

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

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

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## 1. Complaint:

<b>CCT Reference</b>	F20/2743
<b>Subject councillor:</b>	Councillor Jason O’Pray (the Councillor)
<b>Council</b>	Sunshine Coast Regional Council (the Council)

## 2. Decision (s150AQ):

<b>Date:</b>	10 November 2021
<b>Decision one:</b>	<p>The Tribunal has determined on the balance of probabilities, the allegation that on 21 May 2019 Councillor Jason O’Pray a Councillor of the Sunshine Coast Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i> (the Act) by breaching the trust placed in him as a Councillor, either knowingly or recklessly when, having a conflict of interest in relation to a matter, he attempted to influence a local government employee who was authorized to decide or otherwise deal with the matter to do so in a particular way – which contravened sections 175I(3) of the Act and the local government principle in 4(2)( e) ‘ethical and legal behavior of Councillors’ <b>has been sustained.</b></p> <p>The Particulars of the conduct provided by the Independent Assessor are* :</p> <ol style="list-style-type: none"> <li>a. Councillor O’Pray was elected as a Councillor in April 2012.</li> <li>b. On 16 May 2019, an Agenda Review meeting was held to discuss the Ordinary Council Meeting to be held on 23 May 2019.</li> <li>c. Agenda item 8.6 – Commercial Use of Community Land included the consideration of a report prepared by the authorised Council Officer, seeking endorsement of the recommendations for 2019-2022</li> </ol>

Commercial Land Permits.

- d. Appendix A to the officers report included the recommended Applicants for approved activities and locations. Reference 4.2 related to Surf based business at Mooloolaba Beach. The officer's recommendation was that the permit be awarded to XL Surfing Academy only.
- e. Prior to the Agenda Item 8.6 being discussed, Councillor O'Pray stated that he intended to declare a conflict as he had a close personal friendship with Mr Grant Thomas from Maroochy Surf School.
- f. On 21 May 2019, Councillor O'Pray contacted, the Coordinator, Community Land Permits & Parking Unit, in relation to the council officer's report recommendation which was being tabled under Agenda item 8.6 - Commercial Use of Community land at the Ordinary Council Meeting on 23 May 2019 specifically to discuss the Mooloolaba Beach location permit.
- g. During the conversation, Councillor O'Pray outlined that if one of the joint Applicants missed out on using the Mooloolaba Beach location it would be detrimental to their business as they used the location as a backup option when surfing conditions were not ideal at the other approved location.
- h. The Council officer informed him that she was "unable to change the officer recommendation and any alternative recommendations would need to be made by Councillors from the floor of the meeting on 23 May 2019". Councillor O'Pray mentioned that he would send an email about the matter to all Councillors.
- i. At 9:18 am that same day, Councillor O'Pray sent an email to the Coordinator and her Manager, and a number of other addresses.
- j. In the email Councillor O'Pray states:
  - i. the email relates to a confidential item on Thursdays OM (surf school);
  - ii. both of the Applicants are long-time friends of his and he will not be voting on the item;
  - iii. he had spoken with the Divisional Councillor John C, the Council officer and Deputy Mayor Dwyer;
  - iv. his concern with the officer's recommendation that only one of the joint Applicants for the Mooloolaba Beach location (between Beach Access 182 and 183) be successful, as the joint Applicants currently share this location and 'have done so successfully for many years'.

- k. On 23 May 2019, a General Council Meeting was held. Item 8.6 - Commercial Use of Land was listed on the agenda.
- l. Councillor O'Pray attended the Ordinary Meeting and declared a conflict of interest in relation to Agenda item 8.6 – Commercial Use of Community Land on the following basis:
- i. he had received gifts of complimentary flights from Paradise Seaplanes on 3 July 2015, January 2016 and on 19 February 2017; and
  - ii. he was a close personal friend of the owner of the Maroochy Surf School
- m. Councillor O'Pray left the meeting and did not participate in the discussion or vote in relation to agenda item 8.6 – Commercial Use of Community Land

**Decision two**

The Tribunal has determined on the balance of probabilities, the allegation that on 21 May 2019, Jason O'Pray, a Councillor of the Sunshine Coast Regional Council, engaged in misconduct as defined in section 150L(1)(i) of the Act by breaching the trust placed in him as a Councillor, either knowingly or recklessly when, having a conflict of interest in relation to a matter he did influence, another Councillor to vote on the matter in a particular way at a meeting of the local government- which contravened section 175I(2) and the local government principle in 4(2)(e) 'ethical and legal behavior of Councillors' **has been sustained.**

The Particulars of the conduct were as follows:

- a. Councillor O'Pray was elected as a Councillor in April 2012.
- b. On 16 May 2019 an Agenda Review meeting was held to discuss the agenda items for the Ordinary Council Meeting to be held on 23 May 2019.
- c. Agenda item 8.6-Commercial Use of Community Land included the consideration of a report prepared by a Council Officer, seeking endorsement of the recommendations for 2019-2022 Commercial Land Permits.
- d. Appendix A to the officers report included the recommended Applicants for approved activities and locations. Reference 4.2 related to Surf based business at Mooloolaba Beach. The officers recommendation was that the permit be awarded to XL Surfing

Academy only.

- e. Prior to agenda item 8.6 being discussed, Councillor O'Pray stated that he intended to declare a conflict as he had a close personal friendship with Mr Grant Thomas from Maroochy Surf School.
- f. On 21 May 2019 at 9 18 am, Councillor O'Pray sent an email to all SCRC Councillors, the CEO, the Council officer, and the SCC Board of Management (unspecified recipients).
- g. In the email Councillor O'Pray states:
  - i. the email relates to a confidential item on Thursdays OM (Surf school);
  - ii. Both of the Applicants are long-time friends of his and he will not be voting on the item;
  - iii. he had spoken with the Divisional Councillor John C, the Council officer and Deputy Mayor Dwyer;
  - iv. his concerns with the officers recommendations that only one of the joint Applicants for the Mooloolaba Beach location (between Beach Access 182 and 183) be successful, as the joint Applicants currently share this location and 'have done so successfully for many years';
  - v. requests Councillors consider a review of the recommendation on the 'surf school' items.
- h. On 23 May 2019, a General Council Meeting was held. Item 8.6 - Commercial Use of Community Land was listed on the agenda.
- i. Councillor O'Pray attended the Ordinary Meeting and declared a conflict of interest in relation to agenda item 8.6 - Commercial Use of Community Land on the following basis:
  - i. he had received gifts of complimentary flights from Paradise Seaplanes on 3 July 2015, January 2016 and on 19 February 2017; and
  - ii. he was a close personal friend of the owner of the Maroochy Surf School.
- j. Councillor O'Pray left the meeting and did not participate in the discussion or vote in relation to Agenda Item 8.6 - Commercial Use of Community Land.

- Details of the names of Council officers have been redacted.

<b>Reasons:</b>	<p>The Councillor notified the Independent Assessor that he disputed both allegations and that he did not accept that the conduct amounts to misconduct or a breach of trust.</p> <p>The Tribunal in these circumstances must be satisfied there is sufficient evidence before it to establish the allegations are made out to the required civil standard of proof, being the balance of probabilities, and that the conduct amounts to misconduct by section 150L(1)(b)(i) of the <i>Local Government Act (2009)</i> (the Act).</p> <p>The Tribunal in reaching its decision considered the evidence and the submissions provided by the Independent Assessor, the Councillor and his legal representatives. This material was viewed in the context of the relevant councillor conduct provisions in the Act and the Principles that underpin the Act, (including a consideration of relevant provisions with respect to the limitation on the Councillor's human rights contained in the Human Rights Act Qld (2019), and noted :</p> <ol style="list-style-type: none"><li>1. Councillor O'Pray, was an experienced Councillor, and had received relevant and recent training regarding the 2018 legislative amendments in relation to the Act.</li><li>2. The Councillor attended the Agenda Review Meeting held on 16 May 2019 and stated to the Councillors and Council officers at the meeting that he had a conflict of interest in relation to Agenda Item 8.6 and as result of this conflict he left the meeting when this item was under discussion.</li><li>3. Agenda item 8.6 related to the presentation of the report and recommendations by the authorised local government employee regarding the commercial use of community land, namely the allocation of beach permits by the Council to surf school operators at designated locations along the Mooloolaba Beach.</li><li>4. The report and its recommendations were also listed on the Agenda for the Council meeting the following week, on 23 May 2019.</li><li>5. That having declared on 16 May 2019 that he had a personal interest that conflicted with the contents of Agenda item 8.6 , the recommendations and the report of the employee, the Councillor then telephoned the local government employee to discuss her finalised report and recommendations.</li><li>6. The Councillor by various provisions and principles in the Act (sections 4(2)(e), 12(3), 174D, 175E and 175I) is required to observe the obligations and requirements in relation to local government employees and other councillors in relation to specified matters when a conflict of interests is identified.</li></ol>
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7. The Councillor was not permitted by the provisions to *attempt to influence or to influence* another councillor in the way to vote in a particular matter, or to *attempt to influence* the local government employee in relation to the report or recommendations she was authorised to prepare.
8. The Tribunal found the Councillor contravened these provisions when on 21 May 2021 while having stated he had a conflict of interest in relation to the recommendations contained in the report, he conducted a telephone conversation with the employee regarding her recommendation in the report that did or could affect the business interests of one or both of his two friends.
9. On the same date (21 May 2019) he sent an email regarding the same matter to all councillors seeking their consideration to review the recommendation of the local government employee. This matter was listed on the agenda at the next Council meeting two days later (23 May 2019). The Councillor confirmed by this email that he would not participate in the vote as:

***“ ...both of the Applicants are long term friends of mine and I will NOT be voting on the item”.***

10. The evidence was that the local government employee did not alter the recommendation in her report following the conversation initiated by the Councillor. However the evidence did establish that the recommendation was changed by the vote taken by the Councillors on 23 May 2019. This amended recommendation was consistent with the review sought by Cr O’Pray in the email sent to all councillors on 23 May 2019.
11. By section 175I(3) of the Act - the *“councillor must not influence, or attempt to influence, a local government employee... who is authorized to decide or otherwise deal with a matter in a particular way”*
12. By section 175I(2) of the Act -  
*“The councillor must not influence, or attempt to influence, another councillor to vote on the matter in a particular way at a meeting of the local government or any of its committees”.*
13. **Dealing with Councillors personal interests in local government matter (Division 5A Local Government Act 2009)**

**The purpose of the Division is stated to be:**

“to ensure the personal interests of Councillors are dealt with in an accountable and transparent way that meets community expectation, if interests relate to matters to be considered –

“(a) *at a meeting of the local government or any of its committees; or*  
*(b) by a local government employee ... authorised to deal with the matter”*

14. The Tribunal found that the necessity for dealing with matters in an accountable and transparent way must take priority. It is considered that this approach allows due weight to be given to the issue of surf safety, but in a transparent way.
15. The Act provides a process for Councillors that have a conflict of interest in a matter to be able to participate in the debating and discussion process upon obtaining the approval by Councillors at the meeting (s 175E(4)(b) of the Act). This permission may also extend to voting on a matter.
16. In the circumstances of this matter the Councillor could have expressed his views in a transparent and objective way by applying the above process having obtained the consent of the Councillors at the Council meeting as set down by the provisions of the Act.
17. The Tribunal found the Councillor had a perceived conflict of interest in the successful business outcome for two of his friends. There was also found to be a ‘*public interest*’ in ensuring that the Respondent acted in a manner that did not involve the attempted influence (or actual influence) of a local government employee and other Councillors.
18. Accordingly it was determined on the balance of probabilities that:
  - a. The conduct relating to allegation 1 represented an attempt to influence a local government employee and was in contravention of section 175I(3) of the Act; and
  - b. The conduct relating to allegation 2 was an attempt to influence other Councillors in relation to the decision to be made at a Council meeting in contravention of section 175(2) of the Act.
19. In the circumstances of this matter it is accepted by the Tribunal that the Councillor held a genuine concern for the business interests of his 2 friends and for the beach safety of patrons on the Mooloolaba beach.

	<p>20. However, this does not change the fact that the relevant obligations imposed by the provisions of Division 5A of the Act as applicable to the facts and circumstances of this matter were not observed by the Councillor. As a consequence the ‘public interest’ considerations and integrity based and objective decision-making provided by the Act was undermined.</p> <p><b><i>Breach of the Trust placed in the Councillor</i></b></p> <p>The concept of ‘trust in a councillor’ is embodied in the principles of the Act and is viewed broadly, in relation to the trust that the community has in the elected position of councillor. As elected representatives in responsible positions with significant powers, councillors have great discretion and are entrusted to use their powers to undertake negotiations and to make policy and decisions, appropriately, impartially and in the public interest and in compliance with the provisions of the legislation. Any breach of this trust can have a corrosive effect on the community and its confidence in local government.</p> <p>In this context and having regard to the local government principles in section 4 of the Act, and the Councillor’s failure to comply with section 175I(2) &amp; (3) of the Act, the Tribunal is satisfied on the balance of probabilities that the conduct constituted a breach of the trust placed in the Councillor and that the allegations of misconduct <b>are sustained</b>.</p>
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**3. Orders and/or recommendations (s150AR - disciplinary action):**

<b>Date of orders:</b>	10 November 2021
<b>Orders and/or recommendations:</b>	<p><b>Allegation 1 and 2</b></p> <p>Having found that the councillor engaged in misconduct, the Tribunal orders that :</p> <ul style="list-style-type: none"> <li>a) Pursuant to section 150AR(1)(b)(iii) of the Act, that Councillor Jason O’Pray attend training to address the specific conduct which was the subject of the allegations.</li> <li>b) The in-service training is to be undertaken at the expense of the Councillor (section 150AR (1)(b)(iii).</li> </ul>



	<p><i>Notation: The Tribunal <b>recommends</b> the training required by this order be in-service training to be arranged by the Local Government 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><b>Reasons:</b></p>	<p>In making the orders the Tribunal took into account that the Councillor has no previous disciplinary history and has extensive experience as a councillor. The Tribunal considered the relevant training undertaken by the Councillor and provided by the Department of Local Government Racing and Multicultural Affairs (DLGRMA) relating to ethical conduct, Integrity training , and Belcarra amendments training in 2018.</p> <p>The Tribunal formed the view that the nature and extent to which such training dealt with the requirements for compliance with section 175(1) and the principles in section 4(1) and (2) of the Act, was not clear from the submissions and material before the Tribunal.</p> <p>The Tribunal accepts that the conduct of the Councillor in issue was not a failure to disclose a conflict of interest. The significant failure was that having disclosed the interest the Councillor did not observe the obligations required by the Act (s 175I(2) &amp; (3) and attempted to influence the local government employee and Councillors in relation to the vote to be taken by the Council in a particular matter.</p> <p>Accordingly, it is determined that the Councillor requires further training to ensure he acquires a comprehensive understanding of the councillor obligations to manage an identified personal conflict of interest in an accountable and transparent way in compliance with all other relevant procedures and provisions of the Act.</p>