

Councillor Conduct Tribunal: Councillor misconduct complaint – Summary of decision and reasons for department’s website

Local Government Act 2009: Sections 150AS(2)(c)

1. Complaint:

CCT Reference	F20/2320
Subject Councillor	Councillor Ian Todd (the Councillor)
Council	Balonne Shire Council

2. Decision (s150AQ):

Date:	30 June 2021
Decision:	The Tribunal has determined, on the balance of probabilities, that the allegation that on 21 February 2019 Councillor Ian Todd, a councillor of Balonne Shire Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i> in that his conduct involved a breach of trust placed in him as a councillor, either knowingly or recklessly, in that his conduct was inconsistent with local government principle 4(2)(e) being ethical and legal behaviour of councillors and local government employees, when he failed to inform the meeting of his personal interest in the matter as required by section 175E (2) of the Act has been sustained.
Conduct details:	<p>Allegation</p> <p>It is alleged that on 21 February 2019 Councillor Ian Todd, a councillor of Balonne Shire Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i> in that his conduct involved a breach of trust placed in him as a councillor, either knowingly or recklessly, in that his conduct was inconsistent with local government principle 4(2)(e) being ethical and legal behaviour of councillors and local government employees, when he failed to inform the meeting of his personal interest in the matter as required by section 175E (2) of the Act.</p> <p>Particulars of the alleged conduct which could amount to misconduct are as follows:</p>

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| | <ul style="list-style-type: none">a. on 21 February 2019 at an ordinary council meeting, the Balonne SC considered whether to adopt the Temporary Transfer of CAP policy and the Temporary Transfer of CAP procedure (the CAP policy and procedure).b. The CAP Policy and Procedure acknowledges the Council's opportunity to sell its unused water entitlements within the St George river water system to other water users, via a temporary transfer of CAP (being the maximum amount of water that can be extracted from the system annually).c. The matter was not an ordinary business matter.d. Councillor Todd had a personal interest in the matter in that at the time of the meeting he was a local irrigator and the holder of two water entitlements within the St George water supply scheme.e. At the council meeting on 21 February 2019, Councillor Todd did not inform the meeting of his personal interest in the matter, pursuant to section 175E of the Act.f. Councillor Todd's personal interest in the matter did not arise merely because of the circumstances specified in section 175D(2) of the Act.g. Councillor Todd's personal interest in the matter could be deemed as being a real conflict of interest or a perceived conflict of interest because as a local irrigator and the holder of water entitlements within the Saint George Water Supply Scheme, he was eligible to apply for, and be awarded, excess CAP water from Balonne SC under the adopted CAP Policy and Procedure. |
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<p>Reasons</p>	<p><i>Council’s access to river water</i></p> <ol style="list-style-type: none"> 1. The Balonne Shire Council obtained river water under the St George Water Supply Scheme by payment of an annual allocation charge for access to river water impounded by Jack Taylor Weir. Each year, the Council would use approximately half of its allocation. The unused portion of the allocation was available as an income source for the Council when the unused entitlement (excess CAP) could be sold to other water users via a temporary transfer of CAP. The CAP resets at the start of each financial year. The Buyer would need to have, or have access to, infrastructure necessary for extracting their allocation. Council does not sell water physically sitting in the river system, but rather an entitlement to take water. Council’s sale of CAP would be considered valuable to farmers or irrigators in instances where they have used all of their entitlement (ie up to their own CAP). <p><i>Respondent’s involvement with development of Council policy</i></p> <ol style="list-style-type: none"> 2. At times relevant to the allegation before the Tribunal, the Respondent to the application, Cr Todd, held the portfolio of Water Resource Management and Urban Water and Waste Water in the Council. 3. Prior to February 2019, the Council did not have a formal Council-adopted policy for how applications for CAP entitlements were to be handled, although the development of such a policy had been contemplated since early 2018. 4. At times relevant to the allegation, the Councillor held the portfolio of Water Resource Management and Urban Water and Waste Water in the Council. 5. The Councillor had on one occasion previously unsuccessfully sought to purchase some entitlement to excess water. In the month preceding the adoption at a Council general meeting of the policy, he was successful in purchasing some excess water entitlement. 6. In December 2018, the CEO of the Council asked a local government employee to prioritise the policy and procedure and liaise with the Respondent. 7. In a later email from the CEO, the local government employee was also requested to “nail down the operational procedures/guidelines that would sit behind the policy and become the riding instructions for future sales. Happy for you to consult [the Councillor] re that also ...”.
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8. During January and February 2019, the Councillor and the local government employee collaborated and contributed to the wording and preparation of a draft policy and procedure to be put before Council. There was no discussion during the drafting process in any Council workshops. The policy was sent to all councillors with a request for feedback but none was provided.
9. On 21 February 2019, the Policy and Procedure were adopted at the Council meeting on a vote of 6 to 1. Cr Todd seconded the motion. He did not declare a personal interest, nor did he make a conflict disclosure prior to consideration of the proposed policy.
10. The allegation before the Tribunal relates to the Respondent's conduct being his failure to declare a personal interest at the Council meeting on 21 February 2019 (being conduct allegedly inconsistent with local government principle 4(2)(e)). The allegation relies on the obligation set out in section 175E(2).

Pre-conditions for applicability for sections 175E(2)

11. In considering whether the allegation is made out, the Tribunal must be satisfied that pre-conditions for section 175E(2) apply. That requires the following:
 - (a) that the development of the policy and procedure is not an "ordinary business matter" (as that is defined);
 - (b) the Respondent had either a real conflict of interest or perceived conflict of interest, meaning a conflict of interest between his personal interests and the public interest, and which might lead to a decision that is contrary to the public interest.

Ordinary business matter

12. The Applicant's submissions dealt with the issue of whether the conduct related to an "ordinary business matter". In relation to clause (c) of the definition set out above at paragraph 20, the Applicant's submissions include:

"...the CAP Policy and Procedure provided an opportunity for local irrigators to apply for the temporary transfer of CAP. Whilst the Procedure provided a process for Council to offer the temporary transfer of CAP to local irrigators, the opportunity was not for the use or enjoyment of the public. It was a procedure of interest to a specific category of users the broader public in general. (Emphasis in original).
13. It appears that in the final sentence of that paragraph, there may be one or more words missing, and the Tribunal has, consistently with the rest of the paragraph, read that part of the submission as if the final sentence read: "It was a procedure of interest to a specific category of users, **not** the broader public in general".

14. In relation to clause (g)(iv) of the definition of “ordinary business matter”, the Applicant submits the CAP Policy and Procedure “was not merely of interest to the Respondent as a user of goods, services or facilities to be supplied by the local government” as “most (if not all) councillors are users of goods, services and facilities supplied by the local government”.
15. The Tribunal concluded that the matter (being the development of and adoption of the Policy and Procedure) is not a matter of interest “merely as” a member of the public in common with other members of the public. Rather, the interest aligns with that of other water licence holders. While they are also members of “the public” they do not comprise “the public” as a whole and indeed only a small percentage of the public in the local government area.
16. Accordingly, the Tribunal found that the development of, and vote for the adoption of the Policy and Procedure relating to sale of Excess CAP is not an ordinary business matter.
17. Cr Todd had, almost two years earlier provided the Form 2 Declaration of Interests but that does not negate the obligation in section 175E(2). That obligation arises for a matter at a meeting of a local government or any of its committees (s. 175E(1)). His involvement in the development of the Policy and Procedure was only recent history and should have been in his mind.
18. At the Council meeting, the Respondent seconded the motion, which was recorded in the Council Minutes as follows:

Council has an opportunity to offset operating costs without compromising service delivery in the St George river water supply system by offering the temporary transfer of CAP to local irrigators.

The attached Temporary Transfer of CAP Policy and associated Procedure aims to formalise and strengthen the existing process utilised by Council by addressing concerns around the timing of the offer, the amount to offer without comprising¹ customer supply, the notification process, and robustness around submissions and the evaluation process.

Cr Gaske moved and Cr Todd seconded:

That Council receives this report and that;

1. Council adopts the Temporary Transfer of CAP Policy (attached); and
2. Council adopts the Temporary Transfer of CAP Procedure (attached)

CARRIED 6-1.

	<p>19. The Act provided a process which would have allowed the Respondent to disclose his personal interest (although the Tribunal noted that he denies there was a conflict of interest) and to then remain at the meeting. It would then be a matter for the Council members at the meeting to decide if he should leave or stay, and if the latter, what role he was to take in dealing with the matter about which the conflict existed (s. 175E(3) and (4)).</p> <p>20. The Tribunal finds that the Respondent's failure to make the disclosures required by section 175E(2) was inconsistent with local government principle 4(2)(e) requiring his behaviour as a councillor to be ethical and legal.</p> <p>21. The Tribunal considered whether that constitutes a breach of trust as contemplated in the Act. In the Tribunal's view, the trust that the community has or should expect in councillors arises because they, as elected representatives in responsible positions have significant powers to make policy and decisions affecting people within their local government area. Councillors are entrusted to use those powers appropriately and in the public interest. Failure to do so can have a corrosive effect on the community and its confidence in local government. Transparency in the exercise of those powers is necessary for councillors to show they have done so appropriately and in the public interest.</p> <p>22. The Tribunal is satisfied that the Respondent's failure to make the disclosures at the meeting that he should have made, gives rise to a breach of trust.</p> <p>23. By not declaring his personal interest at the meeting on 21 February 2019 as required by section 175E(2), Cr Todd has not acted ethically, as required by the local government principle set out in section 4(2)(e) of the Act, and the Tribunal finds that he breached the trust reposed in him, and he did so knowingly.</p>
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Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	30 June 2021
Order:	<p>Pursuant to section 150AR(1)(b)(iii) of the Act, the Tribunal orders that Cr Ian Todd attend training to address his conduct which was the subject of the allegation.</p> <p><i>The Tribunal recommends that the training required by the Tribunal's order be in-service training to be arranged by the Local Government</i></p>

¹ This appears to be an error and should perhaps read 'compromising'.

	<p><i>Division (Governance and Capability) within the Department of State Development, Infrastructure, Local Government and Planning within 90 days or at the earliest available opportunity after that time period.</i></p>
<p>CCT Reasons for order</p>	<ol style="list-style-type: none"> 1. Having sustained the allegation, the Tribunal then considered the appropriate order and/or recommendation to be made under s150AR of the Act. 2. The Tribunal noted that the Respondent had not made any submissions about what disciplinary action might be urged on the Tribunal, in the event that the allegation was sustained, although he had been provided an opportunity to do so. 3. The Applicant submitted that the Tribunal consider making an order for a public admission that Cr Todd had engaged in misconduct and an order that he attend training or counselling to address his conduct, including at the expense of the councillor as provided in section 150AR of the Act. 4. The Tribunal notes that Cr Todd has no previous disciplinary history. In relation to the allegation, he had received training which covered dealing with conflicts of interest. 5. In the Tribunal’s view, the Respondent could benefit from further training to address his conduct in relation to his failure to disclose his interest at the Council meeting. An order to do so would be likely to have the effect of deterrence and play a personal educative role.