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	F19/8353
Subject Councillor	Councillor Dane Swalling (the Councillor)
Council	Cloncurry Shire Council

2. Decision (s150AQ):

Date:	28 October 2020
Decision:	The allegation that Councillor Dane Swalling, a Councillor of Cloncurry Shire Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the Act, has been **sustained**.
Reasons:	• The Tribunal finds that the Procurement Policy was not an ordinary business matter as: a. The Procurement Policy was not of interest to the Respondent as an employee of the State or a government entity. The Tribunal accepts the Applicant's submission that *Wendt & Ors v Ipswich City Council*[1] has settled the matter conclusively that Councillors are not employees of the State or a government entity; b. The Procurement Policy was not merely of interest to the Respondent as an elector, ratepayer or resident of the local government area. Most (if not all) Councillors are electors, ratepayers and/or residents of the local government area within which they are elected. If such a reading of that definition were permitted, every matter coming before every Council at every meeting would be an "*ordinary business matter*" and the definition at Schedule 4 of the Act would have no work to do.

[1] [2020] QIRC 002.

	<u>Was there a personal interest, and did it conflict with the public interest?</u> • The Tribunal finds that, as a business owner potentially affected by the proposed Procurement Policy COR1004 version 4, the Respondent did have a personal interest in the Council's decision to adopt it. The question is then whether this personal interest was such to conflict with the public interest, and therefore might lead to a decision that is contrary to the public interest. • The Tribunal finds that the Respondent had a personal interest and that this personal interest had, could have had, the potential to create a perception of a conflict with the public interest (where that public interest includes, but is not limited to, the local government principle of "*transparent and effective processes, and decision-making in the public interest*"). • The Tribunal does not consider it necessary to determine whether the conflict of interest was in fact real or perceived. However, if the Tribunal is found to have been wrong on this point, the Tribunal would have found that at least a perceived conflict of interest was present at the meeting on 28 November 2017. A hypothetical reasonable and informed person (both in the terms of *Ebner* and *Meineke*) would have concluded that the Respondent might not have brought a clear and objective mind to the decision on the Procurement Policy. The *Personal Interests and Official Responsibilities: A Guide for Councillors* document again makes this view – and the steps the Councillor should take in response – extremely clear[2]: *If you think that a fair-minded member of the community **might** perceive that you **might** be unable to make a decision in the public interest because of your personal interest, you may have a conflict of interest in the matter and should tell the Council meeting about your personal interest.* (emphasis in the original). <u>Does an exemption in section 173(3) of the Act apply?</u> • The Tribunal has considered whether one of the exemptions in section 173(3) applied as at 28 November 2017. • It is the Tribunal's finding that section 173(3)(b) did not apply to exclude the Respondent's conflict of interest, and therefore the Respondent's submission that "*he had no greater personal interest in the outcome of the vote than any other business owner*" and that "*his interest in the matter arose simply from being a member of the large class of local business owners in Cloncurry*"[3] must be rejected. • The combined weight of these authorities supports the Tribunal's finding that the Respondent held a greater interest in the Procurement Policy and thus section 173(3)(b) of the Act did not apply to exclude the Respondent's conflict of interest.

[2] Ibid at page 3.

[3] Respondent's affidavit at [78]; cited in Applicant's submissions of 21 August 2020 at [49].

	<u>Did the Respondent deal with the conflict of interest in a transparent and accountable way?</u> • Consistent with the previous authorities, this Tribunal finds that, as the Respondent did not expressly disclose his interest in Cloncurry Plumbing Pty Ltd at the time of considering the Procurement Policy during the Ordinary Council meeting of 28 November 2017, as required section 173(5) of the Act. As such, despite any other steps he may have taken or considered taking, he failed to deal with the conflict of interest in a transparent and accountable way as required by section 173(4) of the Act. <u>Did the failure to disclose a conflict of interest amount to a breach of trust?</u> • The Respondent's failure to disclose his conflict of interest, and therefore allow other non-conflicted Councillors the ability to determine how to manage that interest, strikes at the heart of the public having confidence in the Council's decision on the Procurement Policy. The Tribunal thus finds that the Respondent's conduct in contravention of section 173(4) of the Act involved a breach of trust, and so was misconduct in accordance with section 176(3)(b)(ii) of the Act.

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

Date of orders:	28 October 2020
Orders and/or recommendations:	Having found that the councillor engaged in misconduct, pursuant to section 150AR(1) of the Act, the Tribunal orders that: The Tribunal orders, pursuant to s150AR(1)(b)(i) of the Act (being an order substantially the same as an order that could have been made under the former section 180), that: • Pursuant to s150AR(1)(b)(i) of the Act, the Respondent make a public admission that he engaged in misconduct, within 90 days of the date that a copy of this decision and orders are given to him by the Registrar.
Reasons:	• The Tribunal took into account that: a. The Respondent has no prior disciplinary history (section 150AQ(2)(a)); b. There was no part of the application that related to inappropriate conduct (section 150AQ(2)(b)); c. The Respondent did not admit to the allegation made, but the Tribunal is reasonably satisfied that the allegation is true and has made that finding (section 150AQ(2)(c)). • The Tribunal notes the character statement from Ms Wardrop in support of the Respondent. However, the Tribunal has given the

	statement little weight as there is no evidence in that statement to suggest that Ms Wardrop was fully informed of the allegations against the Respondent in making her statement in his support. • The Tribunal accepts the Respondent's submissions regarding cooperation and non-attendance at the training. The Respondent is entitled to remain silent in the face of allegations made by the Applicant as a longstanding rule of common law and no inference can be drawn in relation to him taking that course.[4] Further, the Respondent has explained his absence from the training session in a manner the Tribunal finds is reasonable. • The Tribunal is also willing to accept that the Respondent takes steps to further his own understanding of his obligations as a Councillor. There was no evidence before the Tribunal to suggest that the Respondent does not take his official responsibilities seriously, nor that he sought to deliberately confound his fellow Councillors or conceal his interest, either from Council or the Applicant's investigators. • The Tribunal does not accept that a finding of misconduct in this case would not be instructive to Councillors under the current Act. Considering all of the above matters, the Tribunal considers that an order that the Respondent issue a public admission of misconduct under section 150AQ(1)(b)(i) of the Act will serve both general and specific deterrence by discouraging the Respondent from failing to disclose such conflicts in future, whilst ensuring other Councillors are educated as to their own requirements to properly disclose conflicts of interest.

[4] *Petty v R* (1991) 173 CLR 95.