor Stubbs contravened regulation 3(1)(d) and (g).

In Complaint SP 38 of 2008 Councillor Bromell states his perception of the consequences of Councillor Stubbs' conduct. In his response of 1 December 2008 Councillor Bromell, *inter alia*, provided more information in relation to his belief that Councillor Stubbs' conduct caused detriment to the Shire and the CEO.

Complaint SP 39 of 2008 - Councillor Clarke's allegations

7. Two allegations are made by Councillor Clarke in Complaint SP 39 of 2008. They are the same allegations as allegation (1) and allegation (2). In her response of 26 November 2008 Councillor Clarke, *inter alia*, provided information in relation to her belief that Councillor Stubbs' conduct caused detriment to the Shire and the CEO, and that Councillor Stubbs intended to cause that detriment.

Consolidation of complaints

8. Due to the common ground in the complaints, it is convenient that they be dealt with together so that the relevant issues can be examined and determined and for that reason the Panel decided that a consolidation, or a joint examination, of the complaints is appropriate.

Alleged contravention of regulation 3(1) is not an allegation of minor breach

9. The Panel notes that in his complaint Councillor Bromell expresses his opinion that Councillor Stubbs' conduct contravened regulation 3(1)(d) and (g). The general principles set out in regulation 3(1), while important, are *not* rules of conduct and hence contravention of the general principles is not a minor breach under section 5.105(1)(a).

Procedural fairness matters

10. A *Notice of Complaint* dated 9 December 2008 was sent to Councillor Stubbs. The copies of the documents and material referred to in the Notice were attached to it. The Notice advised Councillor Stubbs of allegation (1) and allegation (2), and invited his response to them. Councillor Stubbs' response is dated 27 January 2009. In his response Councillor Stubbs acknowledges having committed the conduct complained about in this matter, but he denies that such conduct was a contravention of regulation 7(1)(b) or regulation 10(1)(b).

Relevant material facts

11. On the basis of the available information the Panel is satisfied there is sufficient evidence from which it may be concluded, and from which the Panel has concluded and finds, that it is more likely than not that the relevant material facts in this matter are as follows:

- (1) Councillor Stubbs had been the Shire's CEO from 1990 to 1996.
- (2) Following the completion of the Shire's Ordinary Council Meeting held on Wednesday 10th September 2008 the Council, in accordance with its usual practice, hosted a dinner for Councillors and certain senior members of the shire staff.
- (3) During the dinner:
 - (a) topics of informal conversations included the restoration of the Busselton jetty; and
 - (b) Councillor Stubbs, in reference to advice that the CEO had given earlier to Council during the OCM, said to the CEO words to the effect: "*I was totally dismayed at your answer to my question regarding the commencement of work on the jetty.*"
- (4) Between 8.08am on Thursday 11th September 2008 and 8.01am on Friday 12th September 2008, the 3 emails were sent.
- (5) At 8.01am on Friday 12th September 2008 the email under consideration in this matter was sent by Councillor Stubbs to the CEO, and to the other Shire Councillors, the "Busselton-Dunsborough Mail" newspaper and the "Busselton-Dunsborough Times" newspaper.
- (6) Councillor Stubbs was a Council member at 12 September 2008.

- (7) At 12 September 2008 the Shire's then current Code of Conduct was the Code of Conduct (Policy 037/1) adopted by Council on 25 June 2008 ("the Shire's Code of Conduct").

Allegation (1) – alleged breach of regulation 7(1)(b)

12. The Panel now considers allegation (1) and allegation (2) in turn. In relation to allegation (1) it is noted that regulation 7(1)(b) reads:

"A person who is a council member must not make improper use of the person's office as a council member

(b) to cause detriment to the local government or any other person."

Regulation 7 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 7(1)(b) is a minor breach.

Councillor Stubbs' response to allegation (1)

13. Councillor Stubbs' response to allegation (1) is set out in his response of 27 January 2009. As mentioned, Councillor Stubbs acknowledges having committed the conduct complained about in this matter, but he denies that such conduct was a contravention of regulation 7(1)(b). His reasons for this denial are set out in his response of 27 January 2009.

14. In the Panel's view, Councillor Stubbs's reasons for this denial, as set out in his response of 27 January 2009, that are relevant in this matter are as follows in the following passages from his response:

- (1) *"The regulation has three components all of which must be present namely:*
 1. *the use of my office must have been improper;*
 2. *detriment must have been caused; and*
 3. *it must have been my intention to cause detriment."*
- (2) *"As a councillor I have a statutory responsibility to represent the interests of electors, ratepayers and residents of the district and also to facilitate communication between the community and the Council. The issue I raised both in the meeting, at the dinner and in the subject of the correspondence was relevant, widely publicised and directly related to one of the two most significant issues facing the Shire of Busselton at the time."*
- (3) *"The CEO's response I considered to be inappropriate because as the CEO, and an employee of the Shire, it is not appropriate to write in such terms to one of the members of his employer's governing body. It constituted, in my view, insubordination and is inconsistent with his role which includes to advise the Council and ensure that advice and information is available to the Council so that informed decisions can be made by it.*

I do not consider that my conduct in making public the CEO's attitude to a member of his governing body on an issue of such fundamental importance which had been so widely and publically debated both locally and within the state to be an improper use of my position as a Councillor.

To the contrary I consider that the substantial level of public interest in the subject matter and the CEO's view (when read in conjunction with his previously widely published views in the Busselton Dunsborough mail) in relation to the Busselton jetty project, meant that in order to properly and transparently represent the interest of electors, ratepayers and residents of the district that communication was warranted."

Panel's views in relation to regulation 7(1)(b)

- 15.** In the Panel's view a breach of regulation 7(1)(b) will occur if:
- (a) at the relevant time the person complained about was a council member, and committed the alleged conduct; and
 - (b) the member's conduct was a use of the member's office as a council member; and
 - (c) viewed objectively, the member's conduct constituted making improper use of the member's office as a council member (where the term "viewed objectively" means as viewed by a reasonable person – i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts); and
 - (d) the member's conduct was committed by the member for the purpose (motive or intent) of causing detriment to the local government or any other person.
- 16.** Conduct has been held to be "improper" where it involves "a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case."¹
- 17.** In the Panel's view:
- (1) The required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as complemented by the Act (which includes all regulations, including the Regulations, made under it) and any relevant code of conduct.
 - (2) The fiduciary obligations owed by a council member to his or her council (or local government) include: a duty to act in good faith (i.e. the council member must in his/her dealings act bona fide in what he/she considers to be the best interests of the council); an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred (i.e. for "proper purposes"); and the "no profit" rule – i.e. a council member cannot obtain an advantage for the member or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his or her position.

¹ [R v Byrnes: Re Hopgood (1995) 183 CLR 501 at 514 - 5]

(3) For regulation 7(1)(b) to be breached, it is not necessary that a detriment has been actually suffered, as it is sufficient that the council member had the intention of causing a detriment.²

(4) Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing.³

18. The Panel notes that, in considering the meaning of the term “detiment” in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:

- (a) the noun “detiment” as “loss, damage, or injury” and “a cause of loss or damage”;
- (b) the noun “loss”, relevantly, as “detiment or disadvantage from failure to keep, have or get”;
- (c) the noun “damage” as “injury or harm that impairs value or usefulness”;
- (d) the noun “harm” as “injury; damage; hurt” and “moral injury; evil; wrong”; and
- (e) the noun “disadvantage”, relevantly, as “any unfavourable circumstance or condition” and “injury to interest, reputation, credit, profit, etc”.

19. In the Panel’s view, the term “detiment” is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, or any state, circumstance, opportunity or means specially unfavourable. Accordingly, “detiment” may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment.

20. The Panel considers that for the purposes of regulation 7(1)(b) it may find that a council member intended by his/her conduct to cause a detriment to a person if:

- (a) the member’s admission/s is/are to that effect; or
- (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member’s conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct,

and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.

² *Chew v R* (1992) 173 CLR 626

³ *Chew*, at 647; *R v Byrnes* at 514 - 5

Panel views on the Shire's Code of Conduct

21. It is the Panel's view that the required standards of conduct of Councillor Stubbs as a Shire council member as at 12 September 2008 were the standards that flow from the fiduciary obligations owed by him to Council (or the Shire of Busselton) as complemented by the Act and the provisions of the Shire's Code of Conduct applicable to Council members. Those provisions are set out in clauses 1, 2.1, 2.2.1, 3.1.1 and 3.2.2 of the Shire's Code of Conduct.

22. In relation to the Shire's Code of Conduct:

(1) Clause 3.1.1 reads, relevantly:

"(b) ... all Council members ... shall:

- ...
 - *Fulfil their public and professional duties in a manner that is ethical, impartial, objective, responsible and in the best interests of the local government uninfluenced by fear or favour;*
 - *Act in accordance with their obligation of fidelity to the local government;*
 - *Not use or attempt to use their positions for personal benefit ..., either by influencing others, the improper use of information gained in the performance of their duties, or otherwise;*
- ...
 - *Understand and be mindful of their role, responsibilities, empowerment and limitations and act within those parameters ...*
 - *Refrain from making allegations which are improper or derogatory, unless true, in the public interest and in an appropriate forum;*
 - *Refrain from any form of conduct in the performance of their official or professional duties which may cause any reasonable person unwarranted offence or embarrassment."*

(2) Clause 3.2.2 is in section 3.2, on "Matters of Conduct", and is prefaced by the statement:

"The following sections of the Code of Conduct will address specific matters of conduct and, as necessary, provide specific direction on actions that must be taken when and as a matter arises by a person acting in a specific role."

(3) Clause 3.2.2 reads:

"Specific rules for Council members are defined in part 2 of the Local Government (Rules of Conduct) Regulations 2007.

- (a) *Further to that, Council members are to recognise their role as distinguished from that served by employees of the Shire of Busselton, and the Council (ie in its convened state).*
- (b) *Council members when interacting with employees of the Shire of Busselton in their capacity as a Council member shall observe the protocol of making requests for information and discussing the business of the Council with the relevant Director and/or the identified responding officer during any organised briefing session for a matter before the Council for consideration. The liaison between individual Council member and individual employee on matters of local government business shall be conducted in a respectful, courteous and honest manner."*

23. The Panel notes that, in relation to clause 3.1.1(b) of the Shire's Code of Conduct, and in considering the meaning of the terms "ethical", "impartial", "objective", "responsible", "improper", "derogatory", "unwarranted", "offence" and "embarrassment", the Macquarie Dictionary (2nd ed) defines:

- (a) "ethical" as, relevantly, "in accordance with the rules or standards for right conduct or practice";
- (b) "impartial" as "not partial; unbiased; just";
- (c) "objective" as, relevantly, "free from personal feelings or prejudice; unbiased";
- (d) "responsible" as, relevantly, "answerable or accountable, as for something within one's power, control, or management", "having a capacity for moral decisions and therefore accountable; capable of rational thought or action" and "reliable in business or other dealings; showing reliability";
- (e) "improper" as, relevantly, "unsuitable or inappropriate, as for the purpose or occasion";
- (f) "derogative" as "lessening; belittling; derogatory";
- (g) "derogatory" as "tending to derogate or detract, as from authority or estimation; disparaging; depreciatory";
- (h) "detraction" as "the act of detracting, or of belittling the reputation or worth of a person; disparagement";
- (i) "unwarranted" as "not justified, confirmed, or supported" and "not authorised, as actions";
- (j) "offence" as, relevantly, "the feeling of resentful displeasure";
- (k) "embarrass" as, relevantly, "to disconcert; abash; make uncomfortable, self-conscious, etc; and
- (l) "embarrassment" as, relevantly, "embarrassed state; disconcertion; abashment".

24. In relation to the phrase "in the public interest", it is the Panel's view that:

- (1) The public interest is a broad concept. It is used in other legislation and appears in numerous authorities. However, there does not seem to be any one firm definition of the term.
- (2) The term public interest is best described in the decision by the Supreme Court of Victoria in *DPP v Smith*⁴ where the Court said:

"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of

⁴ [1991] 1 VR 63, at p. 75

society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest".

- (3) The concept of public interest involves matters that affect a considerable number of people. Where something might affect a single individual, it can be in the public interest if the effect involves some general principle that, in turn, has impact upon a wider population - such as conduct that gives rise to issues whether certain laws are adequate or require review.

25. The Panel considers that the role, responsibilities, empowerment and limitations of a council member include the following:

- (1) The role of the council of a local government is set out by section 2.7, which reads:

*"(1) The council -
 (a) directs and controls the local government's affairs; and
 (b) is responsible for the performance of the local government's functions.
 (2) Without limiting subsection (1), the council is to -
 (a) oversee the allocation of the local government's finances and resources;
 and
 (b) determine the local government's policies."*

- (2) Section 2.10 defines the role of a Councillor:

*"A councillor -
 (a) represents the interests of electors, ratepayers and residents of the district;
 (b) provides leadership and guidance to the community in the district;
 (c) facilitates communication between the community and the council;
 (d) participates in the local government's decision-making processes at council and committee meetings; and
 (e) performs such other functions as are given to a councillor by this Act or any other written law."*

- (3) Elected members constitute the Council. They are responsible for observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.
- (4) While a Councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the Councillor's duty to abide by the provisions of the Act and its Regulations and the procedures and decisions of his/her local government.

- (5) The Act does not impose upon a Councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to the relevant provisions of the Act or its Regulations, or that is contrary to the standards of conduct expected of a person in that position.
- (6) A Councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.

26. The Panel notes that, in relation to clause 3.2.2 of the Shire's Code of Conduct, and in considering the meaning of the term "respectful":

- (1) The Macquarie Dictionary (2nd ed) defines 'respect', relevantly, as 'to show esteem, regard, or consideration for' and 'to treat with consideration; refrain from interfering with'.
- (2) The central tenet of Immanuel Kant ⁵ on respect for persons is relevant. The tenet is: "*Act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a means but always at the same time as an end.*" ⁶
- (3) In Kant's view, the respect we owe others is "*to be understood as the maxim of limiting our self-esteem by the dignity of humanity in another person, and so as respect in the practical sense.*" ⁷

27. In the Panel's view:

- (1) A council member of a local government will fail to be respectful of a local government employee ("employee"), and will fail to treat the employee with respect, if the member fails to keep his or her own self esteem (or, ego) in check so as to give proper recognition of the dignity of humanity in the employee.
- (2) For all practical intents and purposes, the behaviour or conduct of a council member will demonstrate a failure to be respectful of an employee, and a failure to treat an employee with respect, if the member:
 - (a) treats the employee merely as a means to something (because to do so values the employee as less than an end in himself or herself); or
 - (b) shows contempt for the employee (because to do so denies that the employee has any worth) – noting that the term 'contempt' in this context refers to the feeling or attitude with which one regards another person as worthless; or

⁵ 1724 – 1804

⁶ Kant, I., 1785 (1964) 4:429, *Grundlegung zur Metaphysik der Sitten*, translated as *Groundwork of the Metaphysics of Morals* by H.J. Paton, New York: Harper and Row

⁷ Kant, I., 1797 (1991) 6:449, *Die Metaphysik der Sitten*, translated as *The Metaphysics of Morals* by M. Gregor, Cambridge: Cambridge University Press

- (c) treats the employee with arrogance (because to do so is a demand that the employee value the member more highly than the employee values himself or herself) – noting that the term ‘arrogance’ in this context refers to an offensive exhibition of assumed or real authority; or
- (d) defames the employee by publicly exposing his or her faults; or
- (e) ridicules or mocks the employee – noting that:
 - (i) the term ‘ridicule’ in this context refers to two cases – namely:
 - (A) when a third person is or third persons are present or in the vicinity, the saying of words or the display of any action or gesture for the purpose (motive or intent) of causing contemptuous laughter at the employee; and
 - (B) otherwise, to deride or make fun of the employee; and
 - (ii) the term ‘mock’ in this context refers to two cases – namely:
 - (A) ridiculing the employee by mimicry of action or speech; or
 - (B) scoffing or jeering at the employee’s action or speech.

Panel views on allegation (1)

28. In relation to allegation (1), it is the Panel’s view that:

- (1) The sending of the email by Councillor Stubbs – in his capacity as a Council member, and with the email signed “Ian Stubbs, Councillor” – was a use of his office of Council member.
- (2) Councillor Stubb’s sending and circulating of the email was motivated by his offence and indignation at that part of the CEO’s email of 11 September 2008 to him that said.

“For future reference, I’m not particularly interested in your expressing your total dismay to me when I am half way through my dinner after a Council meeting. Don’t do that again.”

- (3) If Councillor Stubbs believed he had due cause to make a complaint about the conduct of the CEO, he knew from his previous position of being the Shire’s CEO, and knew from his position as a Council member, that the appropriate forum was Council and the appropriate means was:
 - (a) in the first instance, to write to the Shire President and express his complaint; and
 - (b) if not satisfied by the Shire President’s action or lack of action on his complaint, to submit a Notice of Motion (in relation to his complaint) to be considered by Council during a part of its meeting that is closed to members of the public pursuant to section 5.23(2)(a).

That this was known to Councillor Stubbs, when he sent the email under consideration to the two newspapers, is evident from the passage in that email in which he states:

"I considered asking the Shire President to take disciplinary action against you for your outburst to me through your email. Notwithstanding, I realise this would be a total waste of time so I am sending copies of this email to all Councillors and the local papers. I think it is time your "internal" rudeness was exposed to the public."

- (4) By sending the email to the two newspapers Councillor Stubbs breached his fiduciary obligations owed to the Shire.
- (5) In accordance with its views in paragraphs 17 and 21 above, at 12 September 2008 Councillor Stubbs' duties of his office of a Council member included observing the provisions of the Shire's Code of Conduct applicable to Council members.
- (6) Having regard to the definitions in paragraph 23 above, and in the light of the matters mentioned in paragraphs 24 and 25 above, Councillor Stubbs' conduct in sending the email on 12 September 2008 to the two newspapers was in contravention of clause 3.1.1(b) of the Shire's Code of Conduct, in that:
 - (a) by such sending Councillor Stubbs failed to fulfil his public and professional duties as a Council member in a manner that was ethical, impartial, objective and responsible, by virtue of his action:
 - (i) not being in accordance with the rules or standards for right conduct or practice in relation to his complaint about the CEO's actions in this matter; and
 - (ii) not being impartial, unbiased or just; and
 - (iii) not being free from his personal feelings or prejudice; and
 - (iv) indicating his unreliability in his dealing with his concerns as a Council member about the CEO's conduct; and
 - (b) by such sending Councillor Stubbs failed to refrain from making allegations about the CEO which were improper or derogatory, not in the public interest and not in an appropriate forum, by virtue of Councillor Stubbs allegations about the CEO in the email under consideration:
 - (i) being unsuitable or inappropriate for the purpose of making a complaint about the CEO's conduct; and
 - (ii) being the belittling of the reputation or worth of the CEO; and
 - (iii) not being in the public interest (i.e. his taking umbrage at the CEO's comments was not a matter of the public interest); and
 - (iv) not being made to the Shire President, or to Council when a part of its meeting is closed to members of the public; and

- (c) by such sending Councillor Stubbs failed to refrain from a form of conduct in the performance of his official or professional duties which may cause any reasonable person unwarranted offence or embarrassment, by virtue that a reasonable person, in the position of the CEO, would justifiably have the feeling of resentful displeasure, or be abashed or made uncomfortable, as a reasonable consequence of the contents of the email under consideration being made public.
- (7) Councillor Stubbs' conduct in sending the email on 12 September 2008 to the two newspapers was in contravention of clause 3.2.2 of the Shire's Code of Conduct, in that by such sending he failed to observe the required processes in relation to his concerns about the CEO's conduct, and accordingly:
- (a) Councillor Stubbs failed to properly recognise his role as a Council member [when not in Council] as distinguished from that served by the CEO and the Council (i.e. in its convened state); and
 - (b) Councillor Stubbs interacted in his capacity as a Council member with the CEO in a manner other than by the protocol set out in (b) of clause 3.2.2 of the Shire's Code of Conduct.
- (8) Councillor Stubbs' conduct in sending the email on 12 September 2008 to the two newspapers was in contravention of clause 3.2.2 of the Shire's Code of Conduct, in that by such sending he failed to conduct his liaison with the CEO, on a matter of local government business, in a respectful, courteous and honest manner, by virtue of the matters mentioned in paragraphs 26 and 27 above.
- (9) Viewed objectively, the sending of the email by Councillor Stubbs to the two newspapers was an improper use of his office of Council member by virtue of such sending being:
- (a) in breach of the provisions of the Shire's Code of Conduct, for the reasons set out in paragraph 28(6), (7) and (8) above; and
 - (b) in breach of his duty to act in good faith and his obligation to exercise powers conferred on him as a Council member only for the purposes for which they were conferred, by:
 - (i) the breaches of the provisions of the Shire's Code of Conduct set out in paragraph 28(6), (7) and (8) above; and
 - (ii) failing to observe the required processes in relation to his concerns about the CEO's conduct; and
- (c) in breach of his fiduciary obligations owed to the Shire.
- (10) There is a rational inference arising from the available information that it is more likely than not that when Councillor Stubbs sent the email on 12 September 2008 to the two newspapers his intention was to encourage others to think less of the CEO, and thus his intention was cause that detriment to the CEO, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all of the available information.

29. In relation to Councillor Stubb's explanation for sending and circulating the email – as set out in paragraph 14 above – the Panel observes that:

- (1) While a Councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the Councillor's duty to abide by the provisions of the Act and its Regulations and the procedures and decisions of his/her local government.
- (2) By virtue of section 5.41(a) and (b) the functions of the Chief Executive Officer of a local government include: advising the council in relation to the functions of a local government under the Act and other written laws; and ensuring that advice and information is available to the council so that informed decisions can be made. These functions do not include the Chief Executive Officer being required to give advice to an individual councillor, or to respond to individual councillor's requests for information unless section 5.92 applies (that is, the information is relevant to the performance by the councillor of any of his or her functions under the Act or under any other written law) or unless section 5.94 applies (that is, the local government's information that may be inspected by the public).
- (3) The Act does not impose upon a Councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to the relevant provisions of the Act or its Regulations, or that is contrary to the standards of conduct expected of a person in that position.
- (4) Councillor Stubb's explanation does not provide any lawful justification for his sending the email to the two newspapers.

Panel's finding in relation to allegation (1)

30. In the circumstances, the Panel finds that Councillor Stubbs committed a breach of regulation 7(1) when he sent the email under consideration to the "Busselton-Dunsborough Mail" newspaper and to the "Busselton-Dunsborough Times" newspaper on 12 September 2008.

Allegation (2) – alleged breach of regulation 10(1)(b)

31. The Panel now considers allegation (2), in relation to which it is noted that regulation 10(1)(b) reads, relevantly:

"A person who is a council member must not:

...

(b) attempt to influence, by means of a threat ..., the conduct of a person who is a local government employee in the person's capacity as a local government employee."

Regulation 10 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 10(1)(b) is a minor breach.

Councillor Stubbs' response to allegation (2)

32. Councillor Stubbs' response to allegation (2) is set out in his response of 27 January 2009. As mentioned, Councillor Stubbs acknowledges having committed the conduct complained about in this matter, but he denies that such conduct was a contravention of regulation 10(1)(b). His reasons for this denial are set out in his response of 27 January 2009.

Panel's views in relation to regulation 10(1)(b)

33. In relation to regulation 10(1)(b), it is the Panel's view that:

- (1) Regulation 10(1)(b) is a purposive provision – that is, a council member will commit a breach under it only where there is evidence from which it may be concluded that it is more likely than not that:
 - (a) when he/she made the threat concerned, he/she did so *with the intent (motive or purpose)* of intimidating or overcoming the will of the local government employee to influence the conduct of a local government employee as a local government employee; or
 - (b) when he/she made the promise (of a reward) concerned, made the promise *with the intent (motive or purpose)* to influence the conduct of a local government employee as a local government employee.
- (2) The Panel may form the view that a council member had that intent if:
 - (a) the member's admission is to that effect; or
 - (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to influence the conduct of a local government employee as a local government employee; or
 - (ii) the member's conduct was done with reckless indifference that it would be perceived by a reasonable person as an attempt to influence the conduct of a local government employee as a local government employee, and that such perception was a probable or likely consequence of that conduct,
- (3) A council member will be treated as having *attempted to influence* the conduct of a local government employee if the council member, with the necessary intent, *has tried or made an effort to affect, sway or produce an effect on* a local government employee's conduct as a local government employee.

- (4) A council member will be treated as having made an attempt under regulation 10(1)(b) “*by means of a threat*” where:
 - (a) the council member’s effort to affect, sway or produce an effect on the local government employee is made by the council member’s declaration of an intention to inflict punishment, pain or loss on, or to take any action detrimental or unpleasant to, the local government employee (or on someone, or to something, that he/she cares about) in retaliation for, or conditionally upon, some action or course; and
 - (b) that declaration of intent was made by the council member with the intent (motive or purpose) of intimidating or overcoming the will of the local government employee; or
 - (c) a reasonable person would be likely to perceive that if that declaration of intent was made to an ordinary person of normal stability and courage that ordinary person might be influenced or made apprehensive so as to accede unwillingly to the council member’s demand, desired actions and/or omissions.
- (5) Where a council member’s declaration of intent consists of inflicting something indistinct by the use of the phrase “or else” or any similar phrase, the declaration will ordinarily be treated as a threat.
- (6) Regulation 10(1)(b) applies to any threatened act or omission – including an act or omission that the council member is at liberty to commit or not commit, as the case requires, in his/her private or business capacity or in his/her capacity as a council member.
- (7) A threat may be made expressly or by implication.
- (8) A warning or intimation, or the foreshadowing of something, is not a threat. Particularly:
 - (a) a warning is cautionary advice about something imminent (especially imminent danger or other unpleasantness) or about someone’s behaviour;
 - (b) an intimation is to indicate or make known indirectly, or make a hint, an implication or suggestion; and
 - (c) the foreshadowing of something is to foretell, indicate or suggest something in advance.

Panel’s view on allegation (2)

34. In the Panel’s view, while it may be argued whether that the email under consideration was an *attempt* by Councillor Stubbs to *influence* the conduct of a local government employee, in the light of the matters mentioned in paragraph 33(4) above, even if there was such an attempt it was not “*by means of a threat*” by virtue that:

- (a) there is nothing in the email under consideration that constitutes a declaration by Councillor Stubbs of his intention to inflict punishment, pain or loss on, or to take any action detrimental or unpleasant to, the CEO (or on someone, or to something, that he cares about) in retaliation for, or conditionally upon, some action or course; and
- (b) even if there was such a declaration in the email under consideration, a reasonable person would not be likely to perceive that if that declaration was made to an ordinary person of normal stability and courage that ordinary person might be influenced or made apprehensive so as to accede unwillingly to Councillor Stubbs's demand, desired actions and/or omissions.

Panel's finding in relation to allegation (2)

35. In the circumstances, the Panel finds that Councillor Stubbs did not commit a breach of 10(1)(b) when he sent the email under consideration to the "Busselton-Dunsborough Mail" newspaper and to the "Busselton-Dunsborough Times" newspaper on 12 September 2008.

Panel's concluding observations

36. The Panel concludes its dealings with the two complaints in this matter by making the following observations in relation to Mr Macnish's statements in his email, sent on 11 September 2008 to Councillor Stubbs and the other Shire Councillors – *"For future reference, I'm not particularly interested in your expressing your total dismay to me when I am half way through my dinner after a Council meeting. Don't do that again."*:

- (1) In the Panel's view, Mr Macnish's statement "*Don't do it again*" was a needless, inappropriate and confrontational rebuke of Councillor Stubbs.
- (2) In the Panel's view, Councillor Stubbs genuinely regarded the statements to be, in his own words, "*inappropriate because as the CEO, and an employee of the Shire, it is not appropriate to write in such terms to one of the members of his employer's governing body.*"

.....
Quentin Harrington (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: Local Government Act 1995
File No/s: SP 38 & 39 of 2008
Heard: Determined on the documents
Considered: 8 April 2009 and 26 June 2009
Corams: 8 April 2009:
Mr Q. Harrington (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)
26 June 2009:
Mr R. Weaver (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 38 of 2008

Complainant: Cr Ross Lindsay BROMELL

Council member complained about: Councillor Ian William STUBBS

And

SP 39 of 2008

Complainant: Cr Beverley Joan CLARKE

Council member complained about: Councillor Ian William STUBBS

Regulations involved: Regulation 7(1) & Regulation 10(1)(b)

DECISION & REASONS FOR DECISION

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.

SUMMARY OF FINDINGS

The Panel has made the following findings ("the Findings"):

- (1) That Councillor Stubbs committed a breach of regulation 7(1)(b) ("the breach") when he sent the relevant email to the "Busselton-Dunsborough Mail" newspaper and to the "Busselton-Dunsborough Times" newspaper on 12 September 2008.
- (2) That Councillor Stubbs did not commit a breach of regulation 10(1)(b) by that sending.

CHANGE IN CORAM

Mr Ross Weaver (“**Mr Weaver**”) was the Presiding Member at the Panel’s meeting on 26 June 2009 by virtue of him being the Deputy Member of Mr Quentin Harrington, who was unable to attend the meeting.

Before the Panel made its decision under section 5.110(6) of the *Local Government Act 1995* (“**the Act**”) in this matter, Mr Weaver confirmed that he was familiar with and had considered: all of the documents and information that the Panel had previously considered in this matter prior to the Panel meeting on 26 June 2009; and the Panel’s Reasons for Finding in this matter.

SUMMARY OF DECISION

The Panel’s decision on how the breach is dealt with under section 5.110(6) of the Act was that, for the following reasons, pursuant to paragraph (b)(i) of that section it ordered Councillor Stubbs be publicly censured as specified in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”).

Procedural fairness matters

2. The Panel gave to Councillor Stubbs:

- (a) notice of the Findings;
- (b) a copy of the Panel’s Reasons for Finding (“the Reasons for Finding”); and
- (c) a reasonable opportunity for him to make submissions about how the breach should be dealt with under section 5.110(6).

3. Councillor Stubbs responded to the previous Panel’s notice of the Findings, with a 2-page letter dated 18 May 2009 (“Councillor Stubbs’ submissions”).

Opportunity given for comment on adverse observation

4. On 6 May 2009 the Panel gave to Mr Macnish:

- (a) in relation to his statement “*Don’t do it again*” in his email sent on 11 September 2008 to Councillor Stubbs, notice of the Panel’s observation made in paragraph 36(a) of the Reasons for Finding that, in the Panel’s view, that statement was a needless, inappropriate and confrontational rebuke of Councillor Stubbs; and
- (b) an opportunity for him to make comment on that observation before the Panel makes its decision on the breach.

Mr Macnish responded with his letter of 27 May 2009. The Panel notes that in relation to the Panel’s observation repeated in paragraph 4(a) above, Mr Macnish does not criticize or object to the observation.

Councillor Stubbs’ submissions

- 5. Turning to Councillor Stubbs’s submissions, they are as follows:

“I submit that the Standards Panel should dismiss the complaint. In support of this submission I advise as follows:

1. *It is most unlikely that I will make the same mistake again. I believed, quite honestly, that I was representing the interests of the Community by communicating to them important developments on the jetty issue which at that time was a very contentious and widely discussed issue. One learns more through experiences.*
2. *The Standards Panel’s concluding observations (item 36) seems to be saying that while I had breached regulation 7 (1) (b) there were some circumstances that may have driven me, or motivated me, to take the action that I did. I agree with the Standards Panel’s observations. Whilst I am not suggesting the actions of the CEO necessarily excuse me, I do believe the Panel should take those actions into consideration when deciding how the breach should be dealt with.*
3. *It is now nearly 9 months since this incident occurred. We have all moved on and are trying to provide a good level of Local Government to the Community. The level of discontent about the Shire’s performances has reduced somewhat of late as the Council has addressed some of the major issues that were of concern. Public airing of the subject of the complaints so long after the event will, in my mind, do nothing constructive. In fact, I believe it may very well re-ignite some old hostilities which may cause detriment to the Shire and the CEO which was the original reason for the complaints against me.*
4. *Publicly censuring me, or requiring me to apologise publicly, is likely to result in the whole issue being raised for debate again. It is most probable that the local papers will want to cover the issue extensively which, at this stage, is unlikely to achieve anything constructive. As stated previously this may very well cause detriment to the Shire and the CEO which was the original reason for the complaints against me.*

5. *I am not trying to be smart when I say that a public censure of me, or me having to make a public apology, is unlikely to have any material effect on me. I feel that having the complaints lodged and the Panel finding that I had in fact breached regulation 7 (l) (b) are in fact sufficient warning for me to consider carefully what I do and say in future.*
6. *I guess I am stating the obvious when I say that Local Government in Busselton is very volatile. The Council is, regrettably, divided by factions. I also guess that I am stating the obvious when I say that Councillors Bromell and Clarke are not regarded as my allies. I believe that if there has to be a public censure or a public apology, it will result in added divide within Council when other Councillors learn of the complaints. I am not sure that this is going to be very helpful to a Council that is trying to get along and address some very major and contentious issues.*
7. *I do not believe anything will be gained from me having to undertake training in matters relating to the complaints. I have mentioned on a number of occasions above that I believe it is most unlikely I will make the same mistake again. Further, I have stated quite clearly that I have learnt from this experience."*

Panel's views

6. In determining an appropriate sanction or sanctions in this matter:
 - (1) The Panel's views are that:
 - (a) the action of a council member publicly rebuking an administration officer, particularly the Chief Executive Officer, is inappropriate conduct and usually deserving of a public apology being ordered to be made by the council member to the officer; and
 - (b) any improper use by a council member of his/her office of council member for the purpose of causing a detriment to an administration officer, particularly the Shire's Chief Executive, is a very serious matter and usually deserving of public censure.
 - (2) The Panel notes that:
 - (a) Councillor Stubbs has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach;
 - (b) while it has power to order Councillor Stubbs alone to apologise, it has no power to order both Councillor Stubbs and Mr Macnish to make apologies to each other for their respective conduct in this matter; and
 - (c) on the basis of his submissions, Councillor Stubbs has expressed some contrition for his offending conduct in this matter, and he has in effect said he has learned his lesson and is unlikely to repeat such conduct again.

(3) However, the Panel also notes that at the time Councillor Stubbs sent the relevant email to the two newspapers:

- (a) he was clearly well aware of the available and appropriate complaint procedures if he wanted to complain about Mr Macnish's conduct in this matter; and
- (b) he deliberately made his decision not to follow those procedures.

Panel decision

7. Having regard to the Reasons for Finding (in particular, paragraph 28 thereof), the matters mentioned in paragraph 6 above, and the general interests of local government in Western Australia, the Panel's decision in this matter is that pursuant to paragraph (b)(i) of section 5.110(6) it orders that Councillor Stubbs be publicly censured as specified in the attached Minute of Order.

.....
Ross Weaver (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel ("the Panel") hereby gives notice that:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal ("SAT") for a review of the Panel's decision in this matter. *In this context "decision" means a decision to dismiss the complaint or to make an order.*
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice under the *State Administrative Tribunal Act 2004* ("SAT Act") section 20(1).
- (3) The Panel's *Reasons for Finding* and these *Reasons for Decision* constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act section 20(1).