



Local Government Standards Panel

Complaint Number	SP 52 of 2018
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stan Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
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)

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 of the Act in respect to regulation 9 or regulation 10 of the Regulations,when Cr Bell made various Facebook posts relating to Mr Stan Scott the Chief Executive Officer of the Shire (**"the CEO"**) as further described in paragraphs 18 and 21 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.¹
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.²
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 accurate³; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ 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 Australia⁶.

¹ Section 5.105 of the Act

² Section 5.106 of the Act

³ Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

⁴ Briginshaw v Briginshaw (1938) 60 CLR 336

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

⁶ 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 the 6 July 2018 the Panel received an email from Mr Stan Scott, acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form (with attachments) dated 6 July 2018 provided by Mr Stan Scott.

18. In his letter of complaint Mr Scott alleges that Cr Bell has breached regulation 7, regulation 9 and regulation 10 by:

- a. making a Facebook Post on 26 June 2018 regarding the actions of the CEO as to Facebook pages of Shire employees set out in paragraph 21.a (**“Post 1”**);
- b. making a Facebook Post on 26 June 2018 regarding the CEO and the last occurring Ordinary Council Meeting as set out in paragraph 21.b (**“Post 2”**); and
- c. making a Facebook Post on 27 June 2018 regarding a communications policy of the Shire and the CEO as set out in paragraph 21.c (**“Post 3”**),

(together **“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 occurred⁷;
- 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 breach⁸;
- d. was satisfied the Department had provided procedural fairness to Cr Bell; and

⁷ Section 5.107(4) and 5.109(2) of the Act

⁸ Section 5.107 and 5.109 of the Act



- e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

21. The relevant Facebook Posts (together “the Posts”) the subject of the Complaint are as follows:

- a. **Post 1** – posted 27 June 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page

“ It’s official - the CEO of the Shire of Toodyay is shutting down all oversight by Council

Not only has information been removed from this month’s Council Agenda to a level where councillors are unable to form a complete view on the workings and operation of the CEO and Shire, but (and this is the one I find disturbing) .

. .

The CEO is seeking The Council to approve that my Facebook page (and the private Facebook page of every Councillor and shire employee) will be managed by the CEO

So to every Shire employee out there, if the Council approves the Communications Policy tonight then your boss (the CEO) will be able to tell you what you can say on your own private page

Not only that, this policy makes the CEO the manager of your Facebook page.

So from tonight, everything you write / post / comment on Facebook and any other social media site needs to be approved by your boss

Now tell me the CEO is not a modern day dictator.

Oh, and by the way, the CEO is employed by Council.

That means that I (am the 8 other councillors are his boss)

I don’t think that there are many workplaces out there where an employee tells a boss what he can and cannot say publicly

I especially do not think that there are many employees out there that are brazen enough to even think that they should have the authority to manage their bosses Facebook page.

Am I angry by the arrogance of the CEO?

Yes

Am I surprised by his desire to shut down all communication from councillors and his employees?

No

Will council support handing over the management of their personal / private Facebook pages (as well as the private Facebook pages of all Shire employees) to the CEO

Let’s hope not ”

- b. **Post 2** – posted 27 June 2018 by Cr Bell, on his Councillor of Toodyay Shire Facebook page:

“ Highlights from last night’s Council Meeting

The proposed (anti-) Communications Policy was withdrawn by the CEO just as Council was to consider that specific policy.



That means, for now at least, the threat that the CEO would dictate what a Shire employees and those that do volunteer work for the Shire can put on their own personal Facebook page has been delayed.

But expect to see a revised version of this policy submitted to Council by the CEO again soon. Let's hope any new draft focuses on how the Shire can improve its communication with the community (rather than target staff) because I think both the Shire (CEO) and Council need to work on how we engage better with rate payers.

The Public Question Time Policy (the so-called gag Policy) was also voted down by all councillors in attendance last night. That means that question time will not have a maximum time allocated to it

It also means that the proposed dress code for rate payers attending the meeting was voted down too.

So that is two wins for common sense.

The only topic of debate last night that caused me some concern was that the Shire and some Council members appear to have formed a position on rates before the Shire's budget has been finalised.

Some councillors argued last night for a 0.9% rate rise.

Now compared to the rate rises of previous years, a 0.9% looks mild indeed. But it is still higher than necessary.

A 0% rate rise was also debated.

My thoughts - let's finalise the budget first before trying to work out what level of rates we, as a Shire need. Who knows, perhaps Council may find that a rate cut can be achieved this year.

I remain absolutely confident that a rate cut can be achieved this year (and in a sustained way such that it won't impacting future operations by the Shire).

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Just as you never ask a hairdresser if you need a hair cut, you should probably never ask a local government CEO if he needs more money. (The answer from both will always only ever be "yes")"

- c. **Post 3** - posted 26 June 2018 by Cr Bell, on the Toodyay Community Forum Facebook page using his personal Facebook profile:

" To All Shire Employees

Just thought I would give you the heads up that the CEO is seeking approval from Council tonight that will give him absolute authority over your personal Facebook page

That means that the CEO can take over management of your personal Facebook page from tomorrow

and that you may need seek his approval before posting things"

22. In the Complaint, Mr Scott also provided a copy of each of Post 1, Post 2 and Post 3 and the various comments following the Posts.
23. Mr Scott also makes the following assertions regarding the Complaint:



- a. the matter of the communications policy was originally deferred to a Council Forum and then considered at such forum on 12 June 2018 without comment by Cr Bell;
 - b. Cr Bell has misrepresented the draft communications policy, sought to denigrate the CEO and to create discontent amongst Shire employees;
 - c. the posts attract significant comments that are negative and critical of the CEO;
 - d. Cr Bell “stoked the fires” by repudiating the comments of those who disagreed with him and encouraging those who sought to disparage the CEO;
 - e. Cr Bell meets the requirements for a breach of regulation 7 as:
 - i. he was a Council member at the time;
 - ii. he made the Posts as a Council member;
 - iii. the office of a Council member was used improperly; and
 - iv. he used his office improperly to disadvantage the Local Government and the CEO; and
 - f. the posts caused considerable actual damage to the reputation of the Council and the CEO.
24. Mr Scott also make the following more general comments regarding Cr Bell’s conduct:
- a. Cr Bell is a new councillor elected in October 2017. Since this time he has established his “Ben Bell - Councillor for the Shire of Toodyay” Facebook profile which has had a number of inappropriate posts made with the intent to:
 - i. increase his own profile as a councillor;
 - ii. bring the council and the Shire into disrepute; and
 - iii. put pressure on the CEO and other councillors;
 - b. these posts have dishonestly misrepresented the Shire and fellow Councillors on a range of issues and created significant community angst and backlash;
 - c. Cr Bell has been requested on several occasions to modify his behaviour by the Shire President and other Councillors;
 - d. during WA Local Government Association (WALGA) training he was advised that his Facebook activity may be in breach of the Regulations;
 - e. the Shire participated in the Governance review program provided by the Australian Institute of Company Directors (AICD). As part of this process a special session was held involving AICD, the Shire President and Cr Bell seeking Cr Bell’s agreement to modify his behaviour;
 - f. Cr Bell is also the Managing Director of a publicly listed mining company so is well aware of the importance of honesty and clarity in public statements; and
 - g. there is no reasonable argument that Cr Bell’s actions are the result of inexperience or lack of understanding. This leads to the conclusion his actions are deliberate and calculated.



Respondent's Response

25. 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.
26. It is denied that Cr Bell has committed any minor breach.
27. In respect to Regulation 7 it is specifically asserted that:
 - a. the allegations of minor breach are not made out and the Panel should dismiss the Complaint;
 - b. there is no evidence provided in the Complaint that any advantage was obtained or that any detriment occurred;
 - c. Cr Bell considered his statements to be part of a robust public debate;
 - d. Cr Bell at all times had regard to the interests of the Shire's rate payers;
 - e. Cr Bell addressed what he regarded as deficiencies in the existing level of communication between the Council and the ratepayer by providing this information and discussion on an open and accessible social media platform;
 - f. Cr Bell is of the view that this Complaint and other complaints made are a targeted approach by the CEO who is attempting to prevent him from raising legitimate queries and concerns about Shire operations;
28. In respect to Regulation 9 it is argued that the Facebook Posts do not fall within the prohibitions in regulation 9 and cannot be reasonably considered to be "*a task that contributes to the administration of the local government*" the Posts 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.
29. In respect to Regulation 10 the following arguments are asserted:
 - a. the statements in Post 3:
 - i. do not constitute a direction as contemplated by regulation 10, this was alerting Council employees to a situation; and
 - ii. the statements do not contain any threat or promise of a reward and therefore does not meet the requirement of the regulation.
 - b. no other directions were given to any Shire employee in the remaining Facebook posts.
30. In addition, it is asserted that the Compliant 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 occasions 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.
31. The Panel notes that the response does not otherwise address any specific comments made by Cr Bell in the Posts.



Panel's Consideration

Regulation 7(1)(b)

32. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard:
- a. Cr Bell was a councillor at the time of the alleged breach and the time of the determination; and
 - b. Cr Bell made use of his office as Council member of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Bell's office in that it:
 - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
 - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
 - d. Cr Bell engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Bell a Councillor at the relevant times

33. 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

34. The Posts the subject of the Complaints are made both on Cr Bell's Councillor page and using the Toodyay Community Forum Facebook page.
35. Posts 1 and 2 were made using Cr Bell's Councillor Facebook profile and were, without question, made in his capacity as a council member for the Shire.
36. Post 3 was made by Cr Bell using his personal Facebook profile on the Toodyay Community Forum Facebook page.
37. However, even while using this profile it is inferred that he is discussing the matter in his capacity as councillor as:
- a. he is making specific comment on a policy of the Shire;
 - b. Cr Bell had previously commented on this issue in his capacity as a councillor; and
 - c. in the relatively small local community Cr Bell would be known in his capacity as a local councillor, partially due to his active and vocal status on Facebook regarding Shire matters.
38. All of the above indicate that all such posts were made in Cr Bell's capacity as a councillor of the Shire.
39. Given the above, the Panel finds, to the required standard, that any reasonable person would conclude that for the purposes of the Complaint, Cr Bell was acting in his role as councillor and therefore making use of his office as a council member.
40. This element is met.



Cr Bell's use was improper

41. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom⁹. 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.
42. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.
43. 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.
44. 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;*
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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."

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



45. 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”¹¹.
46. Cr Bell asserts that he at all times had regard to the interests of Shire ratepayers. However, in the context this argument is not particularly compelling. The subject matter of the communications policy appears to concern Cr Bell personally and other Shire employees rather than the local community.
47. In addition, if the intent is to provide information or an alternative viewpoint to community members, this can be achieved in a manner which does not criticise the Shire or Shire employees in breach of the Code.
48. The posts specifically mention the CEO in a negative manner several times and take an aggressive stance which attempt portray the CEO as:
 - a. introducing a communications policy to unfairly target and control the actions of Cr Bell and other Shire employees; and
 - b. attempting to obtain moneys from rate payers above the needs of the Shire, and therefore can be seen to cast aspersions on the CEO’s competence and credibility in breach of clause 3.1 of the Code.
49. Further, the reference in Post 1 to the CEO being “a modern day dictator” is particularly discourteous and disrespectful and likely to cause offence in breach of clause 1.3 and 3.6 of the Code.
50. The overall tone of the Posts is combative, critical and aggressive and do not reflect the standards of behaviour expected of an Elected Member in a public forum.
51. In this case, the Panel finds it is more likely than not that the Posts by Cr Bell are improper as they:
 - a. were in breach of the Code;
 - b. were of such a nature that a reasonable individual would consider the same to be inappropriate and not in keeping with the conduct that would be expected of a councillor; and
 - c. are deserving of a penalty.
52. This element is therefore met.

Cr Bell intended detriment to be suffered by another person

53. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
54. It is not necessary to find whether any detriment was actually suffered¹², but an intent to cause such detriment must be established.
55. The argument that the comments were made as part of “robust public discussion” is not compelling. The tone and content of the Posts seek to apportion blame rather than to impart information or seek feedback from the community.
56. The contents of Post 1 and Post 2 in particular appear to suggest that the CEO is acting improperly.

¹¹ *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]

¹² *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



57. In addition, the words “modern day dictator”, “brazen”, “arrogance”, “threat” and “dictate”, with specific reference to the CEO, indicate an intention to denigrate the CEO.
58. The Panel finds that it is more likely than not that the several of the comments in the Posts were intended by Cr Bell to cause a detriment to the CEO.
59. This element is met.

Conclusion

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

Regulation 9

61. To make a finding of a minor breach of regulation 9 of the Regulations the Panel must be satisfied that:
 - a. Cr Bell was a councillor at the time of the alleged breach and at the time the determination was made; and
 - b. it is more likely than not that:
 - i. Cr Bell took on, or was involved in, or participated in, the performance, attempted performance, or part performance of a function or responsibility under which the Act or by delegation it is for the local government’s CEO to perform or direct;
 - ii. that such taking on, involvement or participation contributed something to the administration of the local government;
 - 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 participation¹³.

Was Cr Bell a Councillor at the relevant times

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

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

63. The Act distinguishes between the roles of council and the staff employed by the local government, or the “administration”. Local governments are bodies corporate¹⁴ of which the council is the governing body.¹⁵
64. The role of council includes making local laws, overseeing the allocation of the local government’s finances and resources and determining its policies.¹⁶ The role of councillors is to represent the interests of electors, ratepayers and residents of the district.¹⁷ The administration advises councillors to assist in their decision-making and implements policies determined by council and council’s other decisions.

¹³ Yates and Local Government Standards Panel [2012] WASAT

¹⁴ Section 2.5(2) of the Act

¹⁵ Section 2.6(1) of the Act

¹⁶ Sections 3.51 and 2.7(2) of the Act

¹⁷ Section 2.10(a) of the Act



65. The Complaint does not specify how Cr Bell's Facebook Posts constitute an administrative function of the Shire.

66. 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.

67. This element is not met.

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

68. In order to "contribute" the action must "play a part in the achievement of a result"¹⁸.

69. Cr Bell's Facebook posts cannot be reasonably said to be contributing anything to the administration of the Shire or to achieving any particular result.

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

71. This element is not met.

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

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

Conclusion

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

Regulation 10(1)(a)

74. To make a finding of a minor breach of regulation 10(1)(a) of the Regulations the Panel must be satisfied that it is more likely than not that:

- a. Cr Bell was a councillor at the time of the alleged breach;
- b. Cr Bell gave or tried or made an effort to give a direction, order or command to another person, who is an employee of his or her local government; and
- c. such a direction or an order or command was:
 - i. to do or not to do something in the other person's capacity as a local government employee; and
 - ii. not part of anything that the councillor did as part of the deliberations at a council or committee meeting.

Capacity of Cr Bell as Councillor

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

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

76. The posts in question are public Facebook posts open to any person following Cr Bell's Facebook pages.

¹⁸ Yates and Local Government Standards Panel [2012] WASAT at 56



77. Although some comments are specifically directed at Shire Employees (Post 1 and Post 3), the Panel finds that it is more likely than not that the same cannot reasonably be characterised as a “*direction, order or command*” to any employee of the Shire to undertake any task, but were intended to state an opinion or provide information.

78. 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

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

Conclusion

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

Regulation 10(3)

81. 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.

82. The regulation is intended prevent councillor from using their position to publicly criticise local government employees¹⁹. The nature of the Regulation is that the public must hear, or be otherwise aware of, the criticism.

Capacity of Cr Bell as Councillor

83. 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

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

85. This element is not met.

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

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

Conclusion

¹⁹ *Hargreaves and Local Government Standards Panel [2008] WASAT 300*



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

Panel's Finding

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

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

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)