

# 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>	F19/6510
<b>Subject Councillor</b>	Councillor Benjamin Heath (the Councillor)
<b>Council</b>	Cassowary Coast Regional Council

## 2. Decision (s150AQ):

<b>Date:</b>	06 February 2020
<b>Decision:</b>	<p>The Tribunal determined, on the balance of probabilities, that the allegation that, between 18 April 2016 and 15 August 2018 Councillor Benjamin Heath, a councillor of the Cassowary Coast Regional Council, engaged in misconduct as defined in <i>section 176(3)(b)(ii) of the Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust placed in him as a councillor</p> <p><b>has been sustained.</b></p> <p><b>The Particulars</b> of the conduct provided by the Applicant are that:</p> <ol style="list-style-type: none"><li>a. Prior to the 2016 local government election, Councillor Heath commenced a relationship with Stephanie Lea. Ms Lea was the owner of Innisfail Seafood, a seafood business located at 51 Fitzgerald Esplanade Innisfail.</li><li>b. On 19 March 2016, Councillor Heath was elected as a councillor of the Cassowary Coast Regional Council.</li><li>c. Prior to and during his term as a councillor, Councillor Heath was involved in various aspects of the business including marketing. For a 6 month period Cr Heath was a paid employee of Innisfail Seafood.</li></ol>

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	<p>d. On 5 May 2016, Cr Heath submitted his first Form 2 Register of Interests of a councillor and their related persons (Form 2) for the 2016 term. The Form 2 did not record Councillor Heath’s interest in Innisfail Seafood</p> <p>e. On 25 July 2018 Councillor Heath purchased Innisfail Seafood from Ms Lea.</p> <p>f. On August 2018, Councillor Heath updated his register of Interests to reflect the purchase of Innisfail Seafood.</p> <p>g. Councillor Heath had a legal obligation under section 171B of the Act to record his interest in Innisfail Seafoods within 30 days of his term as a councillor commencing. Given Councillor Heath’s contribution to the business, which encompassed being a paid employee, and his relationship to the business owner, it was an interest that was required to be recorded in Schedule 5, section 17 of his register of interests. Schedule 5, section 17 requires particulars of each interest that raises, appears to raise, or could raise, a conflict between the relevant person’s duty under the Act and the holder of the interest.</p> <p>h. The alleged conduct could amount to misconduct on the basis that it did not comply with local government principle 4(2)( e) being ‘ethical and legal behavior of councillors and local government employees’ in that Councillor Heath failed to comply with his statutory obligation under section 171B of the Act.</p>
<p><b>Reasons:</b></p>	<p>1. The parties did not agree in totality on the facts of this matter and Councillor Heath notified the Independent Assessor of his intention to dispute the allegation. The Tribunal in such circumstances must be satisfied there is sufficient evidence and facts before it to establish the allegation is made out and that the conduct amounts to Misconduct.</p> <p>2. Section 171B of the Act states if:</p> <p><i>(1)(a) a councillor has an interest that must be recorded in a register of interests under a regulation in relation to the councilor ;</i></p> <p><i>(2) The councillor must in the approved form inform the Chief Executive Officer of the particulars of the interest or change to the interest within 30 days after the interest arises or the change happens.</i></p> <p><b>Contents of Register of Interests</b></p> <p><b>Section 291 of the Regulation states:</b></p>

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(1) *The Register of interests must contain the financial and non- financial particulars of an interest mentioned in **Schedule 5 (sections 1-17)** held by ..*  
*(a) a councillor;*

3. On the basis of the evidence filed by the Independent Assessor and by the Councillor, and having regard to the provisions of the Act and the Regulation the Tribunal finds that between the period 18 April 2016 and 15 August 2018, the Councillor had not recorded in the Register of Interests his financial or non-financial interest in Innisfail Seafood. This interest was required to be recorded within 30 days of the interest arising.

4. The brief of evidence outlined the Councillor’s conduct and business activities during the period 18 April 2016 to 15 August 2018 that “raised, appeared to raise or could raise” a perception that he had business interests in a local seafood business that was owned by his partner. The Tribunal determined that the Councillor did not record these business activities in the Register of Interests as required by the Local Government Act section 171B and the Local Government Regulations section 291(1) Schedule 5 section 17.

5. The Register of Interests is available for public inspection and is required to be kept up to date for the purpose of transparency by elected officials. The information provided in the Register of Interests and as specified in section 291, Schedule 17 to the Regulations must be sufficiently informative to enable the issue of whether or not an actual or perceived conflict may or does arise in regard to Council decision-making<sup>1</sup>.

6. In this context the Tribunal is satisfied to the requisite standard of proof that the Councillor contravened section 171B of the Act, when he failed to record in the Register of Interests the particulars relating to his involvement with the business of Innisfail Seafood that “raised or could raise “ the perception of a conflict between his duty as a Councillor and his personal interests. The interest held by the Councillor was to be recorded within 30 days of the interest arising pursuant to section 171B of the Act and was an interest defined by Schedule 5 section 17(1) and (2) of the Local Government Regulations.

7. The Tribunal determined that the Councillor was “aware “ that the personal business “ interest “ he held could raise an awareness or perception of a conflict between his duties as a councillor and his personal interests. The Tribunal noted that the evidence established that an application was made by Innisfail Seafood to the Council to reduce the

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<sup>1</sup> Scaffoldi v Chief Executive Officer, Department of Local Government and Communities [2017] WASCA 222;{2017} 52 war 368 at[47-48]

	<p>infrastructure charges regarding a material change of use to the business and was considered at two Council Committee meetings on 25 July and 12 October 2017. At both these meetings Councillor Heath declared that he had “a material personal interest ..due to his personal relationship with the co-owner of Innisfail Seafood Depot..” and he proposed that he would exclude himself from the meeting while the matter was being debated.</p> <p>8. The evidence before Tribunal established that following this declaration to the two(2) Council Committee meetings in both July and October 2017 Councillor Heath failed to update his Register of Interests to include the particulars of his declared <i>financial or non- financial interests</i> relating to the Innisfail Seafood business and “his relationship with the co-owner”.</p> <p style="text-align: center;"><b>Breach of Trust</b></p> <p>9. The Tribunal considered whether such conduct is sufficient to amount to a breach of trust for the purpose of the application of section 4(2)( e) principles that underpin the Act being the “<i>ethical and legal behavior of councillors</i>” .</p> <p>10. 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 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 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>11. In the circumstances of this case, and having regard to the above principles in section 4 of the Act and the Councillor’s failure to comply with the provisions of section 171B of the Act and section 291 Schedule 5 section 17 of the Regulation, the Tribunal is satisfied that on the balance of probabilities the conduct constituted a breach of trust placed in the Councillor and consequently was determined to be misconduct.</p> <p>In this context and having regard to the evidence presented by the parties and the provisions of the Act including sections 171B and section 176(3)(b) (ii) of the former Act the Tribunal is satisfied that the allegation of misconduct is sustained.</p>

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

<p><b>Date of orders:</b></p>	<p>29 May 2020</p>
<p><b>Order/s and/or recommendations:</b></p>	<p>The Tribunal made the original orders on 16 April 2020 on the basis that Councillor Heath remained a councillor of the Cassowary Coast Regional Council. The Tribunal was advised on 30 April by the CEO that Councillor Heath was not re-elected following the elections conducted on 28 March 2020. The original orders made were therefore not applicable to a person who was no longer a councillor.</p> <p>The Tribunal in such circumstances relies on the Acts Interpretation Act to amend the original orders and to make orders specifically applicable to councillors who have resigned or are not re-elected.</p> <p>The Tribunal's discretion under s150AR to make a range of orders is restricted in the circumstances of this matter as the Respondent is no longer a councillor and pursuant to section 150AR(5) the Tribunal's powers are limited in relation to disciplinary orders that can be made.</p> <p><b>The Tribunal orders that pursuant to section 150AR(1)(b)(i) of the Act:</b></p> <ol style="list-style-type: none"> <li>1. That the Respondent make a public admission at a Council meeting that he engaged in misconduct in breach of the Act and the principles that underpin the Act.</li> <li>2. This admission is to be made at a date arranged by the CEO in accordance with local government standing orders and within 90 days from the date a copy of this decision and orders are given to the Respondent by the Registrar.</li> </ol> <p>The tribunal requests the CEO facilitate the implementation of the orders by placing the item on the Council agenda in accordance with section 8(2)(d) of the Local Government Standing Orders.</p>
<p><b>Reasons:</b></p>	<ol style="list-style-type: none"> <li>1. The Tribunal considered the relevant factors contained in the brief of evidence and also sought and considered additional submissions in relation to the amended orders to be made. These submissions were received on 15 May 2020 concerning the penalty and disciplinary provisions for persons who are no longer councillors s150AR(5) of the Act.</li> <li>2. The Respondent submitted that it is open to the Tribunal to take no action pursuant to section 150AR(1)(a)<sup>2</sup></li> </ol>

<sup>2</sup> Respondents submissions 15 May 2020 at[18]

The Tribunal did not accept this submission and considered that the relevant facts and circumstances demonstrated that the Councillor engaged in misconduct and that this conduct was serious and that orders pursuant to section 150AR (1)(b) of the Act are appropriate in the circumstances.

3. The Tribunal's view is that despite the fact that the Respondent is no longer a councillor it is an appropriate deterrent and in furtherance of the principles that underpin the Act that the Respondent make a public admission to the Council that he engaged in misconduct.

4. The Orders made by the Tribunal took account of the relevant factors outlined in the statement of facts including that:

- The Councillor has no previous disciplinary history that pre-dates the conduct the subject of this application;
- The Councillor was in his first term as a councillor at the time the conduct occurred.

5. The Act provides that a breach of section 171B is a serious offence and potentially can lead to prosecution in the Magistrates Court. It must be taken that the legislature considers this type of conduct to be serious or potentially serious. Accordingly the Tribunal finds it appropriate in the interests of deterrence of this type of conduct and to maintain community confidence in the system of governance and transparency in the decision-making process that the Respondent make an admission at a Council meeting that he engaged in misconduct in breach of the principles and a provision of the Act.

6. The Tribunal was provided with information that the Respondent did receive and did attend several training sessions between 2016 to 2018. The Tribunal was provided with evidence by the Applicant that confirmed that Councillor Heath had attended training in relation to the completion and preparation of the Register of Interests. Councillor Heath did not dispute this evidence or submit that he had not attended the relevant training sessions.

7. The facts of this matter cast some doubt on whether the prior training and in-service education did assist the Councillor to acquire the necessary insight and understanding to accurately update and complete a Register of Interests. The Tribunal's view is that the provisions within the Act and the Regulations require that all councillors have a comprehensive understanding of "the particulars" that must be included in a Register of Interests.

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	<p>8. As the matter involved conduct that occurred prior to December 3 2018, the Tribunal made orders in accordance with section 150AQ and section 150AR(5) of the Act that are substantially the same orders that could have been made under the former section 180 of the pre-amended Act.<sup>3</sup></p>
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<sup>3</sup> Section 322(2)(c)