

Councillor Conduct Tribunal decision

14 August 2019

Key issue - Conflict of Interest

Dealing with conflict of interest as misconduct

After 21 May 2018, failing to properly disclose or manage conflict of interest became a statutory offence under Section 175E of the *Local Government Act 2009* and conflict of interest was removed from the definition of misconduct.

In appropriate circumstances however, the Independent Assessor has continued to deal with failures to properly disclose or manage a conflict of interest as misconduct on the basis that it is a breach of the trust placed in the councillor (section 176(b)(ii)) - noting that failing to properly disclose or manage a conflict of interest is also a breach of local government principles in:

- Section 4(2)(a) transparent and effective processes and decision making in the public interest, and
- Section 4(2)(e) being ethical and legal behaviour of councillors.

Councillor T's legal representative challenged the Office of the Independent Assessor's dealing with the conflict of interest as misconduct rather than a statutory offence, as an abuse of process.

He argued:

“...either [the councillor] breached Section 175E(2) or he did not. By not preferring that charge, the investigator accepts that it cannot be proved to the requisite standard. The investigator cannot subvert the text of the Act by prosecuting the [councillor] for misconduct [as being] Section 175E(2) under the guise of a 'breach of trust'. Any such procedure is manifestly unsafe, unsound and not fairly open.”

The OIA argued that based on the broader construction of the Act and having regard to the policy objectives of the *Local Government Electoral (Implementing State 1 of Belcarra) and other Legislation Amendment Bill 2018*; the option to deal with conflicts of interest matters as a breach of trust was reasonably open.

It was noted for example, that prosecuting conflict of interest matters as 'integrity offences' would result in the automatic suspension of all councillors upon charging (s153(1)(d) and s182A); and the disqualification of all councillors for four years if convicted – which would be a harsh construction to place on the Act.

The OIA also argued that the ability of the Independent Assessor to deal with appropriate conflict of interest breaches as misconduct supported effective and transparent local government by diverting lower level conduct into a disciplinary process where, pursuant to Section 150AR, the Tribunal may make orders or recommendations involving, training and or counselling, public admissions, fines and other deterrent measures.

The Tribunal accepted this approach as a legitimate strategy and not an abuse of process.