

# 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>	F20/1403
<b>Subject Councillor</b>	Councillor Terry Fleischfresser (the councillor)
<b>Council</b>	South Burnett Regional Council

## 2. Decision (s150AQ):

<b>Date:</b>	1 March 2021
<b>Decision:</b>	<p>The Tribunal has determined, on the balance of probabilities, that Allegation One, being that on 21 August 2019, Councillor Fleischfresser, a Councillor of South Burnett Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i>, in that his conduct involved a breach of the trust placed in him as a councillor, either knowingly or recklessly, in that it was inconsistent with local government principle 4(2)(e) ‘ethical and legal behaviour of councillors and local government employees’, was sustained and that therefore the councillor has engaged in misconduct.</p> <p>The particulars of Allegation One are as follows:</p> <ol style="list-style-type: none"><li>a. In March 2016, the Councillor was elected as a councillor for his third term.</li><li>b. On 21 August 2019, a General Council Meeting (Council meeting) was held. The Council meeting was adjourned, and a citizenship ceremony took place approximately between 10:00 am and 11:06 am.</li></ol>

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	<p>c. The Councillor was present at the citizenship ceremony in the Warren Truss Chamber (Council Chambers), 45 Glendon Street Kingaroy.</p> <p>d. Ms X, a local government employee, also attended the same citizenship ceremony in the Council Chambers.</p> <p>e. During the ceremony, Ms X was standing along the wall of the Council Chambers. The Councillor after completing his role of handing out certificates to the members of the public came and stood beside her along the wall.</p> <p>f. Following a verbal exchange between the Councillor and Ms X, the Councillor put his left arm around Ms X's waist and his hand on her lower hip area, then pulled her into him sideways causing their hips to bump together several times.</p> <p>g. The Councillor's conduct towards Ms X could amount to misconduct in that it is inconsistent with local government principle 4(2)(e) 'ethical and legal behaviour of councillors and local government employees' in that his conduct is in breach of section 353 of the <i>Criminal Code 1899</i> and or section 118 of the <i>Anti-Discrimination Act 1991</i>.</p>
<b>Date:</b>	1 March 2021
<b>Decision:</b>	<p>The Tribunal has determined, on the balance of probabilities, that Allegation Two, being that on 21 August 2019, Councillor Fleischfresser, a Councillor of South Burnett Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i>, in that his conduct involved a breach of the trust placed in him as a councillor, either knowingly or recklessly, in that it was inconsistent with local government principle 4(2)(e) 'ethical and legal behaviour of councillors and local government employees', was sustained and that therefore the councillor has engaged in misconduct.</p> <p>The particulars of Allegation Two are as follows:</p> <p>a. In March 2016, the Councillor was elected as a councillor for his third term.</p> <p>b. On 21 August 2019, a Council Meeting was held. The Council meeting was adjourned, and a citizenship ceremony took place approximately between 10:00 am and 11:06 am.</p> <p>c. The Councillor was present at the citizenship ceremony in the Council Chamber, 45 Glendon Street Kingaroy.</p> <p>d. Ms X, a local government employee, also attended the same citizenship ceremony in the Council Chambers.</p> <p>e. Whilst Ms X was waiting to exit the Council Chambers, the Councillor came up close behind Ms X, put his hands around her waist and rested them low on her hips. He then grabbed her hips and pulled her back towards him in a subtle thrusting motion three or four times. The Respondent then pulled himself back towards her, came up behind close to her face and groaned/growled into her left ear.</p>

	<p>f. The Councillor’s conduct towards Ms X could amount to misconduct in that it is inconsistent with local government principle 4(2)(e) ‘ethical and legal behaviour of councillors and local government employees’, in that his conduct is in breach of section 352 of the <i>Criminal Code 1899</i> and or section 118 of the <i>Anti-Discrimination Act 1991</i>.</p>
<p><b>Reasons:</b></p>	<ol style="list-style-type: none"> <li>1. On 21 August 2019 there was a Citizenship Ceremony held at the Council Chambers. The Councillor was in attendance along with a number of other Councillors and Council staff, as well as members of the public.</li> <li>2. During this ceremony, the Councillor has approached a Council employee (Ms X) and engaged in some form of conversation, following which it is alleged he placed his arm behind her back and on to her hip or upper leg, rubbing it up or down several times (Allegation One). This was witnessed by two other Council employees.</li> <li>3. Following the Ceremony and as persons were leaving the Council Chambers, the Councillor approached Ms X from behind and placed his hands on her hips, before making a noise which witnesses describe as a grunt or growl (Allegation Two). This was witnessed by another Council employee.</li> <li>4. Though the Councillor denies this conduct and the Tribunal understands the seriousness of the allegations made, the Tribunal is nevertheless satisfied that both incidents occurred. In making such a finding, the Tribunal finds that: <ol style="list-style-type: none"> <li>a. On a complete reading of all of the evidence, the Tribunal favours the evidence of witnesses;</li> <li>b. Ms X’s evidence was credible and coherent, and was not subject to specific challenge by the Councillor;</li> <li>c. There was no reasonable basis on the evidence before the Tribunal to reject Ms X, or the witnesses observation of the events as direct eyewitnesses, in circumstances where the alleged conduct was a sufficient departure from “ordinary” office behaviour that the Tribunal considers a reasonable observer would have formed a good memory of the incidents in question;</li> <li>d. The evidence was supported by documentary records made at the time which reasonably support the idea that Ms X felt humiliated and embarrassed by the Councillor’s conduct;</li> <li>e. The affidavits and photographs in evidence do not present sufficient basis for the Tribunal to doubt the recollections of these witnesses.</li> </ol> </li> </ol>

	<p>5. Despite the Independent Assessor suggesting that such conduct was a breach of section 352 of the <i>Criminal Code</i>, the Tribunal will not make such a finding. This Tribunal does not have a criminal jurisdiction and does not intend to engage in consideration of alleged criminal offences.</p> <p>6. The Independent Assessor’s submission that the behaviour offends section 118 of the <i>Anti-Discrimination Act 1991</i> carries more force. This Act specifically describes (in section 119) actions that offend the prohibition against sexual harassment, and these include the behaviour which the Tribunal is satisfied the Respondent has engaged in.</p> <p>7. Even without reference to the <i>Anti-Discrimination Act 1991</i>, it is a reasonably arguable position that the Respondent’s behaviour was unethical behaviour to be carried out by a Councillor, and therefore a breach of trust reposed in him as Councillor. Councils are workplaces, and employees in those workplaces are entitled to attend without fear of unwanted or unwarranted physical contact from others. Councillors must remain aware that their conduct towards the employees at Council should accord with high standards of workplace propriety and decorum. Inadvertent physical contact is one thing. But physical contact of a more intimate nature, where the recipient gives evidence of that contact being “<i>embarrassing</i>” and “<i>degrading</i>”, is not to be condoned.</p> <p>8. The Councillor’s behaviour was undertaken entirely without regard as to its appropriateness for such a workplace. His attempts to justify or excuse his behaviour as an expression of affection or friendship is likewise inappropriate, as the Tribunal is aware of at least one prior instance that should have put the Councillor “on notice” that his affection towards Council employees was not being received warmly. The Councillor should have taken heed of this instance to adjust his behaviour in the workplace – yet evidently chose not to do so.</p>
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**3. Orders and/or recommendations (s150AR - disciplinary action):**

<b>Date of orders:</b>	1 March 2021
<b>Order/s and/or recommendations:</b>	Having found that the councillor engaged in misconduct, pursuant to section 150AR(1) of the Act, the Tribunal orders that:

	<p>Pursuant to section 150AR(1)(b)(ii) of the Act, the Councillor is reprimanded for the conduct that constitutes Allegations One and Two.</p>
<p><b>Reasons:</b></p>	<ol style="list-style-type: none"> <li>1. The Tribunal considered that the Councillor had a prior disciplinary history relating to two previous substantiated instances of inappropriate conduct, and that although the Councillor contested both allegations, the Tribunal is reasonably satisfied that they are true.</li> <li>2. The Tribunal also notes that the Councillor is no longer a Councillor, and that this limits the sanctions available to this Tribunal.</li> <li>3. As the Tribunal considers that the Councillor has behaved in a way that is inappropriate and is conduct that is not acceptable in any workplace from any person, the Tribunal issued a reprimand under section 150AR(1)(b)(ii) of the Act.</li> <li>4. A reprimand will publicly demonstrate the Tribunal’s position that such conduct by Councillors is completely inappropriate and serve as public condemnation of such conduct by an elected official, in the hopes that future Councillors will observe higher standards of behaviour.</li> <li>5. One Member of the Tribunal considered that a pecuniary penalty should have been imposed; however, the majority concluded that such an order would not be necessary. Though a penalty is open to it, the Tribunal considered that: <ol style="list-style-type: none"> <li>a. The Councillor could have (but did not) press for a full oral hearing, which saved both the Tribunal and local government significant time and cost in disposing of the matter, as well as saving Ms X from the potential trauma of recounting her allegations in an open hearing;</li> <li>b. The reprimand, and the findings upon which it is based, will be made public on the website of Council, the Independent Assessor and the Department, and these findings will hold a significance well beyond the making of any orders by this Tribunal; and</li> <li>c. The Councillor has retired and, having no substantial evidence before it as to his capacity to pay, the Tribunal does not consider a pecuniary penalty would be appropriate in all the circumstances.</li> </ol> </li> <li>6. As the Councillor is no longer serving at Council, no further orders to discharge the Tribunal’s protective jurisdiction are necessary.</li> </ol>