

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).

Complaint:

CCT Reference	F19/4391
Date of application of the IA	3 June 2019
Applicant	The Independent Assessor (IA)
Respondent	[REDACTED] <i>the Councillor</i>
Council	Woorabinda Aboriginal Shire Council (the Council)
Complainants/ Public Interest Disclosure	The Complainant’s names have been withheld. The Tribunal was notified the Complainant’s are protected by the provisions of the Public Interest Disclosure Act 2010. The Tribunal is not permitted to publish the name on the Departmental website in decision summaries or give another entity any information that is part of a public interest disclosure section 150AS(5)(a) of the Local Government Act 2009 .

Conflict of interest disclaimer/declaration (s150DT):

1. Having reviewed the material provided, all Tribunal members confirmed that they did not have a real or perceived conflict of interest in proceeding to decide the complaint.

Hearing (s150AP & Chapter 7, Part 1):

Time and Date:	Day 1 -10am 5 December 2019 Day 2- 10am 11 December 2019 Day 3 -9.30 am 12 December 2019
Heard at:	Level 21, Court 21.01, Central Plaza 2, 66 Eagle Street, Brisbane

Appearances where applicable)	<p>The matter was heard at an oral hearing and the parties were represented by :</p> <p>Ms A. Bridgeman, in house counsel for the Independent Assessor (The Applicant)</p> <p>Ms L Marshall of counsel instructed by Gilshenan & Luton Solicitors for the Councillor (The Respondent).</p>
Public Hearing	<p>The Tribunal determined that the hearing was to be a public hearing(s213 Local Government Act , section 298 Local Government Regulation).</p>

Decision (s150AQ):DETERMINATION

Date:	16 February 2021
A - Allegation 1	<p>That in or around April 2018, ██████████, the Councillor ██████████ of Woorabinda Aboriginal Shire Council, engaged in misconduct as defined by section 176(3)(b)(ii) of the <i>Local Government Act 2009</i>, in that conduct involved a breach of trust placed in him as a councillor.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p> <ol style="list-style-type: none"> a) In or around April 2018, a public forum was held at the Dreamtime Cultural Centre in Rockhampton to discuss the Council’s five-year corporate plan. b) In his opening remarks, the Councillor ██████████ told the people assembled that he calls ██████████ a ‘white c..t’ and ██████████ calls him a ‘black c..t’. c) ██████████ stood up and told the Councillor ██████████ and the persons present that he has never called the Councillor ██████████ a black c..t. The Councillor ██████████ then retracted the statement. d) The persons present at the public forum included Council staff and external stakeholders including members of the Department of Aboriginal and Torres Strait Islander partnerships and staff from the Office of the Prime Minister and Cabinet. <p>The Councillor’s ██████████ conduct in relation to ██████████ the then CEO of the Council, was not consistent with local government principle 4(2)(e) being ‘ethical and legal behaviour of councillors and local government employees’ or the responsibilities of councillors to provide high quality leadership to the local government and the community under section 12(3)(b) of the <i>Local Government Act 2009</i> (the Act).</p>

<p>Reasons for Decision</p>	<p>The Tribunal was satisfied there was not sufficient evidence before it to establish on the balance of probabilities that the conduct the subject of the allegation took place.</p> <p>The Independent Assessor led evidence that suggested the Tribunal make a finding of misconduct based on previous occasions where the words “white c..t” and “black c..t” had been used in the course of conversation, but whilst “joking” or “gammin”.</p> <p><i>In Re a Solicitor</i> the Court concluded that a decision-maker ‘ought not to be satisfied that [the case] has been established unless the preponderance of evidence is so substantial as to establish it clearly.’</p> <p>In the Tribunal’s view this principle does not support the making of a finding of misconduct based on previous occurrences and in circumstances where conflicting accounts of the events are present. There were between eight and eleven witnesses who could have given evidence in this matter, but only six who were called as witnesses.</p> <p>The Tribunal formed the view that the witnesses who were not called could not have assisted the Assessor’s case. Three other witnesses who were present, were not asked questions about the Dreamtime Forum or the words said specifically in this allegation.</p> <p>Although it is certainly possible that the Councillor could have said the words in other places and at other times, the Tribunal finds that it cannot be satisfied on the balance of probabilities that the Respondent in fact said the words at the Dreamtime Forum in the form as described in the above particulars of the allegation.</p> <p>The Independent Assessor has not established to the requisite standard of proof that the statement was made by the Councillor as alleged.</p> <p>The Tribunal finds that the allegation of Misconduct is not sustained.</p>
<p>B - Allegation 2</p>	<p>That in or around May 2018, ██████████ a Councillor ██████████ of Woorabinda Aboriginal Shire Council, engaged in misconduct as defined by section 176(3)(b)(ii) of the <i>Local Government Act 2009</i>, in that conduct involved a breach of trust placed in him as a councillor.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p> <p>a) In or around May, the Councillor ██████████ was talking to Councillor Alberts. They were talking about a project when the Councillor ██████████</p>

	<p>said words to the effect of, ‘I am trying to get some money off(sic) this f.....g white c..t”.</p> <p>b) At the time of making this comment, the Councillor ██████ pointed towards the CEO ██████</p> <p>c) The Councillor’s ██████ conduct in relation to ██████ the then CEO of Council, was not consistent with local government principle 4(2)(e) being ‘ethical and legal behaviour of councillors and local government employees’ or the responsibilities of councillors to provide high quality leadership to the local government and the community under section 12(3)(b) of the Act.</p>
<p>Reasons for Decision</p>	<p>The following matters are relevant to the decision on whether the respondent’s conduct or comments alleged to have been made by him should attract a finding of breach of trust and therefore misconduct.</p> <p>This allegation of misconduct arose from a purported conversation between the Respondent and another Councillor that took place in the presence of the Chief Executive Officer of the Council. The conversation was overheard by a witness, who was a council employee working in an adjoining office. The witness provided evidence that she could see the two councillors from her office and noticed the Respondent pointing towards the CEO as he made the alleged remarks outlined in Particular a) of the alleged conduct (above).</p> <p>The witness gave evidence that she approached the CEO soon after she had overheard this conversation and asked the CEO if the Respondent “calls him that often?”. The CEO was alleged to have told the witness that this phrase is used a lot by the Councillor ██████ towards him and that the phrase is also used frequently to ‘refer to anyone that is not black’.</p> <p>Although there were two witnesses identified to be present during this alleged conversation with the Respondent, neither of these witnesses were required to provide evidence regarding this matter during the hearing. The Tribunal noted that the CEO provided evidence by telephone at the hearing but that he was not questioned about this alleged conversation and he did not provide affidavit evidence in relation to this specific incident. Further, there was no evidence put before the Tribunal from the CEO about the discussion having occurred.</p> <p>During cross examination at the hearing the Respondent accepted the conversation with the other Councillor did take place however denied the words as alleged were used during the conversation. It was of note to the Tribunal that the Councillor who participated in the conversation was not called by the Applicant to provide evidence.</p>

	<p>In those circumstances, the Tribunal could not be satisfied that the conversation took place as alleged and is unable to make a finding of misconduct against a Councillor if there is insufficient evidence available. Although the Tribunal accepted the evidence of the employee who overheard the remarks, she was not present or a direct participant in the conversation and the two key witnesses that were present and could have provided conclusive evidence of this incident were not called to give specific evidence in relation to this allegation.</p> <p>In the Tribunal’s view, the alleged conduct, was could be satisfied to the required standard of proof. Although the Tribunal has not sustained the allegation brought by the Applicant, it is considered the complaint was appropriately referred and was an issue worthy of detailed and objective consideration.</p> <p>The Tribunal concluded on the balance of probabilities that the allegation is not sustained.</p>
<p>C - Allegation 3</p>	<p>That on 23 January 2019, ██████████ the Councillor ██████████ of Woorabinda Aboriginal Shire 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 recklessly or knowingly.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p> <ol style="list-style-type: none"> a) A council Manager was asked by the CEO, to take notes at a Council meeting on 23 January 2019. b) At the start of the meeting, the Councillor ██████████ asked her if she understood ‘confidentiality’. The Council Manager responded yes. The Councillor ██████████ again asked her if she understood ‘confidentiality’. She again responded yes. These comments about confidentiality are suspected to be in reference to the previous Council meeting on 5 December 2018 which the Council Manager attended and which she had reported to the CEO certain discussions with the Councillor ██████████ that had occurred during that meeting. c) During the meeting, the Councillor ██████████ asked the Council Manager where she was living, if her unit was safe and would she get out if there was a fire hazard and further, if she had a car. d) The Council Manager considered the Councillor’s comments to be threatening as her unit had been broken into the previous year, there had been several attempted break-ins since, and her car had also been stolen. <p>The Councillor’s ██████████ conduct in relation to the Council employee, was not consistent with local government principle 4(2)(e) being ‘ethical and</p>

	<p>legal behaviour of councillors and local government employees’ or the responsibilities of councillors to provide high quality leadership to the local government and the community under section 12(3)(b) of the Act.</p>
<p>Reasons for Decision</p>	<p>The Independent Assessor has alleged that the statements (described above) amounted to a breach of the trust placed in the councillor. The statements were alleged to be inconsistent with the provisions of the <i>Local Government Act 2009</i>(the Act) that requires “ethical and legal behaviour” by a councillor (section 4(2)(e) of the Act) and also the provision of “high quality leadership ...”(section 12(3)(b) of the Act).</p> <p>The Councillor admitted making the statements as alleged, but has denied that the statements constituted misconduct.</p> <p>Though the witness who was the subject of the comments said they were made in a “threatening” manner, the Tribunal is satisfied that the Councillor was making arguably reasonable enquiries as to the professional ability and personal safety of the witness.</p> <p>The Tribunal formed the view from the evidence that the witness may have believed that the sole purpose for these lines of questioning by the Councillor was to bully or threaten her. However the Tribunal’s role is to objectively assess all relevant evidence and the Councillor’s behaviour.</p> <p>This witness presented as a professional clearly grappling with fundamental concerns about the leadership of the Council in a dysfunctional and belligerent – one might almost say toxic – workplace environment, characterised by the disputes between the Chief Executive Officer and the Councillor [REDACTED].</p> <p>The Tribunal considers the evidence did not establish to the requisite standard that the Councillor had engaged in misconduct. The allegation is not sustained.</p>
<p>D - Allegation 5</p>	<p>That on 20 June 2018, the Respondent Councillor [REDACTED] a Councillor [REDACTED] of the Woorabinda Shire Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the <i>Local Government Act 2009</i>, in that his conduct involved a breach of the trust placed in him as a councillor.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p>

	<p>a) On 20 June 2018, the Respondent made the following comment to John Solar, Program Manager at Woorabinda Pastoral Company, 'hey john, have you heard [REDACTED] is on ice'¹;</p> <p>b) The comment was in reference to, and made in the presence of, Council Officer, who is employed as a Manager for the Council.</p> <p>c) The officer stopped when she heard this comment and said, 'Excuse me? No, I'm not'.</p> <p>The Respondent's conduct in relation to the Council employee, was not consistent with local government principle 4(2)(e) being 'ethical and legal behaviour of councillors and local government employees' or the responsibilities of councillors to provide high quality leadership to the local government and community under section 12(3)(b) of the Act.</p>
<p>Reasons for Decision</p>	<p>The Independent Assessor alleged that the Councillor has made statements alleging illicit drug use by a Council employee. The statement was made in the presence of the employee, and the conduct was alleged to be a breach of trust reposed in the Councillor.</p> <p>The Councillor denied saying the words, either to the employee or at all.</p> <p>The Tribunal considered the evidence presented at the three day hearing and the submissions provided by the legal representatives on behalf of the Independent Assessor and the Councillor. The Tribunal was not satisfied from the evidence presented that the Councillor made the statement because:</p> <ul style="list-style-type: none"> a. The evidence of the original complainant was read into evidence at the hearing without objection, however some aspects of this evidence was in conflict with the evidence of another witness, and this apparent conflict was not otherwise clarified during the hearing; b. Though the oral evidence was sufficiently credible, authentic, and contemporaneous, the apparent inconsistencies in relation to the location in which the impugned conduct occurred was not put to the Councillor, nor was the Councillor challenged as to his recall of where the statement allegedly was made; c. There was no evidence presented from a third witness to the alleged conduct, whose evidence presumably could have presumably corroborated the complainant's recall of events. In these circumstances the Tribunal is entitled to consider that the third witness' evidence would not have assisted the case of the Independent Assessor;

¹ The Tribunal has inferred from the particulars that that the allegation impugns the employee as imbibing "ice" (crystal methamphetamine.)The Tribunal thus infers that the Allegation is that the Respondent claimed the Council employee was using illegal drugs.

	<p>d. Although the Councillor did admit he had sometimes made offensive statements when making jokes, the Tribunal did not consider that this was the case here;</p> <p>e. There was no evidence that making allegations of illicit drug use (i.e. the reference to employee “being on ice”) was considered “common talk” in the community ;</p> <p>f. Applying the relevant law, the Tribunal could not be adequately satisfied that the allegation, involving a serious defamation by the Councillor of the employee’s character (by improperly alleging she imbibed in illicit drug use), has been made out.</p> <p>In the Tribunal’s view the Respondent’s conduct referred to in this allegation, was not substantiated by the evidence, and consequently it could not be sufficiently established that the conduct was inconsistent with the principle of ‘ethical and legal behaviour’ required of all councillors(section 4(2)(e) of the Act), nor could it be established that the conduct contravened section 12(3)(b) of the Act to provide ‘high quality leadership to the local government and the community” .</p> <p>The Tribunal considered on the balance of probabilities that the allegation is not sustained.</p>
<p>E - Allegation 7</p>	<p>That between 1 November 2016 and 1 January 2017. ██████████ the Respondent Councillor, ██████████ of Woorabinda Aboriginal Shire Council, engaged in misconduct as defined in section 176(3)(ii) of the <i>Local Government Act 2009</i>, in that his conduct involved a breach of the trust placed in him as a councillor.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p> <p>a) The Manager ██████████ employed by Woorabinda Aboriginal Shire Council commenced this role in August 2016.</p> <p>b) Following the end of her formal probation period on 5 November 2016, the then CEO ██████████ renewed her contract for three years.</p> <p>c) In November or December 2016, the Manager overheard the Councillor ██████████ asking about position with the CEO. When the CEO ██████████ advised that he had renewed her contract, the Councillor ██████████ shouted, “<i>You should have f.....g told me you were entering into a contract with her, I have Sam and John Solo down there</i>”.</p> <p>d) After this incident, the Respondent Councillor ██████████ would call out “<i>Is your job safe</i>” before walking into the Manager’s office. He then began sitting down stating, “<i>Yes good morning but you should give someone else your role</i>”.</p>

	<p>The Councillor's [REDACTED] conduct in relation to the Council employee, was not consistent with local government principle 4(2)(3) being ethical and legal behaviour of councillors and local government employees' or the responsibilities of councillors to provide high quality leadership to the local government and the community under section 12(3)(b) of the Act.</p>
<p>Reasons for Decision</p>	<p>The following matters are relevant to the decision on whether the respondent's conduct or comments alleged to have been made by him should attract a finding of breach of trust and therefore misconduct.</p> <p>There was an allegation about a purported conversation between the respondent and the CEO of the Council overheard by the witness, who was a council employee. The witness interpreted the conversation as referring to her, and that the respondent's comments during the conversation meant that the respondent was unhappy that the CEO had granted an extension of the employee's contract. Despite there being evidence from the council employee of her having made a contemporaneous diary note about the overheard conversation, that note was not produced nor had the witness made any reference to it in her statement. Further, there was no evidence put before the Tribunal from the CEO about the discussion having occurred. The respondent denied the conversation took place.</p> <p>In those circumstances, the Tribunal could not be satisfied that the conversation took place.</p> <p>There was also an allegation that the respondent had made comments on more than one occasion which suggested that the ongoing employment of the council employee was not assured. This occurred within the hearing of other council employees. The council employee was aware that the respondent did not have the authority to terminate the employee's employment. The respondent's remarks would have been, at least, embarrassing and unsettling for the employee. At the time of the comments, there was no code of conduct applicable.</p> <p>In the Tribunal's view, the respondent's conduct as referred to in this allegation, in the absence of an applicable code of conduct, fell short of conduct of a failure to demonstrate ethical and legal behavior, consistent with local government principle 4(2)(e) nor was the Tribunal satisfied that it was an example of a failure to provide high quality leadership to the local government and the community.</p> <p>The Tribunal concluded on the balance of probabilities that the allegation is not sustained.</p>

<p>F - Allegation 14</p>	<p>That on or around 4 December 2018, [REDACTED] the Respondent Councillor, a Councillor [REDACTED] of Woorabinda Aboriginal Shire Council, engaged in misconduct as defined in section 150L(c)(ii) of the Local Government Act 2009, in that his conduct contravened the acceptable request guidelines of the local government under section 170A.</p> <p>The Tribunal has determined on the balance of probabilities that this allegation is not sustained.</p> <p>Particulars of the alleged conduct which could amount to misconduct are that:</p> <ul style="list-style-type: none"> a) On or around 4 December 2018, the Respondent Councillor [REDACTED] gave a direction to a Council employee, not being the CEO or a senior executive employee of the Council. b) The employee is a Manager at the Council. c) The direction related to the employee arranging for solar Christmas lights to be installed in selected trees around Woorabinda for the Christmas period. <p>On 27 June 2018, the Council adopted the Acceptable Councillor Request Guidelines. The guidelines provide that councillors may request, from any employee, assistance or information relating to minor/routine matters but for anything other than minor/routine matters, wherever reasonably possible, councillors shall direct requests for assistance or information to the CEO or Manager, whichever is the most appropriate for the request concerned.</p>
<p>Reasons for Decision (Brendan WM)</p>	<ol style="list-style-type: none"> 1. On or around 4 December 2018, the Respondent is alleged to have given a Council employee a direction, that direction being to install solar Christmas lights in selected trees around the Woorabinda area for the Christmas period. 2. For the purposes of this allegation, it is not necessary that the Councillor use the exactitudes of language “<i>I instruct</i>” or “<i>I direct</i>”. 3. The Applicant submits, and the Tribunal accepts, that the Applicant is not required to prove a direction was issued. Allegations said to infringe section 150L(c)(ii) of the Act in this manner ought to be considered strict liability breaches of the Act. 4. It is clear that, absent any further motivation or impetus from the Respondent, the Council employee would not have undertaken any of preliminary works to source or install the Christmas lights. Instead, it was a prompt for that employee to “do his own research” (even if the ultimate sourcing, procurement or purchase of those lights for Council would have required, or did require, the permission or approval of the Council CEO). 5. It is clear from reading the Acceptable Request Guidelines passed by Council on 27 June 2018 that the definition of a minor or routine

matter are intended to be inclusive, not exclusive, in nature. Such requests might include, but are not to solely limited to, requests by Councillors to employees for information or assistance for procedural issues, follow ups, or any matters assigned by the CEO or Manager to that employee.

6. There are good public policy reasons for this approach to the interaction between section 170 and 170A. Section 170 of the Act captures a bald prohibition of “directing” an employee who is not the CEO or senior executive of the Council; however, all other forms of correspondence or conversation between Councillors and Council employees are permitted so long as they comply with the relevant Guidelines. In such a way, each individual Council may pass Guidelines (under section 170A(6) of the Act) that tailor and guide such correspondence and conversation in manners unique to their Council areas. Thus it is not for this Tribunal to dictate how, and in what form, Councils choose to regulate such interactions between Councillors and Council employees.
7. In these circumstances there is sufficient evidence to conclude that the request by the Respondent to the employee fell within the relevant Guidelines.
8. In the event that the Tribunal is wrong about the conclusions, the Tribunal considers that it is not satisfied that the Applicant has proven its allegation on the evidence.
9. The evidence of the employee was (in the main) supportive of the Respondent’s account and consistent with the Respondent’s own evidence of the impugned conversation, with the Applicant’s attacks of the Respondent’s credibility as a witness also not supported by the totality of the evidence.
10. Finally, though the Tribunal considers a plain reading of the Guidelines supports a finding that the request by the Respondent fell within those Guidelines, the Applicant also led no evidence that would support an interpretation of the Guidelines favourable to their case. Had the Applicant chosen to, it could have led evidence as to the Respondent’s understanding of the Guidelines (other than just an awareness of their existence), or led evidence as to what was anticipated by the drafters of the document as to what a “minor/routine” matter was intended to capture.
11. In the absence of such evidence, the Tribunal cannot be reasonably satisfied that Allegation 14 has been made out.

Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	Not applicable
Orders and/or recommendations:	As the allegations are not sustained orders are not required.