

# 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:

<b>CCT Reference</b>	F19/10039
<b>Subject councillor:</b>	Councillor Wayne Kimberley (the former Councillor and Deputy Mayor)
<b>Council</b>	Cassowary Coast Regional Council (the Council)

## 2. Decision (s150AQ):

<b>Date:</b>	24 March 2021
<b>Decision:</b>	<p>The Tribunal conducted a hearing to determine whether, Councillor Wayne Kimberley, a former councillor and Deputy Mayor of the Cassowary Coast Regional Council, engaged in misconduct when he failed to declare a conflict of interest at a council meeting on 7 December 2017.</p> <p><b>The Tribunal has determined, on the balance of probabilities, that the following allegation has been sustained;</b></p> <p>‘It is alleged that on 7 December 2017, Councillor Wayne Kimberley, the Deputy Mayor and a councillor of Cassowary Coast Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the <i>Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust placed in him as a councillor, that was inconsistent with local government principles 4(2)(a), ‘transparent and effective processes and decision-making in the public interest’ and or 4(2)(e) ‘ethical and legal behaviour of councillors and local government employees’, in that Councillor Wayne Kimberley 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 .</p> <p><b>Particulars of the alleged conduct</b> provided by the Independent Assessor</p>

which could amount to misconduct are as follows:

- a) On 7 December 2017, a general Council meeting was held. One of the matters on the agenda was Item 13.5 Council Indemnity Approval – Ongoing Legal Matters (Item 13.5).
- b) The matter was not an ordinary business matter.
- c) Councillor Wayne Kimberley attended the general Council meeting.
- d) Item 13.5 listed two recommendations for consideration namely:
  - (i) That pursuant to section 9 of the *Local Government Act 2009*, Council resolves to indemnify Mr James Gott, Chief Executive Officer in the matter of D169 of 2017 District Court, and Cr Rick Taylor’s immediate family in respect of criminal matter QPS Occurrence #:QP1701075677 being ongoing legal proceedings;
  - (ii) Extend Council’s brief to its lawyers to appear on behalf of the Chief Executive Officer and other Council officers and Councillors and their direct families as necessary as determined by the Chief Executive Officer at the trial of the criminal proceeding QPS Occurrence #:QP1701075677 and for the limited purpose of ensuring that the proceedings are not used to examine the Councillors, Officers and immediate families in respect of any other proceedings involving the parties.
- e) Councillor Wayne Kimberley did not inform the meeting of the following interests:
  - (i) An interest in the defamation matter D169 of 2017 (proceedings instituted by Mr James Gott against Mr Toogood and Mrs Toogood) from 31 July 2017; and
  - (ii) An interest in legal representation and appearance by Council’s lawyers on behalf of the Respondent and/or his immediate family in criminal proceedings QPS Occurrence #:QP1701075677 against Mr Toogood and Mrs Toogood.
- f) Councillor Wayne Kimberley’s personal interest in the matter did not arise merely because of the circumstances specified in section 173(3)(a) of the Act.

The Tribunal found, on the balance of probabilities, that the allegation of misconduct including the **particulars (d)(i)** of the alleged conduct that referred to the Respondent’s interest in agenda item 13.5, recommendation (i) has **not been sustained**.

The Tribunal determined, on the balance of probabilities, that the allegation of misconduct with respect to an interest in agenda item 13.5, recommendation (ii) **has been sustained**.

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<b>Reasons:</b>	<p>The parties agreed on the majority of the facts, however the Respondent disputed that he had engaged in misconduct. The Respondent disputed that he had a conflict of interest when he voted at the council meeting. The Tribunal reviewed all the facts including those facts agreed by the parties, all the evidence and submissions filed by the Applicant and the submissions provided by the Respondent and his legal advisors.</p> <p>In considering whether or not a conflict of interest existed between the Respondent’s personal interests and the public interest, the Tribunal considered whether the Respondent had a personal interest that was relevant to the discussions of the two Council resolutions listed at item 13.5(i)&amp;(ii).</p> <p><b>The Background</b> to this case and the allegation stems from a history of interactions between the Council and two members of the public (Mr &amp; Mrs Toogood) regarding complaints made against Council officers and Councillors.</p> <p>With respect to the two recommendations listed for discussion on the Council agenda item 13.5 that led to the complaint and the allegation, the Tribunal is satisfied that:</p> <ul style="list-style-type: none"> <li>• The Respondent was present when the items were discussed; and</li> <li>• The matters were not “ordinary business matters” (section 173(1)(b) of the Act. )<sup>1</sup></li> </ul> <p>Section 173(1)&amp;(2) of the <i>Local Government Act</i> provides that a conflict of interest is a conflict that exists between a councillor’s personal interest and the public interest “that might lead to a decision that is contrary to the public interest”.</p> <p><b><i>Agenda item 13.5 (i) states :</i></b></p> <p><i>‘That pursuant to section 9 of the Local Government Act 2009,Council resolves to indemnify Mr James Gott, Chief Executive Officer in the matter of D169 of 2017 District Court, and Cr Rick Taylor’s immediate family in respect of criminal matter QPS...being ongoing legal proceedings.’</i></p> <p><b><u>Did the Respondent have a personal interest when he voted at the meeting?</u></b></p> <p>To answer this question the Tribunal considered “<i>Whether a reasonable and fair-minded observer might perceive that the councillor might not bring an impartial mind to the decision and might make a decision contrary to the public interest</i>”.<sup>2</sup></p> <p>The Tribunal noted the Respondent’s personal interest when he voted on resolution (13.5(i)) related to his knowledge of the information and legal</p>
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<sup>1</sup> Ordinary Business matter is defined in the Dictionary at section 4 of the Act

<sup>2</sup> *Ebner v Official Trustee in Bankruptcy (2000)205 CLR337*

documents provided for the reference of the Councillors when they attended the meeting.

The Tribunal formed the view that the Applicant had failed to establish how the Respondent's personal interest (in voting to indemnify the Chief Executive Officer, Mr Gott) was an interest that was any greater than the other councillors who voted and were not named in the proceedings or how the conduct might lead to a decision that is contrary to the public interest'.

It was considered by the Tribunal that the intended outcome was to manage or limit ongoing and costly vexatious complaints against the Council by two local residents.

Was there a conflict of interest?

The Tribunal formed the view that the Respondent in voting for Agenda item 13.5(i) did not have an interest that was in conflict with the public interest or that might have led to a decision that is contrary to public interest. It was considered based on the available evidence, that it was in the public interest that the Council protect ratepayers funds by taking action to reduce costly and vexatious actions against the Council and its officers.

The Tribunal found on the balance of probabilities that the Applicant failed to establish the existence of a real or perceived 'personal interest' held by the Respondent or that the Respondent had a conflict of interest when he voted at the meeting in relation to agenda item 13.5(i).

As such a conflict of interest, real or perceived, has not been established pursuant to the provisions of the Act (section 173(2)).

**Agenda Item 13.5 (ii) states:**

*'Extend Council's brief to its lawyers to appear on behalf of the Chief Executive Officer and other Council Officers and Councillors and their direct families as necessary as determined by the Chief Executive Officer at the trial of the criminal proceedings QPS Occurrence...and for the limited purpose of ensuring that the proceedings are not used to examine the Councillors, Officers and immediate families in respect of any other proceedings involving the parties.'*

Personal interest

In relation to Agenda item 13.5(ii) the Tribunal considered whether the Respondent had a personal interest in the matter and whether there

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existed a perception that the Respondent could potentially benefit if this agenda item was adopted by resolution at the Council meeting.

In voting on the motion to engage lawyers to 'appear on behalf of ...other Council Officers', including the Respondent and the Respondent's 'direct family members' the Tribunal formed the view from the available evidence that a personal interest did exist at the time the vote was taken. The hypothetical reasonable person might conclude that the Respondent might not have brought an impartial mind to this decision.

On this basis, the Tribunal considered the Respondent did have a personal interest in considering agenda item 13.5 (ii).

Was there a conflict of interest?

The benefit to the Respondent as described in this agenda item was the provision of legal assistance to some councillors including the Respondent and his family members in relation to the ongoing criminal litigation proceedings involving Mr & Mrs Toogood and several other Cassowary Coast councillors.

In such circumstances the Respondent was afforded a potential benefit and had a personal interest in the outcome of the resolution, that constitutes a conflict between-

*' the councillor's personal interests; and*

*the public interest that; that might lead to a decision that is contrary to the public interest.'* (section 173(2) of the former Act)

The Tribunal found that the Respondent in voting on Agenda item 13.5, recommendation (ii), the Respondent had a conflict of interest pursuant to section 173(2) of the Act which he was required to deal with in a *transparent and accountable* way (section 173(3)(b)) The Respondent was obliged to declare that he had a conflict of interests to the Council meeting and prior to voting on this resolution pursuant to the provisions of 173(5) of the former Act.

Section 173(5) requires that the Respondent must inform the meeting of his personal interest and, if he participates in the meeting about the agenda item, the Respondent must inform the meeting how he intend(s) to deal with the real or perceived conflict of interest.

There is no suggestion or evidence before the Tribunal that established the Respondent discharged the mandatory obligation by effectively managing the conflict of interest or the perceived conflict of interest. On that basis, the Tribunal is satisfied that the conflict of interest identified above (in relation to Agenda item 13.5, recommendation (ii)) was not dealt with by the Respondent in a '*transparent and accountable way*' as envisaged under the Act.

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	<p><b>Breach of Trust</b></p> <p>The Tribunal considered whether such conduct is sufficient to amount to a breach of the trust placed in the councillor for the purpose of the application of the integrity principles that underpin the Act.</p> <p>The Tribunal formed the view that the conduct in relation to agenda item 13.5 (ii) was inconsistent with the local government principles of ‘.. <i>transparent and effective processes and decision-making in the public interest</i>’ and ‘...ethical and legal behaviour of councillors and local government employees’<sup>3</sup></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 position of a councillor. As elected representatives in responsible positions with significant powers, councillors have great discretion and are entrusted to use their powers to make policy and all decisions appropriately and in the public interest. Any breach of this trust can have a corrosive effect on the community and its confidence in local government.</p> <p>In the circumstances of this case, and having regard to the above principles in section 4 that underpin the Act, the Councillors failure to act in a way that was consistent with these principles, and the obligations imposed by section 173(4) of the Act, the Tribunal is satisfied that on the balance of probabilities the conduct constituted a breach of trust placed in the Councillor.</p> <p>In this context and having regard to the evidence presented by the parties and the misconduct provision in section 176(3)(b)(ii) of the former Act, the Tribunal is satisfied that the <b>allegation of misconduct is sustained</b>.</p>
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**3. Orders and/or recommendations (s150AR - disciplinary action):**

<b>Date of orders:</b>	21 June 2021
<b>Order:</b>	<b>The Tribunal orders pursuant to section 150AR(1)(b)(i) of the Act:</b> <sup>4</sup>

<sup>3</sup> Section 4(2)(a) and 4(2)( e) of the *Local Government Act 2009*

<sup>4</sup> Being an order that is substantially the same as an order made under former Act section 180 & 180(4). Former section 180(4) provides for the making of any order or recommendation that it considers appropriate in view of the circumstances relating to the misconduct”

	<p>That the Respondent make a public admission that he has engaged in misconduct, within 90 days of the date a copy of this order is provided to him by the Registrar.</p>
<p><b>Reasons:</b></p>	<p>The Tribunal accepted that the conflict of interest requirements under the Act are an important mechanism of accountability and transparency and is mindful that its jurisdiction is protective, not punitive.</p> <p>In considering an appropriate order, the Tribunal’s considerations also included the following additional information :</p> <ul style="list-style-type: none"> <li>• The Respondent had received relevant training regarding his responsibilities as a councillor included training regarding the provisions of the legislation.</li> <li>• the Respondent has no previous disciplinary history or findings of misconduct.</li> <li>• The Respondent was in his first term as a Councillor</li> <li>• The submissions received from both the Respondent and the Applicant in relation to the penalty orders.</li> </ul> <p>The Tribunal noted that the Respondent is no longer a Councillor and under these circumstances the orders that can be made by the Tribunal are restricted by the provisions of the Act (section 150AR(3))</p> <p>Whilst the Tribunal considered the misconduct in this case to be at the lower end of the disciplinary order scale, it holds the view that a finding of misconduct by an elected Council arising from a failure to declare a conflict of interest in a Council meeting is a serious matter.</p> <p>In the view of the Tribunal, an order to take no further action would undermine the principles of the Act and the personal interest disclosure obligations required to be implemented by elected Council members. Having considered all the information before it, the Tribunal considered that, such conduct undermines the integrity principles of the Act. The Tribunal considered it appropriate that the Respondent should make a public admission to the Council that he has engaged in misconduct in relation to the meeting procedures and the declaration of personal interests. In the circumstances of the current matter and given the Respondent is no longer an elected councillor no further order appears to be necessary.</p>