

# Councillor Conduct Tribunal: Councillor misconduct complaint – Summary of decision and reasons for department’s website

*Local Government Act 2009: Sections 150AS(2)(c)*

## Complaint:

<b>CCT Reference</b>	F20/2320
<b>Subject Councillor</b>	Councillor [REDACTED] (the Councillor)
<b>Council</b>	Balonne Shire Council

### 1. Decision (s150AQ):

<b>Date:</b>	30 June 2021
<b>Decision:</b>	<p><b>The Tribunal has determined that the allegation:</b></p> <p>That between 20 January 2019 and 7 February 2019, Councillor [REDACTED] a councillor of Balonne Shire Council, engaged in misconduct as defined in section 150L(1)(b) of the <i>Local Government Act 2009</i>, when he influenced a local government employee who was authorised to decide or otherwise deal with the matter to do so in a particular way, contrary to section 175I(3) of the Act has <b>not been sustained</b>.</p>
<b>Conduct details:</b>	<p><b>Allegation</b></p> <p>That between 20 January 2019 and 7 February 2019, Councillor [REDACTED] a councillor of Balonne Shire Council, engaged in misconduct as defined in section 150L(1)(b) 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 his conduct was inconsistent with local government principle 4(2)(e) being ethical and legal behaviour of councillors and local government employees, when he influenced a local government employee who was authorised to decide or otherwise deal with the matter to do so in a particular way, contrary to section 175I(3) of the Act.</p>

Particulars of the alleged conduct which could amount to misconduct are as follows:

- a. In early 2018, Mr Peter Willey, Manager, Water, Sewerage and Towns, was tasked with drafting a policy and procedure in relation to the temporary transfer of CAP.
- b. On 14 December 2018, the CEO of Balonne SC sent an email to Mr Willey asking that he prioritise the policy and procedure, and to liaise with Councillor [REDACTED] in doing this.
- c. On 21 January 2019, Councillor [REDACTED] attended the St George depot to discuss the CAP policy with Mr Willey. As Mr Willey was on leave, Councillor [REDACTED] had a discussion with Mr Andrew Boardman, Acting Director for Infrastructure Services whereby he provided commentary in relation to the draft policy.
- d. On 1 February 2019, Mr Willey contacted Councillor [REDACTED] via email attaching the draft version of the CAP Policy and Procedure, seeking Councillor [REDACTED] feedback.
- e. On 4 February 2019, Mr Willey had a meeting with Councillor [REDACTED] at the St George Depot in relation to the draft CAP Policy and Procedure. At this meeting, Councillor [REDACTED] suggested “minor tweaks” in relation to the buyer’s payments timing and clarity around withdrawing offers if payment is not made by the deadline.
- f. Mr Willey incorporated Councillor [REDACTED] proposed changes into the draft version of the CAP Procedure.
- g. On 21 February 2019 at an ordinary council meeting, the Balonne SC considered whether to adopt the temporary transfer of CAP Policy and Procedure (CAP Policy and procedure).
- h. Councillor [REDACTED] had a real or perceived conflict of interest in the CAP Policy and procedure. Councillor [REDACTED] personal interests in this matter was due to his position as a local irrigator and a holder of water entitlements within the St George water supply scheme.
- i. The matter was not an ordinary business matter.

<p><b>Reasons:</b></p>	<ol style="list-style-type: none"> <li>1. The Balonne Shire Council obtained river water under the St George Water Supply Scheme by payment of an annual allocation charge for access to river water impounded by Jack Taylor Weir. Each year, the Council would use approximately half of its allocation. The unused portion of the allocation was available as an income source for the Council when the unused entitlement (excess CAP) could be sold to other water users via a temporary transfer of CAP. The CAP resets at the start of each financial year. The Buyer would need to have, or have access to, infrastructure necessary for extracting their allocation. Council does not sell water physically sitting in the river system, but rather an entitlement to take water. Council's sale of CAP would be considered valuable to farmers or irrigators in instances where they have used all of their entitlement (ie up to their own CAP).</li> <li>2. Prior to February 2019, the Council did not have a formal Council-adopted policy for how applications for CAP entitlements were to be handled, although the development of such a policy had been contemplated since early 2018.</li> <li>3. At times relevant to the allegation, the Councillor held the portfolio of Water Resource Management and Urban Water and Waste Water in the Council.<sup>1</sup></li> <li>4. In December 2018, the CEO of the Council asked a local government employee to prioritise the policy and procedure and liaise with the Respondent. The need for development of the policy had been prompted by some criticism of processes adopted up to that time. The CEO sent an email to the local government employee on 14 December 2018 which included: <p style="margin-left: 40px;">“Please liaise very closely with [the Councillor] and in the absence of any policy being in place you need to rely on the procedure developed for the sale of the cap earlier this year. It is important we get the timing of the sale process spot on to maximise the return for council so we need to be well and truly on top of it right now”.</p> </li> <li>5. In a later email from the CEO, the local government employee was also requested to “nail down the operational procedures/guidelines that would sit behind the policy and become the riding instructions for future sales. Happy for you to consult [the Councillor] re that also ...”.</li> </ol>
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<sup>1</sup>Paragraph 1 of Respondent's statement (undated)

6. On 21 January 2019, the Councillor attended at the Council depot in an attempt to see the local government employee. That local government employee was on leave at the time and the Councillor instead had a discussion another employee who sent an email to the local government employee about the meeting.
7. Following the local government employee sending an email on 1 February 2019, attaching the draft CAP policy and procedures, the Councillor met with the local government employee on 4 February 2019. The Councillor suggested “some minor tweaks in relation to the buyer’s payment timing and clarity around withdrawing of offers if payment is not made by the deadline”.
8. The local government employee sent the modified policy document to other Council officers, one of whom queried the appropriateness of the seven day time frame to make payment.
9. There was no discussion during the drafting process in any Council workshops. The policy was sent to all councillors with a request for feedback but none was provided. The policy and procedures, as amended was presented to Council.
10. The allegation involved the purported influence of a local government employee. The word “influence” is defined in the Macquarie Dictionary (2<sup>nd</sup> ed) as including “to exercise influence on, modify, affect or sway”.
11. The Councillor’s interactions with the local government employee were at the suggestion of the Council’s CEO. The Councillor’s portfolio which involved water resource management meant he was an appropriate person to provide feedback on a proposed policy, which would eventually be considered by Council.
12. It cannot be contemplated that, in every instance, a councillor, who by virtue of his expertise engages with a council officer in a way which results in a change to a proposal being prepared by a council officer, has influenced that officer. The Applicant submits that notwithstanding that it was the local government employee who approached the Councillor (and that the course was encouraged by the CEO) “it was the Respondent’s responsibility to identify that he had a conflict of interest in the CAP Policy and Procedure and to refrain from dealing with a council employee in relation to the matter in a manner that could constitute influence”. The Applicant further submits that the Councillor influenced the local government employee when he suggested the amendments to the draft CAP Procedure. The Tribunal rejects that submission.
13. The local government employee refers to the suggestions of the Councillor as “minor tweaking”. Objectively viewed, the amendments filled in gaps about procedure, provided certainty about time frames for the procedure and ensured that Council’s interests were protected

by ensuring timely payment and preventing a loss of opportunity for sale of a commodity, where such a sale was frequently time sensitive.

14. While it could be said that the input provided by the Respondent did “modify” what had been included in the draft Policy, in the context of the background against which the input was provided, the changes made and the sensible effect of those, and the description of the changes as “minor tweaking” the Tribunal is not satisfied to the required standard that the Respondent’s conduct did “influence” a local government employee, as contemplated in section 175I.

15. The allegation was **not** sustained.