

# 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:

<b>CCT Reference</b>	F20/2923
<b>Subject Councillor</b>	The Councillor is identified as the Respondent Councillor <sup>1</sup> .
<b>Council</b>	Cloncurry Shire Council (the Council)

## 2. Decision (s150AQ):

<b>Date:</b>	21 October 2021
<b>Decision:</b>	<p>The Tribunal has determined, on the balance of probabilities, that the allegation that on 15 May 2018 the Respondent Councillor of the Cloncurry Shire 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)(a) <i>‘transparent and effective processes and decision-making in the public interest’</i> and section 4(2)(e) <i>“ethical and legal behavior of councillors and local government employees”, in that the Councillor did not deal with a real or perceived conflict of interest in a transparent and accountable way as required by section 173(4) of the Act has not been sustained.</i></p> <p><b>Particulars of the alleged conduct which could amount to misconduct provided to the Tribunal by the Applicant:</b></p>

<sup>1</sup> For the purposes of anonymity the name of the Councillors Business entity has been redacted and is referred to in this summary as (DY)

	<p>a) On 15 May 2018 an Ordinary Meeting of Council was held. One of the matters on the agenda was Item 8.4 T 2018-11 Sewerage Treatment Plant Upgrade Stage 2, in which the Council considered whether to award KJW Contracting the tender to complete works associated with contract T2018-11STP Upgrade Civil Works for the value of \$667,913.54 (excl GST) as per the schedule of rates value in the tender submission.</p> <p>b) The matter was not an ordinary business matter.</p> <p>c) The Respondent Councillor attended the Meeting and was the Chairperson.</p> <p>d) The Respondent Councillor had a personal interest in the matter that:</p> <ul style="list-style-type: none"> <li>i. He is a partner in the partnership of a beef cattle business (<i>the Tribunal has withheld the name of the partnership for the purposes of this summary .The partnership is described as (DY)</i>);</li> <li>ii. (DY) was engaged by KJW Contracting on 5,6 and 7 November 2015 and on 5 December 2015;</li> <li>iii. KJW Contracting has supplied crusher dust to various properties owned by the Respondent Councillor’s family in exchange for in-kind payment; and</li> </ul> <p>e) The Respondent Councillor’s personal interest in the matter did not arise merely because of the circumstances specified in former section 173(3);</p> <p>f) The Respondent Councillor’s personal interest in the matter gave rise to a real conflict of interest or perceived conflict of interest due to the relationship between (DY) -which he is a partner of –and KJW Contracting; and</p> <p>g) The Respondent Councillor did not deal with the real or perceived conflict of interest in a transparent and accountable way.</p>
<p><b>Reasons:</b></p>	<p><b>Background.</b></p> <ol style="list-style-type: none"> <li>1. The Cloncurry Shire Council at its Special meeting on May 2018 (the Council meeting), listed an agenda item for Sewerage Treatment Plant upgrade Stage 2 for a decision to allocate a tender for these works to KJW Contracting (KJW). The Respondent’s family partnership (DY) had conducted business interactions with KJW during November and December 2015.</li> <li>2. The Respondent has substantial experience as an elected councillor and was the Chairperson of this Council meeting.</li> <li>3. Section 173(4) &amp; (5) of the <i>Local Government Act 2009</i> (the Act) applicable at the date of the conduct requires councillors to deal with a conflict of interest in a <i>‘transparent and accountable way’</i>. Councillors when participating in a Council meeting <i>‘must inform the meeting of the interest’</i> including the details of any relevant personal interest that may or does give rise to a <i>conflict of interest or a</i></li> </ol>

*perceived conflict of interest.* In this case the conflict was between the dealings that had been undertaken by the Councillor's partnership (DY) with KJW Contracting, that may cause the Councillor to participate in the Council process with regard to the decision to be made to issue a tender to KJW Contracting in an impartial way

4. The Respondent Councillor did not declare these dealings with KJW at the Council meeting. In documents provided to the Tribunal the Councillor disputed that he was required to declare this interest at the Council meeting or that he had engaged in misconduct arising from the business arrangements with KJW during 2015 and the other works in 2016 outlined in the Particulars d. (i)-(iii) above.
5. In such circumstances the Tribunal must be satisfied that the evidence supports the allegation made by the Independent Assessor. In making the decision the standard of proof relied on by the Tribunal is the balance of probabilities.

**Council discussions and the decision in relation to Agenda item 8.4 T2018 -11 Sewerage Treatment Plant Upgrade Stage 2.**

6. The question to be addressed is whether the Respondent Councillor did have a personal interest that he was required to declare at the 15 May 2018 Council meeting when he participated in the Council discussions and decision regarding the allocation of a tender to KJW.
7. The test applied by the Tribunal to the facts and circumstances of this matter is whether '*a reasonable and fair –minded observer might perceive that the Councillor may not bring an impartial mind to the decision and might make a decision contrary to the public interest*'.<sup>2</sup>

**Meaning of Conflict of interest- the legislation.**

8. Section 173(2) and (3) of the *Local Government Act applicable at 15 May 2018* provides that a conflict of interest is:

-'(2) A conflict between –

(a) a councillor's personal interests; and

(b) the public interest;

that **might** lead to a decision that is contrary to the public interest'.

However a councillor is **exempt** from the above provision by section 173(3)(b) of the Act if it can be demonstrated that the councillor has – '*... no greater personal interest in the matter than that of other persons in the local government area.*'

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<sup>2</sup> Ebner

**Declaration of the conflict of interest at Council meetings**

Section 173(4) of the Act requires if- a matter is to be discussed at a meeting -

*-(4) The councillor must deal with the real conflict of interest or perceived conflict of interest in a transparent and accountable way’.*

**Local Government principles –Section 4**

The councillor’s conduct was also alleged to have contravened the relevant principles of the Act which are:

*-s4(2)(a) transparent and effective processes, and decision-making in the public interest; and*

*...s4(2)(e) ethical and legal behavior of councillors and local government employees.*

**The evidence**

9. The submissions and evidence established that the parties generally did not disagree on the factual details. The Respondent Councillor accepted that at the time of the Council meeting he was a partner of the family business (DY).
10. The Councillor accepted that he participated in the Council meeting on 15 May 2018 and did not declare the alleged conflict of interest.
11. The Councillor’s sworn evidence confirmed that the partnership business (DY) was primarily established for the purpose of farming beef cattle however the partnership also undertook ad hoc works that included dust suppression works.
12. The Applicant provided 4 examples of work undertaken in 2015 between DY partnership and KJW. The Applicant alleged such works confirmed the existence of a personal interest. The works included the supply of labour hire to KJW Contracting by (DY) at a cost of \$935.00 on 6 & 7 November 2015, and the supply of a bob cat with operator to KJW Contracting at a cost of \$1,584.00 on 7 November and 5 December 2015.
13. The Respondent Councillor accepted that although these works were undertaken in 2015, they were arranged by the Respondent’s brother on behalf of his personal sole trading business and not on behalf of the family partnership (DY)<sup>3</sup>. Sworn evidence provided by the Respondent’s brother was that that the payment for these works was directly made to his personal bank account and not to the family partnership bank account.<sup>4</sup>

<sup>3</sup> Respondent’s Councillors submission 8 October 2021 at paragraph 79.

<sup>4</sup> Affidavit evidence of Respondent’s brother 6 October 2021 at 15

14. The Respondent Councillor in written submissions indicated that he was unaware of the works and was only informed about them 'around November 2019' when this investigation by the Applicant commenced.
15. The sworn evidence of the Respondent's brother confirmed that the works conducted in 2015 were not conducted by or on behalf of DY, the partnership business, and were arranged personally by him as the sole trader of his business.
16. The Tribunal did note however, the taxation anomaly in the invoices provided by the Respondent's brother, whereby the invoice was prepared on the stationery containing the details of the family business (DY), however KJW Contracting was directed to make payment to the brothers personal bank account.
17. The Tribunal considered that to issue this invoice and use the Family Partnership name and stationery creates a legal connection to all existing partners of the business. To this extent the Respondent Councillor did hold a personal (legal) interest at the time of the Council meeting.
18. The Respondent Councillor accepted that other informal works occurred at his personal residence on an unknown date in 2016 when crusher dust was received from KJW and minor trenching and leveling works were undertaken. The payment arrangements for these works were *in-kind* and included the provision of a steel water tank.
19. The Tribunal noted the Respondent's submission that in some circumstances, particularly in regional locations, payments *in-kind* are commonplace within the community. The Tribunal noted that such arrangements are rarely recorded by commercial documentation for example invoices or receipts. Accordingly the view was taken that the works associated with the *in-kind* payments in this particular matter are not necessarily reflective of a personal interest. However the Tribunal must consider these works in the context of the 2015 works discussed above (paragraph 12).

**Personal Interest**

20. The circumstances and the evidence established the Respondent Councillor did have **a personal interest** in the Council Agenda item regarding the award of a tender to KJW . This interest arose from the invoicing implemented by the Respondent's brother (also a partner in (DY)) with KJW Contracting. Such arrangements implicated (DY) from a legal and taxation perspective.
21. Although the Tribunal does not condone such invoicing practices implemented by the Respondent's brother the personal interest of the Respondent Councillor arose because of this invoice as follows;

(i) regardless of his actual awareness of the works conducted in 2015, the Respondent, as a partner of (DY) is entitled under statute and the common law to receive any benefits and privileges accruing and is responsible for any applicable liabilities incurred by the partnership; and

(ii) although the 2015 works for KJW Contracting were arranged and undertaken by his brother, (and all payments were made to the brother's bank account) the invoices were prepared under the name of DY the family partnership;

(iii) the effect of these transactions is that the taxation consequences fall upon the family business and not the brother personally.

22. The Tribunal considered whether the *in-kind* payments made for the works conducted by KJW at the Councillor's residence during 2016, could be deemed to be an interest held by the Councillor. The Tribunal was satisfied that these works were not to a level or nature that would create a conflict of interest and therefore these works did not enliven s173(4) of the Act.

**Does this personal interest represent a conflict of interest that must be declared at the Council meeting?**

23. The Tribunal considered if this **interest** could be described as a conflict of interest, either real or perceived as described by the former section 173(2) of the Act.

24. The Respondent's personal interest, arose from the sole trader dealings undertaken by his brother with KJW in 2015. The Councillor's evidence was that he was not aware at that time, that his brother was dealing with KJW.

25. The invoices were noted to have been prepared on the partnership stationery (of DY) and the payment details provided, were to the brother's bank account. It was also noted by the Tribunal that this arrangement is not orthodox as the preparation of an invoice or any document in the name of a partnership according to statute and common law represents an intention to bind all partners unless there exists a contrary indication.

26. The Tribunal formed the view from the circumstances and facts of the matter that although the Respondent Councillor did have an interest, being a partner of the firm, that it was a technical legal interest and was sufficiently distanced from the discussions at the Council meeting on 15 May 2018.

27. It was determined that the above business interactions and dealings, were insubstantial, and sufficiently remote from the Council discussions and did not raise a presumption of bias when the

	<p>Councillor participated in the decision-making process concerning Agenda Item 8.4T2018-11 at the meeting.</p> <p>28. The interest, while relevant to the agenda item and discussions by the Council, was considered not to raise the perception of a conflict when viewed by a reasonable lay observer appraised of the evidence and facts.<sup>5</sup></p> <p>29. The Tribunal was satisfied the interest of the Councillor was not to a level or of a nature that could cause the Councillor to make an impartial decision at the meeting or create a perception of a conflict of interest in relation to Council Agenda item 8.4T2018-11 considered on 15 May 2018.</p> <p>30. Consequently the Councillor was thus able to bring an impartial mind to the discussions and the Councillor's participation in the Council meeting did not lead to a decision that was in conflict with the public interest.</p> <p>31. Accordingly the Tribunal having considered the facts and circumstances of this matter found there was no requirement for the Councillor to inform the meeting of the interest when he participated in the discussions on 15 May 2018.</p> <p>32. The conduct did not represent a conflict of interest, breach of the trust placed in the Councillor or failure to apply the ethical principles of accountability and transparency that underpin the Act.</p> <p>33. The Tribunal was satisfied on the balance of probabilities that as outlined above, the Councillor did not engage in misconduct as defined by section 176(3)(b)(ii) of the former Act.</p> <p>34. The Tribunal has determined on the balance of probabilities, that the allegation <b>has not been sustained</b>.</p>
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### 3. Orders and/or recommendations (s150AR - disciplinary action):

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

<sup>5</sup> *Ebner v Official Trustee in Bankruptcy* (2000)205 CLR 337.