

Councillor Conduct Tribunal: Publication Notice Misconduct Application

Local Government Act 2009: Sections 150AQ and 150AS

Application details:

Reference No:	F21/13587
Date of Application from the IA:	25 November 2021
Applicant:	Independent Assessor
Respondent:	The Councillor As the allegations are not sustained, the name of the Councillor is withheld pursuant to section 150AS(7)(a) of the <i>Local Government Act 2009</i> (Qld) (the Act).
Council:	Toowoomba Regional Council (the Council)
Complainant:	Anonymous
Public Interest Disclosure:¹	No
Allegations:	<p>Allegation One</p> <p>It is alleged that on 12 December 2017, the Respondent, a Councillor of Toowoomba Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) 176(3)(d) of the <i>Local Government Act 2009</i> (the Act), in that his conduct involved a breach of the trust placed in him as a councillor in that the conduct was inconsistent with the local government principles in section 4(2)(a) ‘transparent and effective processes, and decision making in the public interest’ and section 4(2)(e) ‘ethical and legal behaviour of councillors and local government employees’ in that the Respondent 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.²</p> <p>Particulars</p> <p>Particulars of the alleged misconduct are as follows:</p>

¹ Section 150AS(5): The conduct tribunal must not give another entity any information that is part of a public interest disclosure under the *Public Interest Disclosure Act 2010*, unless giving the information is required or permitted by another Act.

² Allegation One as amended by the Applicant’s interim application dated 10 October 2023.

	<p>a. On 12 December 2017, Toowoomba Regional Council (TRC) held an Ordinary Meeting (the meeting), with Item 10.0 relating to the <i>Company XDR³ Funding Deed</i> (the matter).</p> <p>b. The matter considered a request from Company XDR to extend the existing funding deed between Council and Company XDR due to expire on 31 December 2017 for an additional three years.</p> <p>c. The Respondent attended the meeting.</p> <p>d. A motion was moved by the Respondent in relation to the matter that Council commit to a new funding deed with Company XDR for a three-year term commencing 1 January 2018, providing \$450,000 in the first year with a CPI adjustment each following year. The motion was carried and the Respondent voted in favour of the motion.</p> <p>e. The matter was not an ordinary business matter.</p> <p>f. The Respondent had a real or perceived conflict of interest in the matter on the following basis:</p> <p>i. Company XDR is an economic development organisation that links businesses with opportunities to provide sustainable growth and diversity in the region. The organisation has been operating since 2011 and receives approximately 18% of its funding from three councils, and the remaining 82% from industry in the form of membership revenue. Varying benefits are provided to members of Company XDR depending on the level of membership.</p> <p>ii. As at the date of the meeting, the Respondent's family business, Company MKO,⁴ was a foundation member of Company XDR at a base level membership of \$792 per year.</p> <p>iii. As at the date of the meeting, the Respondent was a director and shareholder of Company MKO.</p> <p>iv. As at the date of the meeting, Company MKO had undertaken printing jobs for Company XDR to the value of \$9317.</p> <p>g. The Respondent did not declare a real or perceived conflict of interest in the matter at the meeting.</p>
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³ The company name has been anonymised to comply with section 150AS(7)(c) of the *Local Government Act 2009* (Qld). See also the definition of '**person**' in schedule 1 of the *Acts Interpretation Act 1957* (Qld), which 'includes an individual and a corporation.'

⁴ The company name has been anonymised to comply with section 150AS(7)(c) of the *Local Government Act 2009* (Qld). See also the definition of '**person**' in schedule 1 of the *Acts Interpretation Act 1957* (Qld), which 'includes an individual and a corporation.'

- h. The Respondent's conflict of interest in the matter did not arise merely because of the circumstances specified in section 173(3) of the Act.

Allegation Two

It is alleged that on 20 February 2018, the Respondent, a Councillor of Toowoomba Regional Council, engaged in misconduct as defined in section ~~176(3)(b)(ii)~~ 176(3)(d) of the *Local Government Act 2009* (the Act), ~~in that his conduct involved a breach of the trust placed in him as a councillor in that the conduct was inconsistent with the local government principles in section 4(2)(a) 'transparent and effective processes, and decision making in the public interest' and section 4(2)(e) 'ethical and legal behaviour of councillors and local government employees'~~ in that the Respondent 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.⁵

Particulars

Particulars of the alleged misconduct are as follows:

- a. On 20 February 2018, Toowoomba Regional Council held an Ordinary Meeting (the meeting) and Item 12.0 was a confidential item in relation to the *Company XDR — Request for Council Approval — Deputation* (the matter).
- b. The matter considered a request from Company XDR to Council as the sole member of Company XDR, to resolve to allow the Chair of Company XDR to receive remuneration.
- c. The Respondent attended the meeting.
- d. A motion was moved by another Councillor⁶ in relation to the matter which included that Council, as the sole member of Company XDR, resolve to allow the Executive Chairman of Company XDR to be remunerated at his existing remuneration level until one week after the commencement date of the new CEO of Company XDR. The motion was carried.
- e. The matter was not an ordinary business matter.
- f. The Respondent had a real or perceived conflict of interest in the matter on the following basis:
 - i. Company XDR is an economic development organisation that links businesses with opportunities to provide sustainable growth and diversity in the region. The organisation has been operating since 2011 and receives approximately 18% of its funding from three councils, and the remaining 82% from industry in the form of membership revenue. Varying benefits are provided to

⁵ Allegation Two as amended by the Applicant's interim application dated 10 October 2023.

⁶ This Councillor's name has been removed to comply with section 150AS(7)(c) of the *Local Government Act 2009* (Qld).

	<p>members of Company XDR depending on the level of membership.</p> <p>ii. As at the date of the meeting, the Respondent's family business, Company MKO, was a foundation member of Company XDR at a base level membership of \$792 per year.</p> <p>iii. As at the date of the meeting, the Respondent was a director and shareholder of Company MKO.</p> <p>iv. As at the date of the meeting, Company MKO had undertaken printing jobs for Company XDR to the value of \$9317.</p> <p>g. The Respondent did not declare a real or perceived conflict of interest in the matter at the meeting.</p> <p>h. The Respondent's conflict of interest in the matter did not arise merely because of the circumstances specified in section 173(3) of the Act.</p> <p>Allegation Three</p> <p>It is alleged that on 18 December 2018, the Respondent, a Councillor of Toowoomba 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 his conduct was inconsistent with the local government principle in section 4(2)(a) 'transparent and effective processes, and decision-making in the public interest' and section 4(2)(e) 'ethical and legal behaviour of councillors and local government employees', when he failed to inform the meeting of his personal interest in the matter as required by section 175E(2) of the Act.</p> <p>Particulars</p> <p>Particulars of the alleged misconduct are as follows:</p> <p>a. On 18 December 2018, Toowoomba Regional Council (TRC) held an Ordinary Meeting (the meeting) and Item 11.0 was in relation to the <i>Company XDR Subsidiary Establishment</i> (the matter).</p> <p>b. The matter considered whether TRC would provide support for the establishment of a Company XDR subsidiary company, Company VGY,⁷ which would facilitate the entity (Company VGY) qualifying for the receipt of grant funding for economic development projects that Company XDR could not access due to the characteristics of the constitution.</p> <p>c. The Respondent attended the meeting.</p>
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⁷ The company name has been anonymised to comply with section 150AS(7)(c) of the *Local Government Act 2009* (Qld). See also the definition of '**person**' in schedule 1 of the *Acts Interpretation Act 1957* (Qld), which 'includes an individual and a corporation.'

	<p>d. A motion was moved by the Respondent in relation to the matter which included that Company VGY be considered a beneficial enterprise benefiting the whole of the local government area and that Council approve the establishment of Company VGY in accordance with the Company VGY Constitution, subject to approval being granted from the Queensland Treasurer. The motion was carried with 11 votes for the motion and one vote against the motion, and the Respondent voted for the motion.</p> <p>e. The matter was not an ordinary business matter.</p> <p>f. The Respondent had a real or perceived conflict of interest in the matter on the following basis:</p> <p>i. Company XDR is an economic development organisation that links businesses with opportunities to provide sustainable growth and diversity in the region. The organisation has been operating since 2011 and receives approximately 18% of its funding from three councils, and the remaining 82% from industry in the form of membership revenue. Varying benefits are provided to members of Company XDR depending on the level of membership.</p> <p>ii. As at the date of the meeting, the Respondent's family business, Company MKO, was a foundation member of Company XDR at a base level membership of \$792 per year.</p> <p>iii. As at the date of the meeting, the Respondent was a director and shareholder of Company MKO.</p> <p>iv. As at the date of the meeting, Company MKO had undertaken printing jobs for Company XDR to the value of \$9416.</p> <p>g. The Respondent did not inform the meeting of his interest in the matter.</p> <p>h. The Respondent's interest in the matter did not arise merely because of the circumstances specified in section 175D(2) of the Act.</p>
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Decision (section 150AQ):

Date:	28 February 2024
Decision:	<p>Allegation One</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that on 12 December 2017, the Respondent, a Councillor of Toowoomba Regional Council, engaged in misconduct as defined in section 176(3)(d) of the <i>Local Government Act 2009</i> (the Act), in that the</p>

	<p>Respondent 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 has not been sustained.</p> <p>Allegation Two</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that on 20 February 2018, the Respondent, a Councillor of Toowoomba Regional Council, engaged in misconduct as defined in section 176(3)(d) of the <i>Local Government Act 2009</i> (the Act), in that the Respondent 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 has not been sustained.</p> <p>Allegation Three</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that on 18 December 2018, the Respondent, a Councillor of Toowoomba 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 his conduct was inconsistent with the local government principle in section 4(2)(a) 'transparent and effective processes, and decision-making in the public interest' and section 4(2)(e) 'ethical and legal behaviour of councillors and local government employees', when he failed to inform the meeting of his personal interest in the matter as required by section 175E(2) of the Act has not been sustained.</p>
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Orders and/or recommendations (section 150AR – disciplinary action):

Date of orders:	28 February 2024
Orders and/or recommendations:	As the Tribunal has decided the Respondent has not engaged in misconduct, no orders or recommendations are necessary.

Tribunal:

Chairperson:	Gabe Bednarek
Member:	Carolyn Ashcroft

Conflict of interest disclaimer/declaration (section 150DT):

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 application.

Hearing (section 150AP & Chapter 7, Part 1):

Time and Date:	11:00am on 30 November 2023
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Heard at:	By telephone conference with both members in attendance.
Appearances:	<p>This matter was heard and determined on the documents pursuant to section 150AP(2) of the <i>Local Government Act 2009</i> (Qld) with no parties appearing.</p> <p>The Tribunal considered the provisions of section 298 of the <i>Local Government Regulation 2012</i> (Qld) and determined that it was appropriate in the circumstances of this matter to conduct the hearing in private. Accordingly, the Tribunal directed that the hearing be held in private.⁸</p>

Reasons for decision:

Abbreviations

The following abbreviations have been used in this determination:

the Act	the <i>Local Government Act 2009</i> (Qld)
the Regulation	the <i>Local Government Regulation 2012</i> (Qld)
the Council	Toowoomba Regional Council
the Respondent	the Councillor
the IA / the Applicant	the Independent Assessor
the Tribunal	the Councillor Conduct Tribunal constituted to hear and determine the allegations made by the IA concerning the Councillor's conduct
the Department	the Department of State Development, Infrastructure, Local Government and Planning

Background

1. On 25 November 2021, the Applicant made an application to the Tribunal containing three allegations of misconduct against the Respondent. The factual background regarding the allegations is set out in the **Allegations** section of the table above.
2. Allegations One, Two and Three are alleged to have occurred on 12 December 2017, 20 February 2018 and 18 December 2018 respectively. At the time of the allegations, the Respondent was serving his second term as a Councillor on the Council, having first been elected at the 2012 Queensland local government elections and re-elected at the 2016 Queensland local government elections.⁹ The Respondent was re-elected at the 2020 Queensland local government elections for a third term.¹⁰
3. Regarding Councillor training, the Tribunal identified 24 entries from the Respondent's diary regarding training sessions attended during his time as a Councillor.¹¹ However, the Council stated that the '*Council does not keep attendance records*' and was '*unable to*

⁸ Section 298 of the *Local Government Regulation 2012* requires that a hearing must be held in public unless the decision-maker directs the hearing is to be held in private.

⁹ Annexure A – Statement of Facts [1].

¹⁰ Annexure A – Statement of Facts [1].

¹¹ Annexure D – Brief of Evidence, Document 4.3, pages 284-289.

confirm whether [the Respondent] attended each one for the whole duration.’¹² The Department provided records that showed the Respondent attended/participated in the following training prior to the date of the latest allegation (being Allegation Three on 18 December 2018):

- (a) On 19 February 2013, the Respondent participated in ‘Local Government Act 2009 2012 Amendments and Local Government Regulation 2012’ training;¹³
- (b) On 4 April 2016, the Respondent participated in the ‘Councillor Induction Program’;¹⁴
- (c) On 18 October 2018, the Respondent participated in ‘Local Government Legislation Amendments (Councillor Integrity) 2018’ training¹⁵ – the Tribunal notes the Respondent’s comment in the training evaluation form that ‘I consider the legislation to be an overkill and could be difficult in place, in practice’;¹⁶
- (d) On 3 December 2018, the Respondent participated in ‘Online Councillor Code of Conduct training’.¹⁷

4. Annexure A – Statement of Facts provided by the Applicant indicates that the Respondent has previous disciplinary history as a Councillor namely:

- (a) A finding of misconduct by the Regional Conduct Review Panel (a predecessor of this Tribunal) ‘in relation to a failure to declare a material personal interest, remaining during discussion, and voting on a matter’ in a Council meeting.¹⁸ However, the Applicant ‘does not rely on this finding of misconduct’;¹⁹
- (b) A finding of misconduct by this Tribunal²⁰ that the Respondent’s conduct involved a breach of the trust placed in the Respondent as a Councillor because the Respondent’s conduct ‘was not in accordance with local government principle 4(2)(e) being ‘ethical and legal behaviour of councillors and local government employees’, in that [the Respondent] did not inform the meeting [...] of his personal interest in the matter being considered’.²¹ In that matter, the Tribunal ordered that the Respondent ‘make a public admission that the councillor engaged in misconduct’.²² The Tribunal notes that the conduct relevant to that matter occurred after the dates of Allegations One and Two but before the date of Allegation Three and that the Tribunal made its decision after the date of Allegation Three.

Conduct of hearing

5. On 18 September 2023, the President constituted the Tribunal panel for this matter. The original panel was a three-person panel consisting of the Chair and two Members. During the course of the matter but prior to the hearing, a panel Member’s appointment with the Tribunal ended. At that time, section 150AM of the Act relevantly stated ‘[t]he conduct tribunal is to be constituted by— (a) for hearing a matter about the conduct of a councillor—at least 2, but not more than 3, members of the conduct tribunal chosen by the

¹² Annexure D – Brief of Evidence, Document 4.3, page 281.

¹³ Annexure D – Brief of Evidence, Documents 4.2.1 and 4.2.2.

¹⁴ Annexure D – Brief of Evidence, Documents 4.2.3, 4.2.4 and 4.2.5.

¹⁵ Annexure D – Brief of Evidence, Documents 4.2.6, 4.2.7 and 4.2.8.

¹⁶ Annexure D – Brief of Evidence, Document 4.2.7, page 259.

¹⁷ Annexure A – Statement of Facts [5d.]; Annexure D – Brief of Evidence, Document 4.2.9, page 280.

¹⁸ Annexure A – Statement of Facts [7].

¹⁹ Annexure A – Statement of Facts [8].

²⁰ Annexure A – Statement of Facts [9].

²¹ Annexure A – Statement of Facts [10a.].

²² Annexure A – Statement of Facts [12a.].

president'.²³ Reading this section along with section 213(4) of the Act stating '*[a] hearing is not affected by a change of the members of an entity that is the decision-maker*', the Tribunal considered it could proceed with the matter and conduct the hearing as a two-person panel.

6. On 20 September 2023, the Chair issued written directions providing dates by which the parties needed to provide evidence, information and written submissions, as well as setting a time and date for the hearing of the matter.
7. On 21 September 2023, the Respondent's legal representatives with the consent of the Applicant requested amendments to the directions.
8. On 25 September 2023, the Chair issued amended directions '*due to the Respondent's extenuating circumstances*' but noted that '*the Tribunal has finite resources and cannot accommodate all the requested extensions of time.*'²⁴
9. After the Tribunal issued the amended directions, the parties sought no further amendments to the amended directions and complied with the amended directions. However, two unusual things happened before the hearing on 30 November 2023.
10. Firstly, on 10 October 2023, the Applicant made an interim application seeking to amend Allegations One and Two. The main reason the Applicant sought the amendments was due to the decision of *Independent Assessor v FJS* [2023] QCAT 244, which clarified what definition of ***misconduct*** applies to Councillor conduct prior to 3 December 2018 (the definition of ***misconduct*** in force at the time of the alleged conduct). The Tribunal noted that the Respondent's legal representatives neither consented to nor opposed the interim application. The Tribunal also noted that pursuant to section 213(2)(f) of the Act, the Tribunal '*may allow a document to be amended*'. Having considered the Applicant's interim application, on 18 October 2023, the Tribunal allowed the application. While the Applicant made the interim application very late in the matter, the Tribunal considered there would be no prejudice or injustice to the Respondent if the allegations were amended as requested by the Applicant. The Tribunal has indicated the amendments to the allegations in the **Allegations** section in the table above.
11. Secondly, on 14 November 2023, along with filing its written submissions as per the amended directions, the Applicant also sought leave to file and rely upon some further evidence. The Tribunal noted that the Applicant's request was made with the consent of the Respondent's legal representatives, who advised that they had no objection to the additional evidence being filed. On 15 November 2023, the Tribunal gave the Applicant leave to file and rely upon its additional evidence, being a document purporting to be Company XDR's constitution. The Tribunal considered there would be no prejudice or injustice to the Respondent if the document was admitted into evidence.
12. At 11:00am on 30 November 2023, the Tribunal conducted the hearing of the matter on the documents. The Tribunal considered the matter to be one that could be heard on the documents.
13. The Tribunal noted the evidence and material before it and was satisfied that all procedural steps required by the Act had been complied with. The specific evidence and material the Tribunal considered in this matter is outlined in the ***Evidence and material considered*** section below.

²³ The Tribunal notes the amendment to section 150AM(a) effective 22 November 2023. Section 150AM(a) no longer states '*at least 2, but not more than 3 members*' are required for a hearing. It now states '*not more than 3 members*'.

²⁴ Amended Directions dated 25 September 2023.

Standard of proof

14. The standard of proof in the hearing is the balance of probabilities.²⁵ The Applicant bears the onus of proof.²⁶ In making its decision, the Tribunal considered *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 where it was said by Dixon J as he then was:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

15. In *Qantas Airways Limited v Gama* [2008] FCAFC 69 at [126], Branson J commented on the above statement and said ‘his Honour made plain that before accepting the truth of evidence of a particular allegation, the tribunal should give consideration to the nature of the allegation and the likely consequences which will follow should it be accepted.’

Evidence and material considered

16. The Tribunal has considered the evidence and material provided to it by the parties, although it has not found it necessary to refer to, or comment on, each item of that evidence and material. In considering the allegation, the Tribunal is obliged to decide whether or not the Respondent engaged in misconduct as defined in the Act as in force at the time of the alleged conduct.²⁷
17. The Tribunal has considered the following evidence and material in this matter:
- (a) The Applicant’s application to the Tribunal about alleged misconduct pursuant to section 150AJ of the Act dated 25 November 2021;
 - (b) Annexure A – Statement of Facts, undated;
 - (c) Annexure B – The Applicant’s letter and Section 150AA Notice and Opportunity to Respond provided to the Respondent, both dated 6 October 2021 (as well as an attached draft Statement of Facts for comment by the Respondent, all sent through in an email also dated 6 October 2021);
 - (d) Annexure C – The Respondent’s Response to the Section 150AA Notice dated 20 October 2021;
 - (e) Annexure D – The Applicant’s Brief of Evidence, which contains documents such as:
 - (i) The affidavit of an Investigator at the Applicant’s office affirmed 9 July 2021, which exhibits the initial web complaint made to the Applicant that resulted in the misconduct application against the Respondent in the present matter;
 - (ii) The Respondent’s initial response to the Applicant dated 18 January 2021 attaching various attachments such as the constitution document of Company XDR, its funding deed, the Respondent’s ‘Form 2—Register of interests of a councillor and their related persons’;
 - (iii) Correspondence from the Applicant to the Respondent dated 18 March 2021 advising of the referral of three allegations to the Applicant’s legal team;
 - (iv) Various Council meeting minutes and attachments to those minutes;
 - (v) The Applicant’s 150CH Notice to Produce Information to Company XDR, the response to that notice, and various correspondence and material associated

²⁵ Section 150AP(4) of the Act.

²⁶ Section 150AN(2)(a) of the Act.

²⁷ *Independent Assessor v FJS* [2023] QCAT 244, [38]-[39].

- with that notice such as invoices from Company MKO to Company XDR;
- (vi) Australian Securities and Investment Commission (ASIC) company searches regarding Company MKO;
- (vii) The Applicant's 150CH Notice to Produce Information to the Department and the Department's response to that notice, containing mostly training materials provided to Councillors and records of the Respondent's attendance at Councillor training;
- (viii) Correspondence between the Applicant and the Council in March 2021 (the Council provided a list of training/development identified from the Respondent's diary);
- (ix) Two previous Councillor misconduct findings against the Respondent;
- (f) Written directions issued by the Tribunal dated 20 September 2023;
- (g) Email from the Respondent's legal representatives dated 21 September 2023 requesting amendments to the written directions with the consent of the Applicant;
- (h) Amended written directions issued by the Tribunal dated 25 September 2023;
- (i) The Applicant's interim application seeking amendment of Allegations One and Two dated 10 October 2023;
- (j) Email from the Tribunal Registry to the parties dated 18 October 2023 stating that the Tribunal allows the Applicant's interim application to amend Allegations One and Two;
- (k) The Applicant's further evidence filed by email on 27 October 2023 containing Council meeting minutes and attachments to those minutes and a letter from the Council confirming that the minutes and attachments are a true copy;
- (l) The Respondent's affidavit sworn on 6 November 2023 containing exhibits such as:
 - (i) Various ASIC historical company extracts;
 - (ii) The Respondent's *'Form 2—Register of interests of a councillor and their related persons'*;
 - (iii) A letter from Company MKO, undated;
 - (iv) The Council's record of the Respondent's attendance at Company XDR events;
 - (v) A printout of a region summary from the Australian Bureau of Statistics website;
- (m) The Applicant's written submissions dated 14 November 2023;
- (n) The Applicant's letter requesting leave to file and rely upon further material in the matter dated 14 November 2023, the further material being an attachment purporting to be Company XDR's constitution;
- (o) Email from the Tribunal Registry to the parties dated 15 November 2023 stating that the Tribunal gives the Applicant leave to file and rely upon the document titled *'[Company XDR] Constitution.pdf'*;
- (p) The Respondent's written submissions sent through by email on 22 November 2023;
- (q) The Applicant's written submissions in reply dated 29 November 2023.

18. The Tribunal noted that large parts of the Applicant's evidence in Annexure D – Brief of Evidence were not provided by way of affidavit or statutory declaration as required by the Tribunal's directions. The Tribunal reminds the parties that as per the directions, only Council documents such as Council meeting minutes, do not need to be provided by way of affidavit or statutory declaration. Unless otherwise advised, all other evidence/material should still be provided by way of affidavit or statutory declaration. The Respondent did not raise anything about this and itself provided evidence that was not sworn/affirmed in an affidavit/statutory declaration for example Company MKO's turnover for FY2016/2017 and FY2017/2018 in Annexure C – The Respondent's Response to the Section 150AA Notice. The Tribunal was satisfied there would be no injustice or prejudice to the Applicant or to the Respondent to rely on unsworn/unaffirmed evidence in this particular matter. The Tribunal also noted the requirement in section 213(1)(b) of the Act for the Tribunal to *'act as quickly and informally as is consistent with a fair and proper consideration of the issues raised in the hearing'*. Therefore, in relation to the filing of evidence/material in this particular matter and also

pursuant to section 213(2)(d) of the Act, the Tribunal ‘disregard[ed] the rules of evidence’ requiring evidence to be sworn/affirmed by way of affidavit/statutory declaration.

Discussion and findings

Introduction

19. The allegations of misconduct in this matter arise from the Respondent failing to declare a personal interest/conflict of interest at Council meetings on three separate occasions. The Respondent’s interest allegedly arises because of the connection between the Respondent’s family business Company MKO, of which the Respondent was a director and shareholder on the dates of the allegations, and Company XDR. Company XDR was established in 2011 by the Council.²⁸ The Council resolved to ‘*establish a company to act as the lead economic development agency for the [...] region.*’²⁹ While the organisation was initially called something else, it subsequently underwent ‘*a number of structural changes*’,³⁰ and is now the entity the Tribunal refers to as Company XDR in this decision. The Council is the sole shareholder of Company XDR.³¹ As the Tribunal understands it, Company XDR is something like a chamber of commerce.
20. In the Tribunal’s view, while each allegation concerns a different Council meeting dealing with a different aspect of Company XDR, all three allegations at their core concern Company MKO’s connection with Company XDR. It is this connection that gives rise to the Respondent’s personal interest/conflict of interest that potentially needed to be declared at each of the three Council meetings the subject of the allegations. Therefore, the Tribunal rejects the Respondent’s submission that:

*It is not, in our submission, enough for a connection simply to be drawn between a Councillor and the general subject matter of an item (for example in this case, a matter generally relating to the entity [Company XDR]). The connection must, in our submission, be drawn between the Councillor and the specific subject matter of the item.*³²

In the Tribunal’s view, to do what the Respondent is submitting, misses the point of the conflict of interest provisions in the Act and would unnecessarily complicate conflict of interest matters.

21. At the time of the conduct in Allegations One and Two, the relevant definition of misconduct in the Act was as follows:

176 ***What this division is about [...]***
 (3) ***Misconduct is conduct, or a conspiracy or attempt to engage in conduct, of or by a councillor— [...]***
 (d) *that contravenes section 171(3) or 173(4).*

Section 173 of the Act as in force at the time of Allegations One and Two relevantly stated:

173 ***Councillor’s conflict of interest at a meeting***
 (1) *This section applies if—*
 (a) *a matter is to be discussed at a meeting of a local government or any of its committees; and*
 (b) *the matter is not an ordinary business matter; and*

²⁸ Annexure D – Brief of Evidence, Document 3.1, page 79.

²⁹ Annexure D – Brief of Evidence, Document 3.1, page 79.

³⁰ Annexure D – Brief of Evidence, Document 3.1, page 79.

³¹ Annexure D – Brief of Evidence, Document 3.1, page 79; Respondent’s affidavit, exhibit 5, page 17.

³² Annexure C – The Respondent’s Response to the Section 150AA Notice [17].

- (c) a councillor at the meeting—
 - (i) has a conflict of interest in the matter (the **real conflict of interest**); or
 - (ii) could reasonably be taken to have a conflict of interest in the matter (the **perceived conflict of interest**).
- (2) A **conflict of interest** is a conflict between—
 - (a) a councillor's personal interests; and
 - (b) the public interest;
 that might lead to a decision that is contrary to the public interest.
- (3) However, a councillor does not have a conflict of interest in a matter—
 - (a) merely because of—
 - (i) an engagement with a community group, sporting club or similar organisation undertaken by the councillor in his or her capacity as a councillor; or
 - (ii) membership of a political party; or
 - (iii) membership of a community group, sporting club or similar organisation if the councillor is not an office holder for the group, club or organisation; or
 - (iv) the councillor's religious beliefs; or
 - (v) the councillor having been a student of a particular school or the councillor's involvement with a school as parent of a student at the school; or
 - (b) if the councillor has no greater personal interest in the matter than that of other persons in the local government area.
- (4) The councillor must deal with the real conflict of interest or perceived conflict of interest in a transparent and accountable way.
- (5) Without limiting subsection (4), the councillor must inform the meeting of—
 - (a) the councillor's personal interests in the matter; and
 - (b) if the councillor participates in the meeting in relation to the matter, how the councillor intends to deal with the real or perceived conflict of interest. [...]

22. At the time of the conduct in Allegation Three, the relevant definition of misconduct in the Act was as follows:

150L What is misconduct

- (1) The conduct of a councillor is **misconduct** if the conduct— [...]
 - (b) is or involves— [...]
 - (i) a breach of the trust placed in the councillor, either knowingly or recklessly; or [...]

At the time of Allegation Three, the conflict of interest provisions were found in section 175D and 175E of the Act, which relevantly stated:

175D Meaning of conflict of interest

- (1) A **conflict of interest** is a conflict that—
 - (a) is between—
 - (i) a councillor's personal interests; and
 - (ii) the public interest; and
 - (b) might lead to a decision that is contrary to the public interest.
- (2) However, a councillor does not have a conflict of interest in a matter—
 - (a) merely because of—
 - (i) an engagement with a community group, sporting club or similar organisation undertaken by the councillor in the councillor's capacity as a councillor; or
 - (ii) membership of a political party; or
 - (iii) membership of a community group, sporting club or similar organisation if the councillor is not an office holder for the group, club or organisation; or
 - (iv) the councillor's religious beliefs; or

- (v) *the councillor having been a student of a particular school or the councillor's involvement with a school as a parent of a student at the school; or*
- (b) *if the councillor has no greater personal interest in the matter than that of other persons in the local government area.*
- (3) *Also, a councillor who is nominated by the local government to be a member of a board of a corporation or other association does not have a personal interest in matters relating to the corporation or association merely because of the nomination or appointment as a member.*

175E Councillor's conflict of interest at a meeting

- (1) *This section applies if—*
 - (a) *a matter is to be discussed at a meeting of the local government or any of its committees; and*
 - (b) *the matter is not an ordinary business matter; and*
 - (c) *a councillor at the meeting—*
 - (i) *has a conflict of interest in the matter (a **real conflict of interest**); or*
 - (ii) *could reasonably be taken to have a conflict of interest in the matter (a **perceived conflict of interest**).*
- (2) *The councillor must inform the meeting about the councillor's personal interests in the matter, including the following particulars about the interests—*
 - (a) *the nature of the interests;*
 - (b) *if the councillor's personal interests arise because of the councillor's relationship with, or receipt of a gift from, another person—*
 - (i) *the name of the other person; and*
 - (ii) *the nature of the relationship or value and date of receipt of the gift; and*
 - (iii) *the nature of the other person's interests in the matter.*

Maximum penalty—100 penalty units or 1 year's imprisonment. [...]

The Applicant alleges the breach of the trust placed in the Respondent as a Councillor, either knowingly or recklessly, occurred because the Respondent's conduct in failing to inform the Council meeting of his personal interest was inconsistent with the **local government principles** in section 4(2) of the Act, namely '(a) transparent and effective processes, and decision-making in the public interest' and '(e) ethical and legal behaviour of councillors and local government employees.'

- 23. The parties provided numerous and voluminous written responses/submissions throughout the course of the matter. Unfortunately, the Tribunal found the parties' responses/submissions to be of limited assistance. Generally, the parties' written submissions unnecessarily complicated the matter, mischaracterised the critical aspects of the matter, were difficult to follow and ultimately confused rather than assisted the Tribunal. As a result, the Tribunal had to form its own view about how to deal with the critical aspects of the matter. Therefore, references to the parties' submissions in the decision are limited.
- 24. At its most basic, the Applicant's case was that the Respondent was a director and shareholder of Company MKO and Company MKO's connection to Company XDR ultimately resulted in a personal interest/conflict of interest that had to be declared at the relevant Council meetings. The Respondent's case was that there was no personal interest/conflict of interest for a myriad of reasons.
- 25. In the Tribunal's view, the central issue in the matter was whether the Respondent actually had a '*personal interest*' that could give rise to a **conflict of interest** as defined in section 173(2) for Allegations One and Two and section 175D(1) for Allegation Three. '*Interest*' is not defined in the Act. The online *Cambridge Dictionary* relevantly defines

'interest' as 'noun (ADVANTAGE) [...] something that brings advantages to or affects someone or something' and 'noun (LEGAL RIGHT) [...] an involvement or a legal right, usually relating to a business or possessions'.³³

What were the Respondent's relevant personal interests and could they give rise to a conflict of interest in section 173(2)/175D(1) of the Act?

26. In the Tribunal's view, there are actually two separate, identifiable and relevant *'personal interests'* the Respondent had in Company XDR by virtue of being a director and shareholder of Company MKO:

- (a) Company MKO's membership of Company XDR;
- (b) Company MKO receiving paid printing work from Company XDR.

Company MKO's membership of Company XDR

27. The letter from Company XDR dated 28 February 2021 provided critical evidence about Company MKO's membership of Company XDR:

[Company XDR] has been operating since 2011 and currently has a membership of around 450 businesses [...]. [Company XDR] offers 6 different levels of membership from Base Membership at \$792 per year up to Diamond Membership at \$34,639. The cost difference depends on the level of support that we provide.

[Company MKO] were (up until recently) foundation members of [Company XDR] at a Base level of \$792 per year. Foundation members are those that have supported our organisation continuously from the beginning and receive no extra benefit apart from acknowledgement on a sign within the [Company XDR] office. [Company MKO] cancelled their membership with [Company XDR] late last year but until then received the benefits that a Base level member receive including:

- Welcome pack including one complimentary networking event pass per year ([Company MKO] have not used this benefit — [...] Councillors always pay for tickets to [Company XDR] events at member rates)
- Attendee guest lists prior to any events or conferences
- Access to printed and electronic [Company XDR] publications such as Development Status Reports (these are also published on the [Company XDR] website and available to non-members)
- Monthly newsletter (sent to a database of 5,000 businesses)
- Directory listing on [Company XDR] website
- Access to online [Company XDR] Exchange (this is a platform that lists local tenders and EOIs)
- [Company XDR] member discounts ([Company MKO] have never used this benefit)
- Member discount to The Branch co-working space ([Company MKO] have never used this benefit)³⁴

28. The Tribunal makes several observations about Company MKO's membership of Company XDR. Firstly, the Tribunal notes that Company MKO was a base level member of Company XDR, the lowest level. Accordingly, the actual membership benefits themselves at that level appear unremarkable. Furthermore, Company MKO would have received the same benefits as other base level members of Company XDR.

29. Secondly, the Tribunal considers it significant that these membership benefits were provided to Company MKO and not to the Respondent directly, creating somewhat of a

³³ Cambridge Dictionary accessible at <https://dictionary.cambridge.org/>.

³⁴ Annexure D – Brief of Evidence, Document 3.9.1, page 179.

distance. The Tribunal notes the Respondent's sworn evidence that:

*In the past I have actively distanced myself and the Business from any possible perceived conflicts. I did this going to great and in my view, unnecessary, lengths to do so even when I believed there was no possible or reasonable perceivable conflicts.*³⁵

However, on the dates of all three allegations, the Respondent did remain a registered director and shareholder of Company MKO.

30. Thirdly, at the time of writing the above letter in February 2021, Company XDR states there were around 450 businesses that were members of Company XDR. The Tribunal accepts this was an extremely small percentage of businesses in the region.³⁶ However, the Tribunal notes that apart from minors and unincorporated bodies or associations of persons, including partnerships, applying in the bodies' associated, partnership or business names, membership/patronage of Company XDR was not closed to individuals or incorporated businesses.³⁷

31. In the Tribunal's view, while the Respondent can be seen to have a personal interest in Company XDR through Company MKO's membership of Company XDR, the combination of the abovementioned factors makes it difficult to conclude that any such personal interest could rise to a level so as to create a conflict of interest. Any personal interest the Respondent had in Company XDR membership by virtue of being a director and shareholder of Company MKO was too remote, too diluted and too insignificant to be a personal interest that could create a conflict of interest situation. The Tribunal notes the similar conclusion in *Independent Assessor v Councillor, Gympie Regional Council*, 26 April 2019, CCT reference F19/3356 at paragraph 9 of the publicly available decision summary:

Although as stated previously it could be deemed that [redacted] had an interest in the concept plan, the Tribunal was satisfied that it was not to a level or of a nature that would create a conflict of interest situation. As no conflict of interest for [redacted] was deemed to exist, this therefore did not enliven s173(4) of the Act, which required the councillor to deal with the real or perceived conflict of interest in a transparent and accountable way.

If the Respondent did have a declarable conflict of interest due to Company MKO's membership of Company XDR, did any of the exceptions in section 173(3) apply regarding Allegations One and Two or section 175D(2) regarding Allegation Three?

32. The Tribunal considered the Respondent's reliance on the exceptions in sections 173(3) and 175D(2) of the Act. Specifically, the Respondent relies on the exception that a Councillor does not have a conflict of interest '*merely because of— [...] (iii) membership of a community group, sporting club or similar organisation if the councillor is not an office holder for the group, club or organisation*'.³⁸ The Respondent's sworn evidence was that he sought advice on this point and '*[t]he response I received was that, providing I was not an Executive Member, there was no requirement to declare.*'³⁹ The Applicant submitted the exception did not apply to the Respondent because '*the Respondent was not a member of [Company XDR], [Company MKO] (a for-profit private enterprise part-owned by the Respondent and to which*

³⁵ Respondent's affidavit [15].

³⁶ Exhibit 7 to the Respondent's affidavit is a printout of a region summary from the Australian Bureau of Statistics website, which indicates that at 30 June 2020, there were 15,544 businesses in the relevant region and at 30 June 2021, there were 16,059.

³⁷ Annexure D – Brief of Evidence, Document 2.2.2, page 40; '*[Company XDR] Constitution.pdf*' document, pages 4-5 (on 15 November 2023, the Tribunal gave the Applicant leave to file and rely on this additional document).

³⁸ Section 173(3)(a)(iii) of the Act for Allegations One and Two and section 175D(2)(a)(iii) of the Act for Allegation Three.

³⁹ Respondent's affidavit [36]-[37].

*the Respondent, as a director, owed fiduciary duties) was a member of [Company XDR].*⁴⁰

33. The Tribunal notes that the wording of section 173(3)(a)(iii)/175D(2)(a)(iii) of the Act is quite broad – it does not say the councillor’s membership, it simply says membership. Compare the wording of section 173(3)(a)(iii)/175D(2)(a)(iii) with the wording of (iv) which specifies *‘the councillor’s religious beliefs’* [emphasis added]. While the Tribunal accepts Company MKO was the true member of Company XDR, the Tribunal is of the view that section 173(3)(a)(iii)/175D(2)(a)(iii) of the Act contains sufficiently broad wording so that Company MKO’s membership of Company XDR can extend to the Respondent as a director and shareholder of Company MKO.
34. There was also disagreement between the parties⁴¹ as to whether Company XDR could be classified as *‘a community group, sporting club or similar organisation’*, specifically *‘a community group’*. As *‘community group’* is not defined in the Act, the ordinary meaning of the word from a dictionary can be used. The online *Cambridge Dictionary* defines *‘community’* as *‘the people living in one particular area or people who are considered as a unit because of their common interests, social group, or nationality’* and *‘group’* as *‘a number of people or things that are put together or considered as a unit’*.⁴² The first of Company XDR’s objects in its constitution is:

*To create an industry responsive economic development agency with the ability to work effectively with major industry partners, government at all levels and the business sector to create a positive environment for economic development and investment in the [...] regions.*⁴³

35. In light of the above definitions and the extracted Company XDR object, the Tribunal’s view is that *‘community group’* is sufficiently broad to include Company XDR.
36. The Tribunal also considered whether the exception in section 173(3)(b)/175D(2)(b) that the Councillor does not have a conflict of interest if *‘the councillor has no greater personal interest in the matter than that of other persons in the local government area’* could also apply. On this point, the Respondent gave sworn evidence that:

*I genuinely believed I didn’t have a declarable conflict due to the fact that [Company XDR] was an entity solely owned by Council with a purpose of growing economic activity across the region. The Business, as a member, had no greater benefit than any other of our over 15,000, businesses across the region.*⁴⁴

In response, the Applicant submitted that:

*This is objectively not true. While the Respondent may perceive that the business did not receive a benefit, that is merely his opinion and the uncontested fact is that, as a member of [Company XDR], [Company MKO] had access to services that non-members did not have. This evidence should therefore be given no weight.*⁴⁵

37. While the Tribunal accepts that Company MKO as a member of Company XDR had access to services non-members did not have, the Tribunal takes the view that membership/patronage of Company XDR was effectively open to all adults and incorporated businesses in the area. Further, Company XDR membership and its associated benefits was an interest shared by hundreds of businesses in the area. Therefore, the Tribunal accepts that in

⁴⁰ Applicant’s submissions in reply [19].

⁴¹ Applicant’s submissions [30]; Respondent’s submissions [48].

⁴² *Cambridge Dictionary* accessible at <https://dictionary.cambridge.org/>.

⁴³ Annexure D – Brief of Evidence, Document 2.2.2, page 38; *[Company XDR] Constitution.pdf* document, page 2 (on 15 November 2023, the Tribunal gave the Applicant leave to file and rely on this additional document).

⁴⁴ Respondent’s affidavit [38].

⁴⁵ Applicant’s submissions [31].

terms of Company MKO's membership of Company XDR, the Respondent had no greater personal interest in the matters before the Council meetings concerning Company XDR than that of other persons in the local government area.

38. For all of the abovementioned reasons, the Tribunal finds on the balance of probabilities that while the Respondent may have had a personal interest in Company XDR through Company MKO's membership of Company XDR, that interest did not rise to a level or was not of a nature that it could create a conflict of interest and even if it did, it would not be a conflict of interest because it would at the very least fall into the exemption in section 173(3)(a)(iii) for Allegations One and Two and section 175D(2)(a)(iii) for Allegation Three.

Company MKO's printing work from Company XDR

39. On this point, in the letter dated 28 February 2021, Company XDR stated:

The only other benefit that [Company MKO] has received from [Company XDR] is the occasional purchases of printed material. [Company XDR] normally receives 3 quotes from local companies for printing and chooses the lowest quote with the highest quality. [Company XDR] usually spends between \$15,000 - \$30,000 per year on printed material, depending on the number of publications produced. This means [Company XDR] would have spent between \$135,000 and \$270,000 over the last 9 years on printing. Our records (which I am happy to share with you) show that [Company XDR's] purchases from [Company MKO] have totalled \$9,317 and were because of their pricing and quality, rather than their membership with [Company XDR].⁴⁶

40. Firstly, the Tribunal notes the Respondent's evidence that while the Respondent is a director of Company MKO, the Respondent has 'no day-to-day involvement with the running of the Business' and has 'not had any day-to-day involvement with the Business since the appointment of [a person to run the business] in 2014.'⁴⁷ Critically, the Respondent gave the following affidavit evidence:

At the time of Council's meetings, the subject of the allegations, I was not aware, and had no knowledge, of any services that the Business had provided [Company XDR]. I had never seen the invoices to [Company XDR], which are reproduced at pages 192 to 216 in the Applicant's Brief of Evidence. I had, and still have, no day-to-day involvement with the running of the Business. That was and is [the relevant person's] job.

The purchase of goods or services through the Business is not and has never been a decision by elected representatives. This decision is made by the organisation's staff and I have absolutely no knowledge of if or when this may occur.⁴⁸

41. Regarding a Councillor's knowledge about facts showing the existence of personal interests potentially leading to a conflict of interest, the Tribunal notes the recent comments by Judicial Member D J McGill SC in *Independent Assessor v FJS* [2023] QCAT 244 particularly at [40]-[48]. *FJS* was a review of a decision of this Tribunal in QCAT. The Judicial Member observed that '[o]bviously a councillor was not going to be able to declare the existence of a personal interest if she was not aware of a fact or facts which served to show the existence of that personal interest'⁴⁹ and did not agree with this Tribunal's decision that *FJS* had a perceived conflict of interest.⁵⁰ Hence, the Respondent in this matter submitted that '[i]t is not possible for the fair-minded observer to be aware of facts of which the subject decision-maker is not and therefore form the basis for a

⁴⁶ Annexure D – Brief of Evidence, Document 3.9.1, page 180.

⁴⁷ Respondent's affidavit [13].

⁴⁸ Respondent's affidavit [25]-[26].

⁴⁹ *Independent Assessor v FJS* [2023] QCAT 244 [42].

⁵⁰ *Independent Assessor v FJS* [2023] QCAT 244 [48].

conflict of interest'.⁵¹

42. This Tribunal notes the Applicant's submissions in reply at paragraph 4 on this point:

Notwithstanding the decision in FJS, the Applicant submits that if the councillor's knowledge of objective facts must be proven to establish a conflict of interest, the effect of this would be to make the conflict of interest framework impractical and would discourage councillors from making necessary and appropriate enquiries. The Applicant submits this would not be in keeping with the local government principle of 'transparent and effective process, and decision-making in the public interest' [footnote reference omitted] and the public confidence in the system of local government would be reduced if any allegations that a councillor has failed to declare a conflict of interest could be dispensed with by a denial from the councillor that they were aware of the relevant facts, which will in many cases be difficult to disprove.

The Applicant then cites Gageler J in *Isbester v Knox City Council* [2015] 255 CLR 135 at [61] for the proposition that a conflict of interest 'remains always to be determined by reference to the objective possibilities which arise from the externally manifested facts' and 'it necessarily involves no inquiry into the actual state of mind of that person or of any other person involved in the decision-making process. The touchstone throughout the relevant inquiry remains the appearance rather than the actuality of bias.' The Tribunal notes the analogy of conflict of interest with decision-maker bias.

43. The Tribunal notes that Gageler J in *Isbester* wrote a minority judgment. At [23] of *Isbester*, the majority judgment of Kiefel CJ, Bell, Keane and Nettle JJ states:

How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised [footnote reference omitted]. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made [footnote reference omitted] as well as to have knowledge of the circumstances leading to the decision [footnote reference omitted].

44. There is a clear tension between on the one hand, Councillors subjectively not knowing about relevant facts showing the existence of personal interests/conflicts of interest and on the other, the objective view that Councillors in certain circumstances ought to know about relevant facts showing the existence of personal interests/conflicts of interest.

45. In *FJS*, the Judicial Member was referred to and considered the relevant authorities including the case of *Isbester* and concluded that to require a Councillor to disclose relevant facts which they genuinely did not know about:

*[W]ould be a completely artificial approach to a question of the existence of a conflict of interest, and would necessarily give rise to a situation were the councillor was required to deal, in a transparent and accountable way, with something of which she was in fact unaware. That strikes me as an absurd interpretation of the section.*⁵²

46. In the absence of any other specific authorities from Councillor conduct tribunals concerning declarations of conflicts of interest, this Tribunal is persuaded and assisted by the Judicial Member's interpretation of this specific issue in *FJS*.

⁵¹ Respondent's submissions [94] referring to *Independent Assessor v FJS* [2023] QCAT 244 at [43] and also [41] and [42].

⁵² *Independent Assessor v FJS* [2023] QCAT 244 [43].

47. However, the Tribunal makes the following extremely clear: if a Councillor is going to rely on not knowing of a relevant fact or facts showing the existence of a personal interest/conflict of interest as a justification for not declaring that personal interest/conflict of interest at a Council meeting, they will need to demonstrate that lack of knowledge clearly and concretely with evidence. A lack of knowledge of relevant facts showing a personal interest/conflict of interest is not to be used as an excuse by Councillors to fall back on every time they fail to properly disclose a relevant interest at a Council meeting. The Tribunal will still consider every matter of alleged failure to declare a personal interest/conflict of interest on its merits and on a case by case basis and, as the Judicial Member stated in *FJS*, ‘guard against a situation where a councillor might avoid a finding of conflict of interest through moral obtuseness’ and ‘guard against *Nelsonian blindness*’ [also known as ‘wilful blindness’, ‘wilful ignorance’ or ‘turning a blind eye’].⁵³
48. In this particular matter, the Tribunal accepts the Respondent's affidavit evidence that he had no knowledge of the printing work Company XDR gave to Company MKO and therefore could not disclose this interest in any of the Council meetings the subject of the allegations. This is consistent with the Respondent's evidence that he did not have anything to do with the day-to-day running of the business and it is also consistent with the letter from the relevant person at Company MKO that it was his ‘responsibilities to manage and develop every business opportunity. I have been the immediate and direct go to person for [Company XDR] I was the nominated individual on our membership certificate.’⁵⁴
49. The Tribunal also considers it is important to look at the evidence holistically, namely at the overall value of the printing work. The evidence, being invoices provided by Company XDR, indicates that Company XDR spent \$9,317/\$9,416 on printing services provided by Company MKO. While the invoices provided by the Applicant in Annexure D – Brief of Evidence, Document 3.11 indicate that the printing work was invoiced in two financial years, being FY2016/2017 and FY2017/2018, this seems to be all that Company XDR has ever spent on printing work with Company MKO. The Tribunal accepts the Applicant's submission that ‘based on [Company XDR's] evidence of its annual print spend [being \$15,000-\$30,000],⁵⁵ [Company MKO] accounted for approximately 15-30% of [Company XDR's] total print spend in that particular period.’⁵⁶ But looking more broadly at this point, if Company XDR's evidence is accepted that Company XDR spent \$135,000 to \$270,000 on printing ‘over the last 9 years’ and \$9,317/\$9,416 of this went to Company MKO, this is somewhere between three to seven percent of Company XDR's printing costs over that 9 year period.
50. Also on this point, Company MKO's evidence is important:

From the beginning of 2016 to early in 2018 we have provided [Company XDR] 44 different printing jobs with a total value of \$13,050. All items were quoted before production started suggesting that we were constantly being scrutinized for competitiveness. The turnover did not rate [Company XDR] very highly in [Company MKO's] customer value list.’⁵⁷

51. In Annexure C – The Respondent's Response to the Section 150AA Notice, the Respondent elaborated on Company MKO's turnover in FY2016/2017 and FY2017/2018:

[Company MKO's] turnover for the financial year 1 July 2016 to 30 June 2017 was

⁵³ *Independent Assessor v FJS* [2023] QCAT 244 [44].

⁵⁴ Respondent's affidavit, exhibit 4.

⁵⁵ Annexure D – Brief of Evidence, Document 3.9.1, page 180.

⁵⁶ Applicant's submissions in reply [26].

⁵⁷ Respondent's affidavit, exhibit 4.

*\$1,473,941.00. For the year 1 July 2017 to 30 June 2018, the turnover was \$1,507,461.00. Accordingly, viewed in the context of time and total turnover of the business at the time, the 'benefit' (to the extent it can be described as such) is similarly insignificant and nominal.*⁵⁸

While the above passage is in the form of submissions and not sworn evidence, the Tribunal considers it important information in this matter and on the balance of probabilities accepts its truthfulness as it is consistent with Company MKO's evidence that '[t]he turnover did not rate [Company XDR] very highly in [Company MKO's] customer value list.' Therefore, in the Tribunal's view, the value of Company XDR's printing work to Company MKO in FY2016/2017 and FY2017/2018 was about 0.006% of Company MKO's turnover for those financial years.

52. Finally, the Tribunal notes the Respondent's submission in Annexure C – The Respondent's Response to the Section 150AA Notice about the test used in the authorities to assess a conflict of interest.⁵⁹ One of the authorities cited by the Respondent is *Independent Assessor v Councillor of Toowoomba Regional Council*, 14 August 2019, CCT reference F19/4195, where on page 2 of the publicly available decision summary, the Tribunal stated:

*The Tribunal considers that in all of the circumstances, a fair-minded observer would not consider that there was a **real possibility** that the Councillor would be swayed in his decision-making by considerations relevant to his interest in the property, in determination of the extension of the policy [emphasis added].*⁶⁰

Consequently, the Respondent submitted:

*[T]hat any interest as a director of [Company MKO] was so remote that there was no real sensible possibility that a fair-minded observer, aware of all of the facts set out in this submission, could have apprehended that [the Respondent] might be swayed by that personal interest. There was accordingly no risk, in our submission, of a decision being made contrary to public interest.*⁶¹

53. The Tribunal finds that looking holistically at the matter, a fair-minded observer aware of all of the relevant facts would not consider that the Respondent might be swayed in his decision-making by considerations relevant to his interest in Company MKO receiving printing work from Company XDR. This is because any interest in the printing work provided by Company XDR to Company MKO when seen particularly in the context of Company MKO's annual turnover in FY2016/2017 and FY2017/2018 and Company XDR's printing expenditure over 9 years, coupled with the fact that the Respondent was a director and shareholder of Company MKO and was therefore not directly receiving the money for the printing work, was so diluted that it could not reasonably be described as an interest 'to a level or of a nature that would create a conflict of interest situation'.⁶²
54. For all of the abovementioned reasons, the Tribunal finds that on the balance of probabilities, the Respondent did not contravene section 173(4) of the Act regarding Allegations One and Two or section 175E(2) of the Act regarding Allegation Three.

⁵⁸ Annexure C – The Respondent's Response to the Section 150AA Notice [30].

⁵⁹ Annexure C – The Respondent's Response to the Section 150AA Notice [33].

⁶⁰ This echoes the test for decision-maker bias as stated by the majority of the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].

⁶¹ Annexure C – The Respondent's Response to the Section 150AA Notice [34].

⁶² *Independent Assessor v Councillor, Gympie Regional Council*, 26 April 2019, CCT reference F19/3356 [9].

Allegation Three and the additional limb of ‘a breach of the trust placed in the councillor, either knowingly or recklessly’

55. For Allegation Three only, the Applicant alleges that if there was a failure to declare the Respondent’s personal interests at a Council meeting as required by section 175E(2) of the Act, then that failure could amount to a breach of the trust placed in the councillor, either knowingly or recklessly due to that conduct being inconsistent with the local government principles of ‘transparent and effective processes and decision making in the public interest’ and ‘ethical and legal behaviour of councillors and local government employees’.
56. As the Tribunal has found that the Respondent did not have a declarable personal interest, Allegation Three cannot be sustained and it is unnecessary to consider the issue of breach of the trust. However, the Tribunal considers it appropriate to briefly discuss this issue.
57. Regarding breach of the trust placed in a Councillor, the Tribunal often cites *Flori v Winter & Ors* [2019] QCA 281, where at paragraph 59 the Queensland Court of Appeal relevantly stated:

For present purposes it is sufficient to observe that a serious criminal offence committed by a police officer that is apt to undermine public confidence in the integrity of that police officer is appropriately described as “a breach of the trust placed in” that person as a member of the police force.

Accordingly, by analogy, the critical question for the Tribunal regarding whether there was a breach of the trust placed in a Councillor is whether a Councillor’s conduct ‘is apt to undermine public confidence in the integrity’ of that Councillor.

58. On this point, the Tribunal notes and accepts the Respondent’s affidavit evidence that:

Very early on in my role as a Councillor, I asked the question [...] about the Business being a member of [Company XDR] and if this, from a legal perspective, would trigger a conflict when determining any decision for [Company XDR].

The response I received was that, providing I was not an Executive Member, there was no requirement to declare. I didn’t think I needed to get my own legal advice on the issue and believed I could rely on the advice given to me [...]. Therefore, at the time of the meetings, the subject of the allegations, I did not declare a conflict.⁶³

59. Advice was given to the Respondent that his personal interest in Company MKO’s membership of Company XDR did not need to be disclosed because of the ‘membership of a community organisation’ exception discussed earlier. While the Tribunal agrees that this advice was correct regarding the exception in 173(3)(a)(iii)/175D(2)(a)(iii) applying to Company MKO’s membership of Company XDR, this advice did not apply to the printing work Company XDR gave to Company MKO, although the Respondent’s sworn evidence is that he did not know about the printing work.
60. If the Respondent had any doubts about whether his personal interests conflicted with the public interest and created a conflict of interest that had to be declared in a Council meeting, the solution is really quite simple: disclose it. Out of an abundance of caution, the Respondent should have simply disclosed his personal interests in Company MKO and Company MKO’s connection with Company XDR within his knowledge at the relevant Council meetings. Doing so would have most likely avoided this entire matter. However,

⁶³ Respondent’s affidavit [36]-[37].

in the Tribunal's view, what is critical is that the Respondent sought advice about how to deal with his personal interests. To the Tribunal, this indicates that public confidence in the Respondent can be maintained because should he find himself in need of advice, he is likely to seek it.

61. The Tribunal also notes that at a meeting of the Council's Economic Development Committee in 2020, the Respondent disclosed his personal interest in Company MKO and Company MKO's membership of Company XDR.⁶⁴ While it is in no way determinative of any issues in the present matter, the Tribunal notes that after considering the Respondent's disclosure, the other Councillors decided that the Respondent did not have a conflict of interest.⁶⁵
62. Finally, there is the requirement that any breach of the trust placed in the Councillor be committed '*either knowingly or recklessly*'. As stated above, the Tribunal accepts the Respondent's evidence that he sought advice on whether he needed to disclose his personal interest in Company MKO and Company MKO's membership of Company XDR. The Tribunal accepts the Respondent's evidence that he had no knowledge that Company MKO received any printing work from Company XDR as he was not involved in the day-to-day running of Company MKO. The only way the Respondent could have realised that Company XDR was giving printing work to Company MKO was if the Respondent went through the company books and looked for companies he recognised that gave work to Company MKO. In the Tribunal's view, this is an overly stringent requirement to impose on someone who is not involved in the day-to-day running of a business. Therefore, even if the Respondent had been found to have breached the trust placed in him as a Councillor, the Tribunal would not be satisfied on the balance of probabilities that he did so either knowingly or recklessly.
63. Ultimately, if breach of the trust were a live issue, the Tribunal would have concluded on the balance of probabilities that the Respondent did not breach the trust placed in him as a Councillor, either knowingly or recklessly.

Conclusion

64. Considering all the evidence and material received in the matter, the Tribunal has determined that on the balance of probabilities, Allegations One, Two and Three **have not been sustained**.
65. As the Tribunal has not sustained any allegations of misconduct against the Respondent, there is no need to consider any orders or recommendations under section 150AR of the Act.

Considerations pursuant to the *Human Rights Act 2019 (Qld)*:

Preliminary

66. The Tribunal considered its obligations to protect the Respondent's human rights under the *Human Rights Act 2019 (Qld)* (the HRA).
67. In relation to any misconduct application made by the Applicant under section 150AJ(1)(a) of the Act, the Tribunal '*must conduct a hearing about the application*' under section 150AL(1) of the Act. The Act does not provide the Tribunal with any discretion regarding the hearing of the application. This is relevant to section 58 of the HRA. Section 58(1) of the HRA states that

⁶⁴ Applicant's additional evidence filed 27 October 2023, document 3, page 16.

⁶⁵ Applicant's additional evidence filed 27 October 2023, document 3, page 17.

'[i]t is unlawful for a public entity [...] to act or make a decision in a way that is not compatible with human rights; or [...] in making a decision, to fail to give proper consideration to a human right relevant to the decision.' Section 58(2) of the HRA provides an exemption to the Tribunal as a public entity from complying with section 58(1) of the HRA *'if the entity could not reasonably have acted differently or made a different decision because of a statutory provision.'*

The right to a fair hearing (section 31 of the HRA)

68. The Tribunal considered that the right to a fair hearing was engaged by the hearing of the misconduct application regarding the Respondent.
69. Section 213 of the Act requires the decision-maker when it conducts a hearing (in this case, the Tribunal) to *'observe natural justice'* and *'act as quickly and informally as is consistent with a fair and proper consideration of the issues raised in the hearing.'* The hearing was conducted on the documents, which is permitted by section 150AP(2) of the Act. The Respondent sought and received legal advice and did not dispute the hearing being conducted on the documents. The Tribunal considered it appropriate in the circumstances to direct that the hearing of the application be conducted in private under section 298 of the Regulation, which in the Tribunal's view is consistent with section 31(2) of the HRA. The Tribunal considered it complied with all the hearing requirements of the Act and provided the Respondent with natural justice and a fair hearing. This decision and reasons will be made publicly available as required by section 150AS(2)(c) of the Act, which the Tribunal considers is consistent with section 31(3) of the HRA. Therefore, the Tribunal considered the Respondent's human right to a fair hearing under section 31 of the HRA has been engaged but has not been limited by the hearing process.

The right to not have one's reputation unlawfully attacked (section 25(b) of the HRA)

70. The Tribunal considered that the right to not have the Respondent's reputation unlawfully attacked may have been engaged by this decision and reasons.
71. However, in the Tribunal's view, this right was not limited because there was no unlawful attack on the Respondent's reputation. Furthermore, the Tribunal has removed the names of all individuals and companies relevant to this matter as required by section 150AS(7) of the Act. In conducting this matter and arriving at its decision and reasons, the Tribunal considered it had acted lawfully and had complied with the provisions of the Act.

Conclusion

72. As the Tribunal did not sustain any allegations of misconduct against the Respondent and did not impose any sanctions on the Respondent, the Tribunal does not consider any other of the Respondent's human rights were engaged or limited by the hearing process or by the decision.

Notices:

73. Following the finalisation of this Decision and Reasons, the Tribunal will arrange for notices to be sent to relevant parties as required by sections 150AS of the Act.

Gabe Bednarek ⁶⁶	Carolyn Ashcroft ⁶⁷
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⁶⁶ The Chairperson sent through his authorisation of this document to the Tribunal Registry by email dated 28 February 2024.

⁶⁷ The Member sent through her authorisation of this document to the Chairperson by an email dated 28 February 2024.