

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 23 & 27 of 2010 (DLG: 20100165 & 20100172)
Heard: Determined on the documents
Considered: 20 September 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 23 of 2010

Complainant: (Cr) Margaret Jean DONKIN

Council member complained about:

Cr Daphne Mae SIMMONS

And

Complaint No. SP 27 of 2010

Complainant: (Cr) Norm KARAFILIS

Council member complained about:

Cr Daphne Mae SIMMONS

Local Government:

Shire of Coolgardie

Regulations involved or alleged breached:

Regulations 4 & 10(3)(a)

FINDINGS AND REASONS FOR FINDINGS

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SUMMARY OF FINDINGS

The Panel found that, at the Shire's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons committed 3 minor breaches – namely, that:

- she used an offensive or objectionable expression in reference to Councillor Margaret Jean Donkin, in contravention of standing order 8.3(2) of the *Shire of Coolgardie Standing Orders Local Law 2000*;
- she made a statement orally and in writing, when a member of the public was present, that implied that the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson, was dishonest, in contravention of regulation 10(3)(a); and
- she made an oral statement, when a member of the public was present, that implied that the Shire's employees, generally, or some of them were dishonest, in contravention of regulation 10(3)(a).

BACKGROUND AND PROCEDURAL MATTERS

The material in **Attachment A** is incorporated here as if set out in full.

AVAILABLE INFORMATION

The information before the Panel in relation to this matter (the available information) is the information and documents described in the table under the heading 'Available information' in **Attachment A**. These documents are referred to below, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. *[Doc B2]* refers to the document that is Doc ID B2 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. *[pp3-4Doc B2]* refers to pages 3 - 4 of Doc ID B2.

FINDINGS AND REASONS FOR FINDINGS

Allegations of minor breach made in the complaints

1. In the Panel's view, the 3 allegations of minor breach in this matter that are made in the complaints are:

- (1) **[allegation (1):] That at the Shire's Ordinary Council Meeting held on 24 May 2010 (the May 2010 OCM) Councillor Simmons contravened standing order 8.3(2) of the Shire of Coolgardie Standing Orders Local Law 2000 by using an offensive or objectionable expression in reference to Councillor Margaret Jean Donkin.**

The relevant expression that Councillor Donkin alleges that Councillor Simmons so used is that part of the following statement that is in bold type: "*Cr. Donkin had **put herself forward** as the approved bar manager for the liquor application.*"

- (2) **[allegation (2):] That at the May 2010 OCM Councillor Simmons contravened regulation 10(3)(a) by making statements orally and in writing, when a member or members of the public was or were present, that Mr Benson is dishonest or that implied that he is dishonest.**

The relevant statements that Councillor Simmons is alleged to have so used are:

- (i) "*Mr. Benson signed off on the application on the 9/3/10, so he also knew about this.*"
- (ii) "*I believe that the Shire of Coolgardie's code of conduct has been breached in the following ways.*
 - 1.1 *Conflict of interest.*
[A] Members and staff will ensure that there is no actual [or perceived] conflict of interest between their personal interests and the impartial fulfilment of their professional duties.

2.1 Use of confidential information

Members and staff will not use confidential information to gain improper advantage for themselves or for any other person or body, in ways which are inconsistent with their obligation to act impartially, or to improperly cause harm or detriment to any person or organisation.

3.2 Honesty and Integrity

Members and staff will

[a] observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from these standards;

[b] bring to the notice of the Mayor/President any dishonesty or possible dishonesty on the part of any other member, and in the case of an employee to the Chief Executive Officer.

*[c] **be frank and honest in their official dealing with each other.***

[Bold emphasis supplied]

- (3) [allegation (3):] **That at the May 2010 OCM Councillor Simmons contravened regulation 10(3)(a) by making a statement orally and in writing, when a member or members of the public was or were present, that the Shire employees are dishonest or that implied that the Shire's employees are dishonest.** The relevant statement that Councillor Simmons is alleged to have so used is: *"That staff steal fuel and tools ..." or "We can't stop them pinching fuel and tools, how can you guarantee we can't stop them stealing alcohol as well."*

Background and material facts

2. The Panel notes that Attachment B to the *Notice of Complaint* dated 13 August 2010 [Doc I] sent to Councillor Simmons, to which she responded, sets out the apparent relevant background and material facts in this matter (which Councillor Simmons has not disputed), as follows with some appropriate editing:

- (1) The Kambalda Community & Recreation Facility (the Facility) is a building that is owned by the Shire of Coolgardie (the Shire) and is used by a number of community groups and sporting groups. At all relevant times the intended purpose of having a bar function area (the bar) in the Facility was that it would be run by a proposed incorporated sportsman's association / club (the Sportsman's Association) under a club licence (a type of liquor licence) and whose members would be the members of the sporting groups.
- (2) However, one of the usual requirements for a club licence is that an incorporated association applicant must satisfy the licensing authority that it has been well managed for a period of not less than 12 months prior to the application [see section 49(1) of the *Liquor Control Act 1988*].
- (3) Broadly, in those circumstances, in mid-2008 or thereabouts it was proposed that the Sportsman's Association would be established, and the Shire would apply for an appropriate liquor licence for the bar. If its application was granted, the Shire would run the bar until the Sportsman's Association had been established for at least 12 months and the bar's liquor licence had been varied to become a club licence held by the Sportsman's Association.

- (4) Councillor Simmons was at all relevant times, and is currently:
 - (a) an elected member of the Council;
 - (b) qualified under section 2.19(1)(b) to be elected as a member of the Council;
 - (c) not disqualified for membership of the Council under section 2.21, 2.22, 2.23 or 2.24; and
 - (d) not disqualified from continuing her membership of the Council under section 2.25.

- (5) At a Special Council Meeting held on 8th October 2008 Council resolved that the bar was to be operated by Council employees.

- (6) At the meeting of the Kambalda Community & Recreation Facility Working Group (KCRFWG) held on 2 December 2009, an Officer's Recommendation and a committee resolution in regard to the bar (the KCRFWG resolution) was moved by Councillor Donkin and seconded by Ms Marilyn Ward, and was carried unanimously. The KCRFWG resolution was:
 - "1. That the Committee endorses staff action to apply for the appropriate liquor license to operate the bar function area initially."*
 - 2. That the Committee meet with the Kambalda Football Club before the next Council meeting in December with a draft Memorandum of Understanding."*

- (7) Broadly, the purpose behind the second numbered paragraph of the KCRFWG resolution was the mutual desire of the Kambalda Football Club and the Shire that the bar would be operational prior to the commencement of the 2010 football season.

- (8) At the Shire's Ordinary Council Meeting held on 15 December 2009 (the December 2009 OCM), it was moved by Councillor Karafilis and seconded by Councillor Donkin, that Council adopt the KCRFWG resolution. The motion was carried 7/1 – the dissenting Councillor being Councillor Simmons who requested to have her vote against the motion recorded in the minutes.

- (9) A Council employee prepared the Shire's application for a Special Facility Sports Arena liquor licence for the bar (the liquor license application) to the Director of Liquor Licensing (the Director). During this preparation it was noted that the application required a qualified manager under the *Liquor Control Act 1988* (the Liquor Control Act) to be named in it as the bar's proposed approved manager (the approved bar Manager). At the time, no Council employee was so qualified, but Mrs Jill O'Brien, a Council employee and the Facility's manager (the Facility Manager), was aware that Councillor Donkin was (as she is now) the Kambalda Country Club's approved Manager.

- (10) On or about 25 February 2010, in view of the relatively short time left before the commencement of the 2010 football season, the Facility Manager requested Councillor Donkin to consent to her being named in the liquor license application as the bar's proposed approved manager, only for the purpose of assisting the Shire to obtain an appropriate liquor licence for the bar.

- (11) Councillor Donkin gave such consent only for such purpose, on the mutual understanding between her and the Facility Manager that:
- (a) immediately after the liquor license application was approved by the Director, the Shire would advertise the position of the bar's approved Manager, and the successful applicant for the position would replace Councillor Donkin as the bar's approved Manager;
 - (b) by the time the liquor license application was approved by the Director, a Council employee or employees may have completed or substantially completed the necessary courses of training or assessments so that he/she/they could be applicants for that position; and
 - (c) she was not to receive any payment under the arrangement.
- (12) On 25 February 2010 Councillor Donkin signed the liquor license application.
- (13) On or about 16 March 2010 the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson (Mr Benson), signed a "Certificate of Local Health Authority – Section 39" (i.e. section 39 of the *Liquor Control Act 1988*) for the bar under delegated authority in his capacity as an Environmental Health Officer.
- (14) When Mr Benson signed that certificate he was not aware of the arrangements described in paragraphs 2(10) and 2(11) above.
- (15) The agenda for the Shire's Ordinary Council Meeting held on 24 March 2010 (the March 2010 OCM) included Mr Benson's Officer Report dated 16 March 2010 (Mr Benson's report) in relation to the Shire's application for planning approval for the bar (the planning application).
- (16) Mr Benson's report repeated the KCRFWG resolution and recommended in substance and effect that Council approve the planning application and issue the certificate of local planning authority required under section 40 of the *Liquor Control Act 1988*. Councillor Simmons was present at the March 2010 OCM, but Councillor Donkin was not. Council did not deal with the planning application at the March 2010 OCM and held it over for another Council meeting.
- (17) On or about 9 May 2010 Councillor Simmons gave notice of her intention to move a motion (Councillor Simmons' motion) at the Shire's Ordinary Council Meeting to be held on 24 May 2010 (the May 2010 OCM) that, broadly, Council revoke its decisions mentioned in paragraphs 2(5) and 2(8) above.
- (18) Councillor Simmons' motion was supported by her written report dated 9 May 2010 in which she:
- (a) stated in the Summary that she "*recommends that* [Council]:
 1. *Agree to rescind a motion passed on the 8th October 2008 that the bar at the Kambalda Community Recreation Facility (KCRF) is operated by council employees. (Resolution #198/08)*
 2. *Agree to rescind a motion passed on the 2nd December 2009, whereby council adopted the KCRF working group recommendation that council staff apply for the appropriate liquor license and acquire staff to operate the bar. (Resolution #326/09).*" and

(b) stated her “[R]eason (sic) for revoking (sic) liquor license” as:

- “1. Is that council should not be going in opposition to other groups or businesses.
2. ...council should not be liable for any breaches of the licensing Act [particularly by an employed bar manager].
3. This facility was built for the benefit of the community.”

(19) At the time of the May 2010 OCM Councillor Simmons’ position in relation to the bar was, and had been since at least since December 2009, that the Shire ought not to have any involvement in holding a liquor licence for the bar or in the bar’s operation.

(20) At the May 2010 OCM when Councillor Simmons’ motion (being item 12.1.1) was before the Council and she was speaking for it, she gave a copy of a one-page document (the relevant document in this matter) to each of the other Councillors present and then read out aloud its contents in their presence and in the presence of at least one member of the public. Those contents are as follows:

*“Cr. Donkin signed Liquor License Application on the **25/2/10** 3 days after the February council meeting.*

*We have had two council meetings since one on the **22/3/10** and the other on the **19/4/10**.*

Not once was council notified about anything to do with Cr. Donkin application, that she would be the approved bar manager.

*I myself found out that Cr. Donkin had put herself forward as the approved bar manager for the liquor application, on the night of the Coolgardie electors meeting on the **29/4/10**, at which time I found out **even the president did not know**.*

Mr. Benson signed off on the application on the 9/3/10, so he also knew about this.

I believe that the Shire of Coolgardie’s code of conduct has been breached in the following ways.

1.1 Conflict of interest.

[A] Members and staff will ensure that there is no actual [or perceived] conflict of interest between their personal interests and the impartial fulfilment of their professional duties.

2.1 Use of confidential information

Members and staff will not use confidential information to gain improper advantage for themselves or for any other person or body, in ways which are inconsistent with their obligation to act impartially, or to improperly cause harm or detriment to any person or organisation.

3.2 Honesty and Integrity

Members and staff will

[a] observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from these standards;

[b] bring to the notice of the Mayor/President any dishonesty or possible dishonesty on the part of any other member, and in the case of an employee to the Chief Executive Officer.

*[c] **be frank and honest in their official dealing with each other.***

Strategic plan implications;

OUR ROLE

Encourage economic growth and employment growth

ACTION

Develop initiatives which encourage industry/new business”

[Bold emphases supplied]

- (21) Prior to her conduct identified in paragraph 2(20) above, Councillor Simmons did not raise or discuss with Councillor Donkin or any Shire employee her concerns expressed in or that may be reasonably inferred from the relevant document in this matter, and did not take any step otherwise to verify those concerns.
- (22) At the May 2010 OCM when Councillor Simmons' motion (being item 12.1.1) was before the Council and she was speaking for it, she also said in reference to the Shire's employees:

“We can't stop them pinching fuel and tools, how can you guarantee we can't stop them stealing alcohol as well.”

- (23) At the May 2010 OCM, immediately after Councillor Simmons said the words mentioned in paragraph 2(21) above:
- (a) Councillor Karafilis called a point of order, and requested that such statement be withdrawn;
 - (b) the presiding person asked Councillor Simmons to retract or withdraw the comments that Councillor Karafilis was objecting to; and
 - (c) Councillor Simmons then said the following words, or words to the effect, either that *“I withdraw whatever it was that Councillor Karafilis was objecting to”* or *“I withdraw whatever it was I said”*.

Councillor Simmons' responses to the subject allegations

4. Councillor Simmons' responses to the subject allegations are set out in her letter of 26 August 2010 [Doc J] and are reproduced below, where relevant.

Order of dealing with the allegations of minor breach

5. The Panel deals with the allegations of minor breach mentioned in paragraph 1 above by: first considering allegation (1) and Councillor Simmons' response to it; and then considering together allegation (2) and allegation (3) and Councillor Simmons' response to them.

PANEL'S DEALING WITH ALLEGATION (1)

A contravention of a relevant standing order local law is a minor breach

6. Allegation (1) is as mentioned in paragraph 1(1) above. By virtue of the fact of regulation 4, the contravention of a local law relating to conduct of people at council or committee meetings is a minor breach for the purposes of section 5.105(1)(b). In the Panel's view, the *Shire of Coolgardie Standing Orders Local Law 2000* (the Shire's standing orders) is a local law relating to conduct of people at council or committee meetings and, accordingly, a contravention of standing order 8.3(2) is a minor breach as defined under section 5.105(1)(b).

Standing order 8.3(2) reads, relevantly: *"No member of the Council ... is to use offensive or objectionable expressions in reference to any member ... of the Council."*

Councillor Simmons' response - allegation (1)

7. The Panel notes that in her letter of 26 August 2010 [Doc J], Councillor Simmons says in response to allegation (1):

"In response to this allegation I was in the wrong for assuming that Cr. Donkin had offered to use her creditentials to apply for the liquor license for the recreation centre bar. Being as me and the president had had meetings with the C.E.O, in regards to the liquor license, and he had never once indicated that Cr. Donkin would be on the license, I assumed she must have put herself forward."

Admitted or not disputed facts and issues - allegation (1)

8. In the Panel's view, in her response [Doc J] Councillor Simmons has admitted, or does not dispute or indicates that there is no dispute, in respect of the following facts and issues that arise in dealing with allegation (1):

- (1) She was a Council member on 24 May 2010, and attended at the May 2010 OCM.
- (2) At the May 2010 OCM when her motion (being item 12.1.1) was before the Council and she was speaking for it, she gave a copy of the relevant document in this matter to each of the other Councillors present and then read out aloud its contents in their presence and in the presence of at least one member of the public. Those contents included the following passage:

"I myself found out that Cr. Donkin had put herself forward as the approved bar manager for the liquor application, on the night of the Coolgardie electors meeting on the 29/4/10, at which time I found out even the president did not know."

Determinative issues - allegation (1)

9. In view of the matters mentioned in paragraphs 7 and 8 above, it is the Panel's view that the determinative issues in relation to allegation (1) are:

- (1) Do the words 'put herself forward' constitute an expression?

- (2) If issue (1) is answered in the affirmative, is that expression an offensive expression or an objectionable expression?
- (3) If issue (2) is answered in the affirmative, did Councillor Simmons use that expression in reference to Councillor Donkin?

Panel views for the purposes of dealing with allegation (1)

10. In relation to standing order 8.3(2), it is the Panel's views that:

- (1) Amongst the meanings of the word 'expression' in the Macquarie Dictionary (5th ed) is "a particular word, phrase, or form of words".
- (2) For the purposes of standing order 8.3(2), the term 'expression' means a particular word, phrase, or form of words.
- (3) In the term 'offensive or objectionable expression' in standing order 8.3(2), the word 'or' is properly construed to be used in the disjunctive so that separate meanings may be determined for each of the terms 'offensive expression' and 'objectionable expression'.
- (4) For the purposes of standing order 8.3(2), an 'offensive expression' is an expression that is likely to cause offence or displeasure and is insulting.¹
- (5) To an ordinary person, an 'offensive expression' will always be an 'objectionable expression' – however, an expression may be an 'objectionable expression' and not also an 'offensive expression' if, viewed objectively, the expression is a particular word, phrase, or form of words that is distasteful or unacceptable.
- (6) For the purposes of standing order 8.3(2), an 'objectionable expression', is an expression that viewed objectively is distasteful or unacceptable.

11. In relation to the words '*put herself forward*' the Panel notes that:

- (1) In the Shorter Oxford English Dictionary (6th ed), immediately after the word 'put' is defined, appears certain identified phrases that include "*put forward*", which is defined relevantly as "advance for consideration or acceptance, propose, suggest, nominate".
- (2) In the Macquarie Dictionary (5th ed) the phrase "put forward" is defined as "to suggest or propose ... to nominate".

Panel's views on the determinative issues - allegation (1)

12. The Panel's views on the determinative issues identified in paragraph 9 above are that:

- (1) The words '*put herself forward*' is a particular phrase or form of words, and constitute an expression.

¹ *Hargreaves and Local Government Standards Panel* [2008] WASAT 300 at [20].

- (2) An ordinary person would view the making of a statement that “an individual has put himself/herself forward for a remunerated employment position” as a claim that the individual has, on his/her own initiative or urge, suggested or proposed or nominated himself/herself for the position.
- (3) The Panel is satisfied that Councillor Donkin was approached and requested by the Facility Manager to temporarily be the approved manager of the bar, and thus Councillor Donkin did not ‘*put herself forward*’ for that position.
- (4) In the present circumstances, where Councillor Simmons claimed that Councillor Donkin had put herself forward to be the approved manager of the bar, and that claim was false, the expression ‘put herself forward’ is an offensive expression as it was likely to cause offence or displeasure and was insulting.
- (5) Furthermore, in the present circumstances, where Councillor Simmons claimed that Councillor Donkin had put herself forward to be the approved manager of the bar, and that claim was false, the expression ‘put herself forward’ is an objectionable expression that viewed objectively was distasteful or unacceptable.
- (6) On the available information, it is more likely than not that when her motion (being item 12.1.1) was before the Council at the May 2010 OCM and she was speaking for it, Councillor Simmons used the expression “*put herself forward*” in reference to Councillor Donkin.

Panel finding on allegation (1)

13. On the available information, and on the basis of the material and its views mentioned in paragraphs 6 to 12 above, and as required by section 5.110(2), the Panel is satisfied on the available information to the degree required by the Briginshaw principles, and the Panel finds, that it is more likely than not that at the Shire of Coolgardie’s Ordinary Council Meeting held on 24 May 2010 Councillor Simmons contravened standing order 8.3(2) of the *Shire of Coolgardie Standing Orders Local Law 2000* by using an offensive or objectionable expression in reference to Councillor Margaret Jean Donkin, and thus committed a minor breach by virtue of the fact of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007* - the relevant expression so used by Councillor Simmons being in bold in the statement: “*Cr. Donkin had **put herself forward** as the approved bar manager for the liquor application [for the Kambalda Community & Recreation Facility].*”

PANEL’S DEALING WITH ALLEGATION (2) and ALLEGATION (3)

14. Allegation (2) is as mentioned in paragraph 1(2) above. Allegation (3) is as mentioned in paragraph 1(3) above. Regulation 10(3) is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 10(3) is a minor breach. Regulation 10(3) is contravened by a breach of regulation 10(3)(a) or 10(3)(b).

Councillor Simmons' responses - allegation (2) and allegation (3)

15. The Panel notes that in her letter of 26 August 2010 [Doc J], Councillor Simmons says:

(1) In response to allegation (2):

"In response to this allegation I was not inferring that the manager of Regulatory and Development Services was dishonest, I probably have worded it wrong but what I was meaning that a member of the staff knew about this months before the President of the Shire knew. I also stated at that meeting that I had prepared a statement that I was going to read, and asked if anyone wanted a copy of it. All asked for a copy including the C.E.O, and after it was read out the C.E.O than said to me that I should have given this to him before the meeting."

(2) In response to allegation (3):

"In response to this allegation I never made an allegation against employees either in writing or verbally. In the heat of the debate I said [we can't stop them] which the president called for me to retract what I had said, which I did though I did not use the same words but said [I take back what I had said]."

The discussion around this item had been extremely intense all afternoon at the discussion forum as well as at the meeting, and so I suppose we were all pretty well stirred up as the C.E.O had put an item forward at the discussion forum regarding this and had indicated that 88% of the people wanted it from the survey they had sent out, and after I asked 3 times how many surveys were sent out the staff finally answered me that 900 had been sent out and only 43 has been returned and that 37 wanted it and that was how they arrived at the 88%.

So coming into the OCM, I was very aware that the staff was not impartial to this and that even the CEO wanted it, and I believe in the heat of the moment things are said."

Admitted or not disputed facts and issues - allegation (2) and allegation (3)

16. In the Panel's view, in her response [Doc J] Councillor Simmons has admitted, or does not dispute or indicates that there is no dispute, in respect of the following facts and issues that arise in dealing with allegation (2) and allegation (3):

(1) She was a Council member on 24 May 2010, and attended at the May 2010 OCM.

(2) At the May 2010 OCM when her motion (being item 12.1.1) was before the Council and she was speaking for it, she gave a copy of the relevant document in this matter to each of the other Councillors present and then read out aloud its contents in their presence and in the presence of at least one member of the public.

- (3) At the May 2010 OCM when Councillor Simmons' motion (being item 12.1.1) was before the Council and she was speaking for it, she also said in reference to the Shire's employees: *"We can't stop them pinching fuel and tools, how can you guarantee we can't stop them stealing alcohol as well."*

Views for the purposes of dealing with allegation (2) and allegation (3)

17. Attachment B sets out views, including the Panel's general views, and material in relation to regulation 10(3)(a). The Panel adopts those views and that material for the purposes of its dealing with allegation (2) and allegation (3).

Determinative issues - allegation (2)

18. On the basis of the views and material in Attachment B, it is the Panel's view that the determinative issues in relation to allegation (2) are:

- (1) Whether or not the contents of the relevant document in this matter are statements made by Councillor Simmons?
- (2) If issue (1) is answered in the affirmative, viewed objectively, do any of those statements, alone or together, constitute a statement or carry the only reasonable inference from it/them that Mr Benson is dishonest?
- (3) If issue (2) is answered in the affirmative, was the making of the statement/s concerned unlawful under section 345 of *The Criminal Code*.

Panel's views on the determinative issues - allegation (2)

19. The Panel's views on the determinative issues identified in paragraph 18 above in relation to allegation (2) are that:

- (1) As mentioned in paragraph 4 of Attachment B it is the Panel's view that, for the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion.
- (2) When Councillor Simmons gave a copy of the relevant document in this matter to each of the other Councillors present and then read out aloud its contents at the May 2010 OCM she made representations of fact and opinion, and thus she made statements in writing and orally.
- (3) Viewed objectively in the context of the contents of the relevant document in this matter, when Councillor Simmons made the statement: *"Mr. Benson signed off on the application on the 9/3/10, so he also knew about this."* the only reasonable inference from it is that she was alleging that:
 - (a) Councillor Donkin had proposed or nominated herself for the remunerated employment position as the approved manager for the bar in the Kambalda Community & Recreation Facility;
 - (b) Mr Benson was aware of that proposal or nomination, and had not been frank or honest in his official dealings with the other Shire Councillors because he had not informed them of that proposal or nomination; and

- (c) accordingly, Mr Benson was dishonest in his official dealings with the other Shire Councillors because he had not informed them of that proposal or nomination.
- (4) On the available information, the Panel is not satisfied that Councillor Simmons' statement: "*Mr. Benson signed off on the application on the 9/3/10, so he also knew about this.*" is conduct that is unlawful under section 345 of *The Criminal Code*. The reasons why the Panel is not so satisfied are that:
- (a) on the available information, it is the Panel's view that the circumstantial evidence in this matter is susceptible to a number of inferences as to Councillor Simmons' intention when she gave a copy of the relevant document in this matter to each of the other Councillors present and then read out aloud its contents at the May 2010 OCM;
 - (b) these inferences include that Councillor Simmons' said intention was perhaps:
 - (i) to again draw Council's attention to the issue of whether or not the Shire ought to have any involvement in holding a liquor licence for the bar or in the bar's operation, particularly in view of the Shire's potential liability for the acts or omissions of any of its employees involved in the bar's operation;
 - (ii) to draw Councillor Donkin's attention to the issue of whether or not she (Councillor Donkin) had a disclosable section 5.60 'interest' in matters relating to the bar - in particular, item 12.1.1 at the May 2010 OCM;
 - (iii) to draw Council's attention to the issue of whether or not both or either of Councillor Donkin and/or Mr Benson had committed a breach of the Shire's code of conduct; and
 - (c) in the event, while Councillor Simmons' said intention is more likely than not to have been to cause Mr Benson distress or grief, it was not her intention to cause him:
 - (i) significant financial injury or harm; or
 - (ii) significant mental or psychological injury or harm that was, or was likely to be, significant and longstanding,and consequently Councillor Simmons said intention was not to cause the required 'serious harm' (as that term is defined for the purposes of section 345 of *The Criminal Code*) to Mr Benson.

Panel finding in relation to allegation (2)

20. On the available information, and on the basis of the views and material in Attachment B, and the Panel's views mentioned in paragraphs 14 to 19 above, and as required by section 5.110(2), the Panel is satisfied on the available information to the degree required by the Briginshaw principles, and finds, that it is more likely than not that at the Shire of Coolgardie's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons committed a minor breach in that she made a statement orally and in writing, when a member of the public was present, that implied that the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson, was dishonest, in contravention of regulation 10(3)(a).

Determinative issues - allegation (3)

21. On the basis of the views and material in Attachment B, it is the Panel's view that the determinative issues in relation to allegation (3) are:

- (1) Are the relevant words that Councillor Simmons said at the May 2010 OCM – namely: *"We can't stop them pinching fuel and tools"* – an oral statement for the purposes of regulation 10(3)(a)?
- (2) If issue (1) is answered in the affirmative, viewed objectively, does that statement constitute a statement, or carry the only reasonable inference from it, that the Shire's employees, generally, or at least some of the Shire's employees, are dishonest?
- (3) If issue (2) is answered in the affirmative, was the making of the statement unlawful under section 345 of *The Criminal Code*.

Panel's views on the determinative issues - allegation (3)

22. The Panel's views on the determinative issues identified in paragraph 21 above in relation to allegation (3) are that:

- (1) As mentioned in paragraph 4 of Attachment B it is the Panel's view that, for the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion.
- (2) When Councillor Simmons said at the May 2010 OCM that: *"We can't stop them pinching fuel and tools."* those words constitute an oral statement made by her.
- (3) Viewed objectively:
 - (a) that statement is a statement that the Shire's employees, generally, or at least some of the Shire's employees, are dishonest; or
 - (b) alternatively, if the Panel's view mentioned in (a) immediately above is wrong, the only reasonable inference from that statement is that the Shire's employees, generally, or at least some of the Shire's employees, are dishonest.
- (4) On the available information, the Panel is not satisfied that Councillor Simmons' oral statement at the May 2010 OCM that: *"We can't stop them pinching fuel and tools,"* is conduct that is unlawful under section 345 of *The Criminal Code*, on the basis that whatever Councillor Simmons' intention was in fact in making the statement, it was not to cause the Shire's employees, generally, or any of them in particular:
 - (a) significant financial injury or harm; or
 - (b) significant mental or psychological injury or harm that was, or was likely to be, significant and longstanding,and consequently Councillor Simmons said intention was not to cause the required 'serious harm' (as that term is defined for the purposes of section 345 of *The Criminal Code*) to the Shire's employees, generally, or any of them in particular.

Panel finding in relation to allegation (3)

23. On the available information, and on the basis of the views and material in Attachment B, and the Panel's views mentioned in paragraphs 14 to 17 above and in paragraphs 21 and 22 above, and as required by section 5.110(2), the Panel is satisfied on the available information to the degree required by the Briginshaw principles, and finds, that it is more likely than not that at the Shire of Coolgardie's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons committed a minor breach in that she made an oral statement, when a member of the public was present, that inferred that the Shire's employees, generally, or at least some of the Shire's employees, were dishonest, in contravention of regulation 10(3)(a).

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

References to sections and regulations, and the term “viewed objectively”

1. In these Reasons, unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations); a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (the Act); and a reference to the Department is a reference to the Department of Local Government.
- (2) The term “viewed objectively” means “as viewed by a reasonable person” (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

Details of the complaint

2. Mr Tony Nottle, the Chief Executive Officer (the Shire’s CEO) and the Complaints Officer (the Complaints Officer) of the Shire of Coolgardie (Shire), has sent to the Panel two complaints (the complaints) – one dated 8 June 2010 made by Councillor Donkin (Complaint SP23/2010), and the other dated 23 June 2010 made by Councillor Karafilis (Complaint SP27/2010) – about alleged conduct of Councillor Simmons, a current member of the Shire’s Council (the Council).

Complaint SP23/2010 consists of a 2-page *Complaint of Minor Breach* dated 8 June 2010 [Doc B1] and a copy of 1-page document with the heading, in handwriting “*Handed out at Council Meeting 24th May 2010*” [Doc B2].

Complaint SP27/2010 consists of a 3-page *Complaint of Minor Breach* dated 23 June 2010 [Doc D] and a further copy of [Doc B2] without the said heading.

Preliminary matters

3. Each of the complaints is in the form approved by the Minister for Local Government and was made within time. There is at least one allegation made in each of the complaints that Councillor Simmons, a member of the Council at the time of the alleged incident, has committed a minor breach as defined under section 5.105(1)(a).

Councillor Simmons’ response sought and received

4. On 13 August 2010 a *Notice of Complaint* [Doc I] was sent to Councillor Simmons advising her, among other things, of the 3 allegations of minor breach that the Panel will consider in this matter and inviting her to respond to those allegations. Councillor Simmons responded by her letter of 26 August 2010 [Doc J].

Available information

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

Doc ID	Description
A	Copy of (2-page) letter from Mr AG (Tony) Nottle, the Complaints Officer of the Shire of Coolgardie (Shire), dated 9 June 2010.
B1	Copy of (2-page) complaint (Complaint SP 23 of 2010), dated 8 June 2010 – its attachment being [Doc B2]
B2	Copy of (1-page) document with the heading, in handwriting “<i>Handed out at Council Meeting 24th May 2010</i>”.
B3	Copy of (15-page) the <i>Shire of Coolgardie Standing Orders Local Law 2000</i> .
C	Copy of (2-page) letter from Mr Nottle, dated 24 June 2010.
D	Copy of (3-page) complaint (Complaint SP 27 of 2010), dated 23 June 2010 – its attachment being a further copy of [Doc B2] without the said heading.
E	Copy of (3-page) letter from Mr Nottle, dated 30 June 2010.
F1	Copy of (1-page) printout of an email of 14 July 2010 from Mr Nottle, preceded by an earlier email of that date from Mr Geoff Benson to Mr Nottle.
F2	Copy of (1-page) Statement by Mr Benson, dated 14 July 2010 (being the attachment to the said earlier email of 14 July 2010 from Mr Geoff Benson to Mr Nottle.
G	Copy of (2-page) printout of an email of 20 July 2010 from Mr Nottle, preceded by an email of 19 July 2010 to him.
H1	Copy of (4-page) pages 29 to 32 of the agenda for the Shire’s Ordinary Council Meeting (OCM) on 22 March 2010.
H2	Copy of (1-page) page 13 of the confirmed minutes of the Shire’s OCM held on 22 March 2010.
H3	Copy of (8-page) pages 15 and 64 to 69 of the confirmed minutes of the Shire’s OCM held on 24 May 2010.
I	Copy of (12-page) <i>Notice of Complaint</i> to Cr Simmons, dated 13 August 2010.
J	Copy of (1-page) response from Cr Simmons, dated 26 August 2010.

Panel’s role - duty to make finding - required standard of proof - the Briginshaw principles

6. The Panel notes that:

- (1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.

- (2) Under the Act and the common law the Panel: has no power or duty to carry out any investigation in relation to any complaint before it; and has no power to compel any information to be provided to it.
- (3) Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia.
- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for it to make any finding that any minor breach has been committed by a council member, 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 [section 5.106].
- (5) This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).
- (6) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.
- (7) The approach to a court's findings described in the High Court of Australia case of *Briginshaw v Briginshaw*² (*Briginshaw*) is based on the principle that a court in a civil action should not lightly find that a party has engaged in criminal conduct. As accusations of wrongdoing usually involve serious consequences for the defendant, justice demands that the accuser, whether in civil or criminal matters, carries the burden of proof to the requisite standard.
- (8) *Briginshaw* is the leading authority, frequently applied, that where the allegation in a civil proceeding is a serious one:
 - (a) the importance and gravity of the allegation makes it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the evidence survives a careful scrutiny; and
 - (b) circumstantial evidence cannot satisfy a sound judgment of a state of facts if that evidence is susceptible of some other not improbable explanation; and
 - (c) if the evidence adduced, when subjected to these tests, satisfies the tribunal of fact that the conduct alleged was committed, it should so find.
- (9) The contents of paragraphs (8)(a) and (8)(b) immediately above, taken together, are referred to in these *Reasons* as the *Briginshaw* principles.
- (10) Her Honour Branson J, in her separate reasons for judgment in the Full Federal Court case of *Qantas Airways Limited v Gama*³ (*Gama*), has considered and expressed her views on the *Briginshaw* approach - which views were generally agreed with by French J, as he then was, and Jacobson J in their joint reasons for judgment in *Gama*⁴.
- (11) In the Panel's view, the *Briginshaw* principles and Branson J's said views have relevance when the Panel is dealing with a minor breach complaint.

Consolidation of complaints

7. Due to the common nature of 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.

² [1938] HCA 34; (1938) 60 CLR 336

³ [2008] FCAFC 69

⁴ *Supra*, at [110]

Attachment B

VIEWS, INCLUDING THE PANEL'S GENERAL VIEWS, AND MATERIAL IN RELATION TO REGULATION 10(3)(a)

Relevant legislation

1. Regulations 10(3)(a) and (4) read, relevantly:

“(3) If a person, in his or her capacity as a council member, is attending a council meeting ... 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;

(4) Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”

2. *The Criminal Code Chapter XXXV consists of section 345 (the crime of criminal defamation), which reads, relevantly:*

“(1) A person who, without lawful excuse, publishes matter defamatory of another living person (the “victim”):

(a) knowing the matter to be false or without having regard to whether the matter is true or false; and

(b) intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused, is guilty of a crime

(2) In proceedings for an offence under this section the accused person has a lawful excuse for the publication of defamatory matter about the victim if, and only if, subsection (3) applies.

(3) This subsection applies if the accused person would, having regard only to the circumstances happening before or at the time of the publication, have had a defence for the publication if the victim had brought civil proceedings for defamation against the accused person.

...

(7) In this section:

“publish” and “defamatory” have the meanings that those terms have in the law of tort (as modified by the Defamation Act 2005) relating to defamation.”

Elements of breach

3. In view of regulation 10(4) the elements of a breach of regulation 10(3)(a) are that:

- a council member attended a council meeting, committee meeting or other organised event in his or her capacity as a council member
- [and] in the presence of a member or members of the public
- the council member either orally, in writing or by any other means
- made a statement
- viewed objectively, that statement (or the only reasonable inference from the words used, in the context in which they were used) was that a local government employee was incompetent or dishonest
- the making of that statement was not unlawful under section 345 of *The Criminal Code Chapter XXXV*.

4. What is a 'statement' for the purposes of regulation 10(3)(a)?

- (1) The noun 'statement' is primarily defined in the Shorter Oxford English Dictionary (6th ed) as "the action of or an act of stating, alleging, or enunciating something".
- (2) The term 'statement' is defined under section 79B of the *Evidence Act 1906* (W.A.) as including "any representation of fact or opinion whether made in words or otherwise".
- (3) In *Given v Pryor* (1979) 39 FLR 437 at 439, Franki J said:

"... It seems to me a statement may be in any language, including one made by signs that are understood by those deaf and dumb [sic, mute] people who use them, and one written in shorthand. In the same way I cannot see why pictorial or diagrammatic material should not be included in a statement".

- (4) Accordingly, it is the Panel's view that for the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion.

5. What conduct is unlawful under *The Criminal Code Chapter XXXV*?

- (1) It is the Panel's view that, by virtue of regulation 10(4), if a council member attended a council meeting and - when members of the public were present - orally, in writing or by any other means made a representation of fact or opinion that a local government employee was incompetent or dishonest, the council member's conduct of making the representation of fact or opinion will be unlawful under section 345 of *The Criminal Code* (i.e. *The Criminal Code Chapter XXXV*) where, in a prosecution under that section:
 - (a) there is sufficient evidence for the prosecution to prove beyond a reasonable doubt that:
 - (i) the council member published matter defamatory of the employee; and
 - (ii) at the time of such publication, the council member did so:
 - (A) knowing the matter to be false or without having regard to whether the matter is true or false (i.e. the council member did so with 'malice', in the defamation sense); and
 - (B) with the intention to cause serious harm to the employee or the local government concerned or any other person or without having regard to whether such harm is caused; and
 - (b) the council member then fails to prove on the balance of probabilities that, having regard only to the circumstances happening before or at the time of the publication, he or she would have had a defence (which malice does not defeat) for the publication if the employee had brought civil proceedings for defamation against the council member.

6. What is defamatory material?

The Panel notes that:

- (1) Defamation occurs when defamatory material relating to an individual is published. Material will be defamatory if it could:
 - injure the reputation of the individual by exposing them to hatred, contempt or ridicule;
 - cause people to shun or avoid the individual; or
 - lower the individual's estimation by right thinking members of society.

- (2) In other words, material is defamatory of a person if the material has a tendency to lower the person in the estimation of his or her fellow persons by making them think less of him or her.
- (3) Whether or not a matter is defamatory will depend on the circumstances of each individual case, as it is necessary to consider:
 - whether the material was capable of conveying the defamatory meaning alleged by the plaintiff to an ordinary person. If this is answered positively, the next issue for determination is:
 - whether, in fact, an ordinary person would have taken the publication as conveying the meaning alleged.

In answering these questions the standard to be applied is what the ordinary reader, listener or viewer would understand or infer from the statement. The audience is taken not to have any special prejudices. The actual intention of the person making the statement is irrelevant.

There are three ways that a statement can convey a defamatory meaning (otherwise known as an imputation):

- On the *natural and ordinary meaning* of the words: the meaning coming from a literal reading of the words.
- The court may find that the statement is a *false innuendo*. In other words, there is a secondary meaning which comes from reading between the lines.
- The statement may be a *true innuendo*. This is where the alleged meaning arises from the natural and ordinary meaning of the words being read in light of other facts not mentioned in the publication. The statement must be published to at least one person who knows of other facts.

7. What is malice (in the sense that the term is used in the law of defamation)?

At common law a defamatory statement is published with malice (i.e. in the sense that the term is used in the law of defamation) if the person making it: knew at the time of publication that the representation was false; or made the representation recklessly indifferent to whether it was true or false.

At common law, malice includes ill will, spite and improper motive (*Horrocks v Lowe* [1975] AC 135 at 149-151).

8. In view of regulation 10(3)(a) and the context and purposes of section 345 of *The Criminal Code*, what does the term 'serious harm' mean?"

The term 'serious harm' is not defined under *The Criminal Code*. However, in the light of regulations 10(3)(a) and 10(4) and the context and purposes of section 345 of *The Criminal Code*, it is the Panel's view that, when it considers the intent of a council member, the term 'serious harm' in section 345 is a reference to:

- (a) significant financial injury or harm; or
- (b) significant mental or psychological injury or harm that is, or is likely to be, significant and longstanding, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

9. 'incompetent' and 'dishonest'

The Panel notes that the Shorter Oxford English Dictionary (6th ed) defines:

- (a) the word 'incompetent' (as an adjective and noun) as, relevantly, "Chiefly of a person: of inadequate ability or fitness; lacking the requisite capacity or qualification; incapable"; and
- (b) the word 'dishonest' (as an adjective) as, relevantly, "Of a person: lacking in probity or integrity, untrustworthy; (now chiefly) apt to steal, cheat, lie or act fraudulently".

10. What representations of fact or opinion will be a breach of regulation 10(3)(a)?

In the Panel's view the types of representations of fact or opinion that will breach of regulation 10(3)(a) are:

- (a) an express statement that a local government employee is "incompetent" or "dishonest" – e.g. "The CEO is incompetent" or "The Manager, Compliance is dishonest"; or
- (b) a statement implying that a local government employee is incompetent – i.e. implying that the employee is of inadequate ability or fitness, or is lacking the requisite capacity or qualification, or is incapable; or
- (c) a statement implying that a local government employee is dishonest – i.e. implying that the employee is lacking in probity or integrity, is untrustworthy, or has a tendency to steal, cheat, lie or act fraudulently.

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 23 & 27 of 2010 (DLG: 20100165 & 20100172)
Heard: Determined on the documents
Considered: 20 September 2010 & 21 October 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 23 of 2010

Complainant: (Cr) Margaret Jean DONKIN

Council member complained about: Cr Daphne Mae SIMMONS

And

Complaint No. SP 27 of 2010

Complainant: (Cr) Norm KARAFILIS

Council member complained about: Cr Daphne Mae SIMMONS

Local Government: Shire of Coolgardie

DECISION AND 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.

FINDINGS OF MINOR BREACH

The Panel has made 3 findings of minor breach (the findings) in relation to Complaints Nos. SP 23 and 27 of 2010 – namely:

- (1) That at the Shire of Coolgardie's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons contravened standing order 8.3(2) of the *Shire of Coolgardie Standing Orders Local Law 2000* by using an offensive or objectionable expression in reference to Councillor Margaret Jean Donkin, and thus committed a minor breach by virtue of the fact of regulation 4(2) - the relevant expression so used by Councillor Simmons being in bold in the statement: "*Cr. Donkin had **put herself forward** as the approved bar manager for the liquor application* [for the Kambalda Community & Recreation Facility]."
- (2) That at the Shire of Coolgardie's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons committed a minor breach in that she made a statement orally and in writing, when a member of the public was present, that implied that

the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson, was dishonest, in contravention of regulation 10(3)(a).

- (3) That at the Shire of Coolgardie's Ordinary Council Meeting held on 24 May 2010 Councillor Simmons committed a minor breach in that she made an oral statement, when a member of the public was present, that inferred that the Shire's employees, generally, or at least some of the Shire's employees, were dishonest, in contravention of regulation 10(3)(a).

SUMMARY OF DECISION

The Panel's decision on how the said 3 minor breaches (the 3 minor breaches) is dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, pursuant to subsection (b)(ii) of that section it ordered that Councillor Simmons apologise publicly to each of Councillor Donkin, Mr Benson, and to the Shire's employees generally, as specified in the attached Minute of Order (being Attachment A).

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 Regulations.

Procedural fairness matters

2. The Panel notes that through its Presiding Member it has given to Councillor Simmons: notice of the findings (the notice of the findings); a copy of the Panel's Reasons for Findings in this matter (the Reasons for Findings); and a reasonable opportunity for her to make submissions about how the 3 minor breaches should be dealt with under section 5.110(6).

Councillor Simmons' response and submissions

3. By her email of 7 October 2010 Councillor Simmons has responded to the notice of findings and the Reasons for Findings, and has made such submissions. The text of her email reads:

"To whom it may concern,

I would like to take the opportunity given to me to say how the minor breaches should be dealt with under s 5.110[6]n of the local government act 1995.

[a] Dismissing the complaint; The reason that the allegations were made is that in the past our shire has kept a lot of the workings of council Behind closed doors and I was trying in my role of councillor to make us more accountable to the public Hence the reason for the 3 points that I referred to.

This is my preferred option as I did not think at anytime That I was contravening the act or standing orders, but rather giving my constituents what they had asked for That all things be in the open.

In hindsight now I have been learning that there are better ways that I could have made these points, and have set myself the goal of trying to Become a much more informed councillor, by doing the walga diploma course which just in the 4 units I have sat through I have so much better Understanding of the workings of local government.

If you still view these breaches as minor than I think that it is a bit harsh to get a young councillor censored etc, as it really says think twice Before becoming a councillor as you really will need to have more training prior to becoming a councillor so that you don't do what I have done And possibly if people knew what can happen to you they would not be as inclined to step up to the job. On that note I will leave it to you the board to decide what way you want to go with these breaches." (Councillor Simmons' submissions)

Panel's views how the 3 minor breaches should be dealt with under section 5.110(6)

4. The Panel notes that:

- (1) Councillor Simmons has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.
- (2) In Councillor Simmons' submissions she does not dispute any of the findings, reasons or contents in the Reasons for Findings.
- (3) A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.⁵ While a public censure has that character or effect it is aimed at reformation of the offending council member and prevention of further offending acts.
- (4) Judge J Pritchard (as she then was), as the then Deputy president of the State Administrative Tribunal (the SAT), said in her Reasons of the Tribunal in *Treby and Local Government Standards Panel* [2010] WASAT 81 at [116] – [129], relevantly:

⁵ *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

“In relation to the breaches committed by [the Mayor], the Panel concluded that two of the sanctions set out in s 5.110(6)(b) should be imposed, due to the seriousness of the breach of reg 7(1)(b). The seriousness of that breach warranted [the Mayor] being admonished by the Panel for his offending conduct, as well as requiring him to make a public apology to [the 3 Councillors concerned].

[The 2 applicant council members] accepted that by breaching cl 11.9 of the Standing Orders, they breached a local law relating to conduct and thereby committed a minor breach for the purposes of s 5.105(1)(b) of the LG Act. However, the applicants submitted that in the circumstances the Tribunal should make no order as to penalty.

In the alternative, the applicants submitted that in the event that the Tribunal determined that a sanction should be imposed in respect of a breach of reg 7(1)(b) together with cl 11.9 of the Standing Orders, or of cl 11.9 of the Standing Orders alone, the appropriate sanction would be the imposition of a censure, rather than to require an apology. The applicants took that position notwithstanding their submission that a censure constitutes a more severe sanction than an apology. The basis for their submission was that a requirement to provide an apology might be regarded as a vindication of the conduct of [the 3 Councillors concerned] and might serve to encourage a culture of complaints to the Panel arising from Council debates, which was not in the interests of the City.

I agree with the Panel's view that the conduct of the applicants in making the remarks was serious. It involved taking advantage of their position as councillors who were able to make statements in a public forum, to make insulting and derogatory comments about [the 3 Councillors concerned] which questioned their honesty and integrity. Conduct of this kind has the potential to disrupt and undermine the proper conduct of council business. That is particularly so when conduct of this kind is engaged in by the person whose role it is to preside at the meetings, namely the Mayor.

At the same time, as [the other applicant council member] himself effectively admitted, the applicants made the remarks they did in the heat of the moment, in what appears to have been a highly charged atmosphere. This was not a calculated misuse of their office to cause detriment to other persons.

I also take into account the fact that there was no suggestion that the applicants had engaged in conduct of this kind before and the applicants have not been subject to action in respect of a minor breach before now.

The applicants accepted 'that with the benefit of hindsight they could have handled the matter better'. However, they did not express remorse for what they did, and their approach in these proceedings was to seek to justify their own conduct.

Having regard to these considerations, in my view a sanction should be imposed to reflect the community's disapproval of a contravention of reg 7(1)(b) and of cl 11.9 of the Standing Orders, to dissuade councillors from other local

governments from engaging in similar conduct in the future, and thereby to maintain appropriate standards of behaviour by councillors during council meetings.

The conclusion that a sanction should be imposed for the minor breaches raises for consideration whether separate sanctions should be imposed in respect of each minor breach by the applicants. That issue arises, in particular, because of the similarities between the provisions which the applicants contravened, and because the evidence which established each minor breach was the same.

In the criminal context, the general principle in Western Australia is that if the evidence necessary to establish two offences is identical, an offender should not be punished twice for the same conduct: cf s 11 of the *Sentencing Act 1995* (WA) and *Plenty v Bargain* [1999] WASCA 67 at [69] [72] (McKechnie J).; cf *Pearce v The Queen*(1998) 194 CLR 610 at 623 (McHugh, Hayne and Callinan JJ).

In the present case, although standing order 11.9 and reg 7(1)(b) contain some similar elements, they are not identical, but the evidence which was relied upon to establish each breach namely the transcript of the Special Meeting was the same. Counsel for the intervenor accepted that if this was a criminal case, then s 11 of the *Sentencing Act 1995* (WA) would apply. Although the minor breaches are not criminal offences, the same general principle which is applied in the criminal context should be applied in determining the appropriate sanction in this case. In my view, it would therefore be inappropriate to impose a sanction for each minor breach in this case.

Section 5.110(6) of the LG Act contains a range of sanctions. As I have noted above, the applicants submitted that a censure was a more severe sanction than an apology. A censure is a public statement of disapprobation of a councillor's conduct. On the other hand, the personal nature of an apology, and the admission by the individual of wrongdoing which an apology entails, is also a significant sanction. It is not necessary to decide whether one is a more serious sanction than the other. In my view, the correct and preferable decision is that each applicant should be required to make a public apology to [the 3 Councillors concerned], in the terms set out by the Panel in its orders. That sanction is an appropriate reflection of the seriousness of the minor breaches, but also appropriately reflects the fact that [the 3 Councillors concerned] were the subjects of the improper conduct in which the applicants engaged.

...

The fact that the applicants will be subjected to a sanction in respect of their conduct should not be viewed as a sign of encouragement for councillors to pursue complaints of a minor breach of the LG Act in respect of the conduct of a fellow councillor during a council meeting. As I observed earlier in these reasons, there is a good deal of merit in the view that matters of this kind should be dealt with immediately in the course of a council debate, if that is possible. To do so is likely to ensure that the standard of debate within council meetings is maintained, thereby facilitating the proper consideration and determination of council business. An immediate response, rather than the pursuit of a formal complaint which may take months to resolve, is also more likely to preserve relationships among councillors, which is essential to the efficacious functioning of a council. Finally, dealing with breaches of the appropriate standards in the

course of the council meeting itself, where that is possible, ensures that those matters are dealt with in a way, and with the quantum of resources, which is appropriate having regard to the nature and seriousness of the conduct itself.”

- (5) Judge J Chaney (as he then was), as the then Deputy president of the State Administrative Tribunal (the SAT), said in his Reasons of the Tribunal in *Hargreaves and Local Government Standards Panel* [2008] WASAT 300, at [26] – [28]:

“Even if a criticism of a local government employee were to have some justification, the purpose of [regulation 10(3)] is to ensure that that criticism is not dealt with by publicly denigrating the employee. Where that occurs, it is appropriate that the breach be remedied by a public apology.

Cr Hargreaves opposed the requirement for a public apology on the basis that he was simply endeavouring to provide proper representation of his constituents and to address criticisms which he has of the operations of the Shire over a period of years. He considers the requirement that he apologise will merely serve to deepen the divide in the community, and on the Council, which is detrimental to the good government of the Shire.

In my view, an apology is appropriate. If, as Cr Hargreaves contends, he did not intend to be offensive to the health inspector, then an apology for any offence unintentionally caused is a very reasonable step to take. An apology should serve to put the matter behind all concerned, so that they can focus on the constructive and proper government of the Shire.”

Appropriate sanctions for the 3 minor breaches

5. It is the Panel’s view that:

- (1) The Panel’s findings that the 3 minor breaches constitute the first time that the Panel has found that Councillor Simmons has committed any minor breach.
- (2) Taking into account Councillor Simmons’ submissions and the reasoning and matters mentioned in paragraph 4 above, it is appropriate that Councillor Simmons should apologise publicly to each of Councillor Donkin, Mr Benson, and to the Shire’s employees generally, as specified in the attached Minute of Order (being Attachment A), as that sanction is an appropriate reflection of the fact that Councillor Donkin, Mr Benson, and the Shire’s employees generally, were the subjects of the respective offending implications made by Councillor Simmons.

Form of the public apology

6. The Panel notes that:

- (1) When it has dealt with a minor breach by ordering that a council member publicly apologise, the form of the apology specified by the Panel has often been a concise description of the found minor breach/es and a statement by the council member that he or she apologises to the person/s concerned for the offending conduct and for any embarrassment or distress that such conduct caused to such person/s.

- (2) In the context of Part 5 Division 9 of the Act and the Regulations, the components of a full apology (or, a good apology) appear to consist of an acknowledgment of the offending conduct, acceptance of responsibility, expression of remorse or regret, and a promise or undertaking not to repeat the offending conduct.
- (3) However, a forced public apology in the form described in paragraph 6(1) above will often be sufficient to publicise the relevant council member's conduct in such a way that his/her unacceptable conduct is identified to the public and he/she is effectively sanctioned.
- (4) Where it thinks appropriate, the Panel may order that the person against whom the complaint was made make a full public apology in terms that consist of all of the components mentioned in paragraph 6(2) above.

Panel decision

7. Having regard to the Reasons for Findings, the matters mentioned in paragraphs 4 to 6 above (both inclusive), and the general interests of local government in Western Australia, the Panel's decision on how the 3 minor breaches are dealt with under section 5.110(6) is that, pursuant to subsection (b)(ii) of that section, it orders that Councillor Simmons apologise publicly to each of Councillor Donkin, Mr Benson, and to the Shire's employees generally, as specified in the attached Minute of Order (being Attachment A).

.....
Brad Jolly (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 (the 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 the 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).**

Attachment A

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 23 & 27 of 2010 (DLG: 20100165 & 20100172)
Heard: Determined on the documents
Considered: 20 September 2010 & 21 October 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 23 of 2010

Complainant: (Cr) Margaret Jean DONKIN

Council member complained about: Cr Daphne Mae SIMMONS

And

Complaint No. SP 27 of 2010

Complainant: (Cr) Norm KARAFILIS

Council member complained about: Cr Daphne Mae SIMMONS

Local Government: Shire of Coolgardie

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Daphne Mae Simmons, a member of the Council of the Shire of Coolgardie, apologise publicly to Councillor Margaret Donkin, Mr Geoffrey Benson, a Shire employee, and to the Shire's employees generally, as specified in paragraph 2 or paragraph 3 below, as the case requires.
2. At the next Shire of Coolgardie Ordinary Council Meeting immediately following the date of service of this Order on the said Daphne Mae Simmons:
 - (a) the said Daphne Mae Simmons shall request the presiding person for his/her permission to address the meeting immediately following Public Question Time or during the Announcements part of the meeting or at

such time during the meeting when it is open to the public as the presiding member thinks fit, for the purpose of the said Daphne Mae Simmons making a public apology to Councillor Margaret Donkin, to the said Mr Geoffrey Benson and to the Shire's employees generally; and

- b) subject to the said presiding person giving such permission, at the time permitted by the said presiding person the said Daphne Mae Simmons shall verbally address the Shire's Council as follows, without her making any introductory words prior to her address, and without her making any comment or statement after her address:

"I advise this meeting that:

- (1) Two complaints has been made to the Local Government Standards Panel about certain conduct by me as a member of this Council, at its meeting held on 24 May 2010, in relation to the Shire's previous decision to apply for a liquor licence for, and to operate, the bar in the Kambalda Community & Recreation Facility.*
- (2) The Local Government Standards Panel has considered those complaints, and has made 3 findings of minor breach, namely that at the said Council meeting:*
 - (a) I breached standing order 8.3(2) by using an offensive or objectionable expression in reference to a fellow Councillor by falsely claiming that Councillor Margaret Donkin had "put herself forward" as the approved bar manager for the liquor licence application;*
 - (b) I breached regulation 10(3)(a) of the Local Government (Rules of Conduct) Regulations 2007 by making a statement orally and in writing, when a member of the public was present, that implied that the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson, was dishonest; and*
 - (c) I also breached that regulation by making an oral statement, when a member of the public was present, that implied that the Shire's employees, generally, or at least some of them, were dishonest.*
- (3) I apologise to Councillor Doncan, to Mr Benson, and to the Shire's employees generally for my said conduct, and regret any hurt, inconvenience or unpleasantness I have respectively caused to them."*

3. If the said Daphne Mae Simmons:

- (a) fails to comply with the requirements of paragraph 2 above; or

- (b) is not able to so comply due only to the presiding person refusing to give her the permission described in paragraph 2 above,

within 14 days after the next Shire of Coolgardie Ordinary Council Meeting immediately following the date of service of this Order on her, the said Daphne Mae Simmons shall cause the following Notice of Public Apology to be published, in no less than 10 point print, as a one-column or a two-column display advertisement in the first 15 pages of the "Kalgoorlie Miner" newspaper.

PUBLIC APOLOGY

Two complaints have been made to the Local Government Standards Panel (the Panel) about my conduct **as a member of the Council of the Shire of Coolgardie at its meeting held on 24 May 2010** in relation to the Shire's previous decision to apply for a liquor licence for, and to operate, the bar in the Kambalda Community & Recreation Facility.

The Panel has considered the complaints, and made 3 findings of minor breach – namely, that at the said Council meeting:

(a) I breached standing order 8.3(2) by using an offensive or objectionable expression in reference to a fellow Councillor by falsely claiming that Councillor Margaret Donkin had "put herself forward" as the approved bar manager for the liquor licence application;

(b) I breached regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007* by making a statement orally and in writing when a member of the public was present, that implied that the Shire's Manager Regulatory and Development Services, Mr Geoffrey Benson, was dishonest; and

(c) I also breached that regulation by making an oral statement, when a member of the public was present, that implied that the Shire's employees, generally, or at least some of them, were dishonest.

I apologise to Councillor Doncan, Mr Benson, and the Shire's employees generally for my said conduct, and regret any hurt, inconvenience or unpleasantness I have respectively caused to them.

DAPHNE MAE SIMMONS