

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

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

Note that the Tribunal is prohibited from giving another entity information that is part of a Public Interest Disclosure unless required or permitted under another Act; or including in this summary the name of the person who made the complaint or information that could reasonably be expected to result in identification of the person: S150AS(5)(a) and (b).

1. Complaint:

CCT Reference	F19/9909
Subject Councillor	Councillor Tom Tate (the Respondent Councillor)
Council	Gold Coast City Council (the Council)

2. Decision (s150AQ):

Date:	16 May 2022
Decision:	<p>The Tribunal has determined, on the balance of probabilities, that the allegation that between 12 January 2017 and 8 March 2018 the Respondent Councillor, of the Gold Coast City Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the <i>Local Government Act 2009</i>, in that the conduct involved a breach of the trust placed in the councillor, in that it was inconsistent with the local government principles in section 4(2)(e) of the Act being ‘<i>ethical and legal behavior of councillors and local government employees</i>’, being a contravention of section 171B(2) of the Act has not been sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct provided to the Tribunal by the Applicant are:</p> <ol style="list-style-type: none"> a) The Respondent was re-elected as Mayor of the Gold Coast City Council (GCCC) in March 2016. b) On January 2017, the Respondent acquired an interest in a racehorse now known as “Gogoldcoast”.

- c) The Respondent's interest at the time of the purchase was valued at \$41,651.40.
- d) Section 171B(2) of the Act placed a positive obligation on councillors to, in the approved form, inform the Chief Executive Officer (CEO) of the GCCC of the particulars of any interest of the Councillor within 30 days after the interest arises.
- e) Form 2 *Register of Interests of a Councillor* and their related persons being the approved form, requires Councillors to particularise in section 15 "Other assets over \$5000.00".
- f) The Respondent did not inform the CEO of the particulars of the interest namely the interest in the racehorse "Gogoldcoast" via a Form 2 within 30 days of the interest arising.
- g) The Respondent submitted a Form 2 on nine occasions in the period of 12 January 2017 to 8 March 2018. The Form 2's added and removed interests relating to shareholdings, positions held as an officer of a corporation, interests of land, membership of political parties, bodies, associations and trade or professional organisations and reported gifts over \$500 and other assets over \$5000. The Form 2's were submitted on the following dates:
- i. 10 February 2017;
 - ii. 21 February 2017;
 - iii. 3 March 2017;
 - iv. 4 May 2017;
 - v. 17 May 2017;
 - vi. 5 October 2017;
 - vii. 14 November 2017;
 - viii. 20 December 2017; and
 - ix. 14 February 2018.
- h) On 7 March 2018, the Respondent completed a Form 2 to add "Share in a racehorse" to section 15 of his register of interests.
- i) The Respondent's consolidated register of interests dated 7 March 2018, lists "Share in racehorse" in section 15.
- j) Councillors have a legal obligation under section 171B of the Act to inform the CEO of the particulars of their interests or changes to their interests within 30 days of the interests arising or the change happening.
- k) Section 291 of the Local Government Regulation 2012 sets out the particulars required to be contained in the register of interests.
- l) The Respondent failed to comply with section 171B of the Act, in that the Form 2 submitted on the dates as stated in the particulars 25(g)(i)-(ix) did not inform the CEO of the particulars of the interests in the racehorse "Gogoldcoast". As a consequence, the

	<p>Respondent's register of interests, as maintained by the CEO, was inaccurate between the period of 12 January 2017 to 8 March 2018.</p>
<p>Reasons:</p>	<p>Background.</p> <ol style="list-style-type: none"> 1. The Respondent is an experienced councillor and Mayor and had completed a register of interests and updates to the register of interests on many occasions since his election as a councillor in 2012. The Respondent disputed that the alleged conduct concerning the failure to update his register of interests was in contravention of section 171B(2) of the Act and that the conduct constituted a breach of trust and misconduct. 2. The Independent Assessor alleged the Respondent failed to include the details of his ownership of a share in the racehorse, known as Gogoldcoast, in the register of interests as required by section 171(B(2) of the <i>Local Government Act 2009</i> (the Act). The Act requires the interest to be declared in the Register of Interests, within 30 days from the date of the purchase. 3. The Respondent purchased a 22.5% share in a racehorse on 13 January 2017 and the evidence established he did not include the details of the horse into his register of interests until 8 March 2018, approximately 13 months after the date of purchase. The evidence established that during this period the Respondent updated his register of interests on nine (9) occasions, however on each of these occasions did not provide details of Gogoldcoast. 4. The consequence of a contravention of section 171B(2) of the Act in the circumstances of this matter was that the details of the racehorse were not declared in the register of interests and the public record that is available for public scrutiny remained inaccurate for a lengthy period. 5. The Respondent accepted the facts of the conduct as alleged did occur however he disputed that his interest in Gogoldcoast was applicable to the obligations set out by the Act and the Regulation and he considered the details of Gogoldcoast were not required to be included his register of interests. 6. <i>Obligations of councillors to correct the register of interests-</i> Section 171B of the Local Government Act 2009 requires- <i>"if a councillor has an interest that must be recorded in a register of interests under a regulation... (2) The councillor must in the approved form, inform the chief executive officer of the particulars of the interests or the change to the interest within 30 days after the interest arises or the change happens".</i>

	<p>7. The details of the Register of Interests by section 291 of the Local Government Regulation 2012- requires that the register of interests of each councillor <i>“must contain the financial and non – financial particulars mentioned in Schedule 5”</i>.</p> <p>8. Schedule 5 Item 15 requires that the particulars for “each other asset... with a value of more than \$5000” are to be recorded in the register of interests with a sufficient description to identify the interest. The specific particulars of the value, for example the purchase or sale price of Gogoldcoast are not required by Item 15 of the Schedule to be included.</p> <p>9. The Respondent by written submissions disputed that he was obliged by the Act and the Regulation to declare the ‘interest’ in Gogoldcoast. The reasoning in support of these submissions included;</p> <ul style="list-style-type: none"> • that the Respondent believed the racehorse was not an “asset” applicable to or within the meaning of Item 15 of the Schedule;¹ • that the racehorse was “not legally owned” by the Respondent; • that the racehorse was owned by a group of 15 individuals (a horse syndicate) and as such is deemed to be a “hobby” by a taxation ruling of the Commissioner of Taxation (TR93/26)² and consequently it was submitted the interest is not applicable to the provisions of the register of interests; • that the term “asset” was not defined by the Act or the Regulation and consequently the ordinary dictionary definition of the term “asset” to be ‘a building, a piece of equipment or an economic resource ...’³ was applied by the Respondent to interpret the applicability of Gogoldcoast to the Regulation and Item 15 of the Schedule; • that the Independent Assessor did not provide evidence to prove the value of Gogoldcoast. <p>10. As the Respondent disputed the meaning, purpose and relevance of the provisions of the Act and the Regulation to his interest held in Gogoldcoast the Tribunal must be satisfied that the evidence and circumstances substantiate the allegation of a breach of trust and misconduct.</p>
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¹ Respondent’s submissions 4 August 2021 at[28]

² Ibid Respondent’s submissions at [9].

³ Respondent’s submissions incl Macquarie dictionary definition ‘asset’. 4 August at[41]

11. The standard of proof applicable to determinations by the Tribunal is the civil standard⁴ on the balance of probabilities and pursuant to section 150AP(4) of the Act.
12. The Respondent's legal representatives challenged substantial parts of the evidence provided by the Independent Assessor and submitted an application to the Tribunal to cross-examine some witnesses regarding their affidavit evidence. An objection was raised by the representatives to "any reliance by the Tribunal on material" to be placed on the evidence of several witnesses.⁵ The Tribunal considered that as the circumstances of this matter were largely contested and pursuant to the principles of procedural fairness and natural justice that the cross-examination process was appropriate.
13. The proceedings were conducted by video link on 29 April 2022, recorded and transcribed.

The evidence

14. The evidence provided by the Independent Assessor included affidavit evidence and attached documents from witnesses including an officer employed by the Queensland Racing Integrity Commission; the Registrar of Racehorses for Racing Australia and the Keeper of the Australian Stud Book for Racing Australia; the office Manager for Chris Waller Racing Pty Ltd; and the senior investigator from the Office of the Independent Assessor .
15. The affidavit and oral evidence provided by these witnesses established to the satisfaction of the Tribunal that : the date of purchase of the racehorse by the Respondent was 13 January 2017; the price paid by the Respondent for the 22.5% share in the racehorse to be \$41,651.40; that the details of the purchase price for the 22.5% share of the racehorse were contained in the invoice issued to the Respondent and dated 20 January 2017; that the ownership registration Form completed and signed by the Respondent on 6 February 2017 was sufficient to establish proof of ownership; and that the ownership status of Gogoldcoast comprised a number of separate individually owned shares including a 22.5% share owned by the Respondent and was owned or held as a registered racehorse syndicate.
16. The Respondent chose not to provide sworn evidence and written submissions were provided by his legal representatives. These submissions are summarized above at paragraph (9).

⁴ Briginshaw v Briginshaw (1938) 60CLR 336 AT 361-362.

⁵ Respondent's submissions 4 August 2021 at [31,32,33].

17. The Tribunal formed the view that the Respondent’s conduct and comprehension of Item 15 of the Schedule and section 291 to the Regulation and relevant aspects of the local government legislation together with his associated conduct demonstrated a confused and flawed approach to the interpretation of these provisions. It is relevant to note that the evidence established that despite the Respondent’s objections to the inclusion of Gogoldcoast as an interest in his register of interests that on 8 March 2018 he did record Gogoldcoast as an “asset” in his register of interests.
18. It was submitted by the Respondent that although the legislation is not applicable to the interest of Gogoldcoast the interest was recorded on 8 March 2018 purely as a precautionary measure and in response to media pressure and commentary in early March 2018.
19. The Tribunal found the evidence and documents provided by the witnesses from Racing Australia and Racing Integrity Queensland to be probative and relevant to material questions of fact and admissible as evidence of the Respondent’s ownership of the share in the ‘interest’ in Gogoldcoast and the value of the interest to be “over \$5000”.
20. In reaching a finding in this matter the Tribunal addressed the following questions:
- a. Was the Respondent’s purchase of the interest in “Gogoldcoast” an “asset” within the meaning and the context of the Act, the Regulation and Item 15 of the Schedule 5; and**
- b. Did the failure to record the interest between 12 January 2017 to 10 February 2018 constitute a breach of trust and misconduct by the Respondent?**
- Meaning of the terms within the Statute**
- 2.1 The Tribunal accepted the Respondent turned his mind to the question of the meaning and relevance of the term ‘asset’ in the legislation and in doing so he misinterpreted the meaning of the provision. However it is considered the Acts Interpretation Act (Qld) provides clear direction when resolving the question of the meaning of terms within a Statute and that is to consider the purpose of the statute as “...a construction which promotes its object is to be preferred”.⁶
22. The Tribunal’s approach to resolve ambiguity of provisions within the Act and the Regulation is to assess the meaning by reference to

⁶ Section 14B Acts Interpretation Act 1953 (QLD).

	<p>the context, purpose and object of the Act. The purpose of the <i>Local Government Act 2009</i> is -</p> <p><i>“ to provide a system of local government that is accountable, effective, efficient and sustainable” .⁷</i></p> <p>23. The Tribunal accepted the Assessor’s submission that regard must also be had to the “... emphasis placed on transparency and accountability by the local government principles”. In this context the Assessor submitted that the horseracing pursuits with “Gogoldcoast” were not exempt from the accountability and transparency obligations required of councillors pursuant to the Act and the Regulation.</p> <p>24. The Respondent suggested ... “that the true purpose of section 291 Schedule 5 “is only to disclose physical assets, bank accounts, landholdings, shareholdings and investments that justify being disclosed...”⁸ and that as Gogoldcoast is a “hobby” it is not an “asset” or “interest” within the meaning of Schedule 5 Item 15 of the Regulation.</p> <p>25. The Tribunal did not accept the interpretation of the provisions by the Respondent or that a ‘hobby’ is excluded from the intended meaning of the terms contained in Schedule 5 Item 15. The purpose and meaning was found to be clear when read in the context of section 291 of the Regulation to “disclose financial and non-financial interests”⁹ and when viewed in the context of the preceding Items 2-14 of the Schedule.¹⁰ These Items prescribe the type of assets and interests required by the Schedule to be declared.</p> <p>26. In the above context of the Regulation and the Schedule the Tribunal considered that Item 15 is a broad category that catches ..” each other asset with a value over \$5000” and does include interests such as Gogoldcoast.</p> <p>27. It is accepted that exemptions do exist and are provided by Item 15, however the exemptions do not include interests and pursuits deemed to be the “hobby of horseracing” or any other hobby. The Tribunal finds that such interests must be declared by councillors in the register of interests if the value is over \$5000.</p> <p>28. Accordingly the Tribunal determined the Respondent did contravene section 171B(2) of the Act when he failed to declare the interest in his register of interests within 30 days of the purchase.</p>
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⁷ Section 3(b) *Local Government Act 2009*.

⁸ Respondent’s submissions 4 August 2021 [14,15 & 27].

⁹ Section 291 of the Local Government Regulation 2012.

¹⁰ Schedule 5 Items 2-14 Local Government Regulation 2012.

Did this failure to comply with section 171B(2) of the Act represent a breach of trust placed in the Respondent and misconduct?

29. To answer this question consideration was given to the submissions and the nature of the relevant circumstances that led to the Respondent's omission of his interest in Gogoldcoast from the register of interests.
30. The Tribunal accepts that both the nature of the conduct and the circumstances in which it occurred are relevant to determining whether the conduct as alleged is sufficient to amount to misconduct. It is considered that not every breach of a provision of the Act will be considered serious enough to amount to a breach of trust and misconduct having regard to the circumstances and any exculpatory considerations.
31. These circumstances included:
- a. The frequent and multiple updates made to the Register of interests by the Respondent between 10 February 2017-14 February 2018. It was noted that the first update was made within 28 days from the purchase date of Gogoldcoast being 13 January 2017.
 - b. The inclusion of the particulars of Gogoldcoast into the register of interest by the Respondent on 8 March 2018 in response to a media article regarding his failure to record the interest.
 - c. The Taxation Ruling (TR93/26) and the Respondent's belief that this provided an exemption in relation to the "hobby" of race-horsing from the inclusion of the interests into the Register of Interests. This reasoning and explanation submitted by the Respondent was not accepted by the Tribunal other than to the extent that it confirmed the Respondent's confusion and erroneous understanding of the purpose of the councillor transparency and accountability principles and their applicability to section 291 of the Regulation and to Schedule 5.
 - d. The Respondent's reliance on the Macquarie Dictionary definition to determine the meaning of "asset"¹¹ without reference to the term in its context of the Schedule and to the accountability and transparency principles of the Act led to a misunderstanding of the provision and the erroneous belief that the interest in the racehorse "was not an asset".¹²
 - e. The circumstances establish the Respondent did give considerable thought to his obligations as a councillor and the

¹¹ Respondent's submission 4 August 2021 at [41]

¹² Respondent's application 14 December 2021 page [2]

interests to be included in the register of interests and to the meaning of the provisions.

- f. There was no evidence presented by the Independent Assessor that the Respondent intended to conceal the interest held in Gogoldcoast.

Words of a statutory provision to be given the meaning that the legislature intended

32. The nature of the circumstances relevant to the conduct establish the Respondent did consider the transparency and accountability principles of the Act and turned his mind to the meaning and application of the term “asset” and whether his hobby was a relevant asset to be included within his register of interests.
33. The approach to resolving this ambiguity adopted by the Respondent was incorrect as the first step to resolve ambiguity of the meaning within a Statute is to consider the ambiguous provision within its context and within the purpose of the of the Act and Regulation as whole. The Tribunal notes that in exceptional situations the ordinary grammatical meaning of a provision may not be consistent with its legal meaning and to avoid errors of interpretation the meaning of terms and provisions as a first step are to be considered from within the context and in light of the purpose of the Statute.
34. The Respondent relied on the Macquarie dictionary definition or the ordinary grammatical meaning and failed to consider as the first step in the process the meaning and context of the provision within the *Local Government Act and Regulation*. This represented a flawed approach to the interpretation of the Statute in the circumstances of this matter and consequently the Respondent contravened section 171B(2) of the Act.
35. The principle of giving the words of a statute the meaning that the legislature is taken to have intended them to have has been considered and explained by the High Court in *Project Blue Sky Inc. v Australian Broadcasting Authority*[1998] HCA 28;194CLR 355, McHugh, Gummow, Kirby and Hynes JJ at[78]-
‘...Ordinarily, that meaning will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute of the canons of construction may require the words of a legislative provision to be read in a way that does not correspond to the literal or grammatical meaning...’

[emphasis added]

36. The Tribunal is satisfied that the evidence and circumstances of this matter confirm that this case required much more than the application of “a literal or grammatical construction” to understand its meaning. It required giving the provision the meaning that the legislature is taken to have intended it to have and in this matter that meaning did not correspond with the ordinary grammatical meaning. The Tribunal formed the view that in this case the intended meaning of the relevant provision could only be ascertained from its context within the Act and not from the ordinary grammatical meaning of the provision. The Respondents reliance on the literal and grammatical meaning of the word ‘asset’ led to his failure to understand the meaning of the term “asset” within Item 15 of the Schedule and this error underpinned his alleged conduct.
37. The Tribunal noted that at the time of the alleged conduct the Respondent had not had the benefit of the robust Departmental Belcarra Integrity training that was relevant to the completion of the Register of interests. This training was introduced in late 2018 and the Respondent did not complete this training.
38. The Tribunal formed the view that the legislators did not intend by either the former definition of misconduct (s 176(3)(b)(ii)) or the current definition (s 150L) to capture genuine errors of statutory interpretation made by councillors.
39. It was determined that the Respondent turned his mind to the relevant section of the Register of Interests regarding the inclusion of the details of Gogoldcoast yet made a genuine error in interpretation of the meaning of the provision.
40. The Tribunal formed the view that the circumstances that led to the failure by the Respondent Councillor to record the interest of Gogoldcoast in his register of interests between 13 January 2017 and 10 February 2018 is not sufficient to establish a breach of trust. The Tribunal finds on the facts and circumstances of this matter that the conduct was not inconsistent with the local government principle of *... ethical and legal behavior of councillors and local government employees(s4(2)(e)).*

Decision

The Tribunal is satisfied that the Councillor did not engage in a breach of trust and misconduct as defined by section 176(3)(b)(ii) of the former Act and has determined on the balance of probabilities, that the allegation of a breach of trust and misconduct **has not been sustained.**

3. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	Not applicable.
Order/s and/or recommendations:	The Councillor was not found to have engaged in misconduct and accordingly Orders and recommendations are not applicable.