

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

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

1. Complaint:

CCT Reference	F20/2959
Subject Councillor	Councillor John Schilling (the councillor)
Council	Cairns Regional Council

2. Decision (s150AQ):

Date:	30 August 2021
Decision:	<p>The Tribunal has determined, on the balance of probabilities, that:</p> <p>Allegation 1, that on 24 February 2016, Councillor John Schilling, a Councillor of Cairns Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the <i>Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust placed in the councillor, in that it 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 Councillor John Schilling 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 been sustained.</p> <p>Allegation 2, that on 24 May 2017, Councillor John Schilling, a Councillor of Cairns Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the <i>Local Government Act 2009</i> (the Act), when he did not inform a meeting of his material personal interest in a matter, leave and stay out of the meeting room while the matter was being discussed and voted on; and that this conduct constituted a breach of the trust placed in him as a councillor and was inconsistent with local government principle 4(2)(e) ‘ethical and legal behaviour of councillors and local</p>

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	government employees’ as it contravened section 172(5) of the Act, has been sustained .
Reasons:	<p>Allegation 1</p> <ol style="list-style-type: none"> 1. To constitute misconduct, the Respondent’s behaviour at the Council meeting on 24 February 2016 must have involved a <i>“conflict of interest”</i>, defined by the Act. 2. <i>“Interest”</i> is not specifically defined anywhere in the Act but can <i>“...cover any material benefit or advantage of an applicable character, whether pecuniary or otherwise, although exclusive of an interest based upon merely sentimental associations”</i>. 3. Cr Schilling did not dispute that he was the sole director, secretary and shareholder of Schilling Homes Pty Ltd, a corporate entity that owned the business name Mac Constructions and employed (or utilised the services of) the Respondent’s son, Jonathan Schilling. He also did not dispute that Schilling Homes Pty Ltd offered a quotation to Entity 1 as part of an application to Council for grant funding to complete building works. 4. The Respondent was aware of the potential risk that his ownership of Schilling Homes Pty Ltd might have posed for decisions that might be made by him as a Councillor – it is for this reason that his ownership of that entity was disclosed in his Register of Interests held by Council (in addition to his statutory obligation to do so). 5. A conflict does not need to “rear its head” or materialise to constitute a conflict. A conflict exists where <i>“the applicant’s private interests had the appearance of interference with or influence over her performance of her duties, or that there was a potential for that to occur”</i>. 6. There is a very real, very distinct possibility that the Respondent’s wearing of “two hats” at the Council meeting would have caused him to have a conflict between: <ol style="list-style-type: none"> a. Wearing one hat, where being the director of a building company he holds certain fiduciary duties including, but not limited to, due diligence in the company’s affairs as accountable to the shareholders, and running the business in such a manner as is likely to turn a profit; and b. On the other, wearing the hat of an elected Councillor, where the Act imposes statutory responsibilities to ensure transparent and accountable decision-making around the expenditure of ratepayers funds. 7. Having regard to the applications being considered by the Council at the meeting of 24 February 2016, the Tribunal is satisfied that there was a <i>“real sensible possibility of conflict”</i> and this possibility generates a reasonable perception that the Respondent would not bring an impartial view to the decisions being made.

8. Though knowledge is not necessarily a requisite element for misconduct, the Respondent was very much aware that his building company was active in the local government area. The possibility that it had tendered was not a remote one. It was foreseeable that a conflict might arise, and steps should have been taken by him to mitigate that risk by acquiring knowledge from his son about the tenders. He failed to undertake very reasonable and straight forward enquiries as he ought to have done. In fact, the Tribunal found that given the real foreseeability of the conflict in this case that the Respondent engaged in a form of wilful blindness as to the affairs of Schilling Homes Pty Ltd.
9. Applying the Tribunal's established position to the Respondent's wilful blindness is sufficient to demonstrate that the Respondent has breached the trust inherent in the Respondent's position as a Councillor.

Allegation 2

10. Allegation 2 related to an application to Council for grant funding to complete building works by Entity 2 based upon quotations offered to it by Schilling Homes Pty Ltd.
11. It was plainly apparent to this Tribunal that the Councillor had a material personal interest in the matter of whether to award a grant to Entity 2:
 - a. **Firstly**, the Respondent stood to gain personally under section 172(2)(a) of the Act, where as director and sole shareholder of Schilling Homes Pty Ltd he stood to gain a benefit as he had an entitlement to profits and/or dividends that might be made payable on the completion of the work; or
 - b. **Secondly**, under section 172(2)(c) of the Act, the Respondent's son Jonathan Schilling stood to gain a benefit through his employment by Schilling Homes Pty Ltd to complete the works.
12. The Respondent's conduct in relation to Allegation 2 goes beyond a failure on his part to undertake reasonable enquiries or even 'wilful blindness'. The evidence indicates that he had knowledge that the quotation was sent to Entity 2 by Jonathan Schilling, as he had been cc'd the quotation by his son.
13. Having found that a material conflict of interest existed, it is a matter of fact that the Respondent did not inform the meeting of the councillor's material personal interest in the matter and did not leave the meeting room (including any area set aside for the public) and stay out of the meeting room while the matter was being discussed and voted on. In fact, he made no declaration of conflict of interest at any time and proceeded to vote on the agenda item to award the grant to Entity 2.
14. The conflict of interest was real, material and serious, and the Respondent should have taken more care to exclude himself from Council decisions which could have been tainted by his involvement.

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

Date of orders:	30 August 2021
Orders and/or recommendations:	<p>The Tribunal orders that, for Allegation 1, within 90 days of the date that a copy of this decision and orders are given to him by the Registrar:</p> <ol style="list-style-type: none"> a. Pursuant to s 150AR(1)(b)(i) of the Act, that former Cr Schilling make a public admission that he engaged in misconduct, at a meeting of Council that is open to the public; b. Pursuant to s 150AR(1)(b)(iv) of the Act, that former Cr Schilling pay an amount of \$500 to the local government. <p>The Tribunal orders that, for Allegation 2, within 90 days of the date that a copy of this decision and orders are given to him by the Registrar:</p> <ol style="list-style-type: none"> a. Pursuant to s 150AR(1)(b)(ii) of the Act, that former Cr Schilling is reprimanded; b. Pursuant to s 150AR(1)(b)(v) of the Act, that former Cr Schilling reimburse the local government for \$1,500 of the costs arising from the councillor's misconduct.
Reasons:	<ol style="list-style-type: none"> 1. The fact that the Respondent is no longer a Councillor is important, as it limits the orders open to this Tribunal. 2. Further, the Tribunal can only impose an order that is "<i>substantially the same</i>" as an order that could have been made under the former section 180 of the Act. 3. The conduct was also aggravated in that the Respondent played a part in the approval of the funds to his business. The conduct resulted in a not insubstantial and direct financial benefit to the company, and through it to himself as a shareholder and the Respondent's son through his involvement in the company. 4. The Councillor was a second-term Councillor. He was educated in his responsibilities and trained by the Department in his obligations. Consequently, the Tribunal considers that the Respondent should have demonstrated more probity than he did. Whilst each case will be taken on its merits, Councillors' simply must be cognisant of an inherent risk of conflict should they own or operate a business which obtains, or might obtain, a benefit either directly or indirectly from Council funding. 5. The conduct in both Allegations resulted in the Respondent receiving, through the corporate vehicle Schilling Homes Pty Ltd, a total of \$79,840.60 in ratepayers funds. 6. The Tribunal has made the orders sought by the Applicant, involving both a public admission and reprimands from this Tribunal, as well as pecuniary penalties and recovery of costs.

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