

Councillor Conduct Tribunal decision

16 August 2019

Key issue – Breach of Trust

Meaning of the words ‘either knowingly or recklessly’

The Office of the Independent Assessor alleged that a councillor breached the trust placed in him as a councillor, either knowingly or recklessly, when he posted particular content on his private Facebook page on two occasions in February 2019.

Following amendments to the *Local Government Act 2009* which took effect on 3 December 2018, the category of misconduct known as a breach of trust was changed as follows:

*Conduct which involves a breach of the trust placed in a councillor, **either knowingly or recklessly.***

These terms are not further defined in the *Local Government Act 2009*.

In considering the meaning of the terms the Councillor Conduct Tribunal noted the OIA’s submissions that:

- (1) The Oxford dictionary defines ‘knowingly’ as ‘in full awareness of consciousness; deliberately’. ‘Recklessly’ is defined as ‘without regard to the danger or consequences of one’s actions; rashly’.
- (2) The Councillor Complaints Report (which in turn, is referred to in the Explanatory Notes to the *Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018*) recommended the expansion of the definition of misconduct, ‘to make it clearer to councillors what constitutes misconduct’. The Government supported this recommendation in principle. Accordingly, the added words would appear to have been intended to expand upon the definition of misconduct, and not act as a limit upon it.
- (3) Section 15 of the *Crime and Corruption Act 2001* also uses the phrase ‘knowingly or recklessly’ in defining a breach of trust for the purposes of corrupt conduct. The Crime and Corruption Commission has provided some administrative guidance on what it considers is the meaning of the terms ‘knowingly or recklessly’ in this context:

‘Knowingly’ can be taken to mean that the person knew that their actions were a breach of the trust placed in them;

‘Recklessly’ can be taken to mean that, while the person did not necessarily know that their actions were a breach of trust, they were aware that there was a real and apparent risk that the conduct would amount to a breach of the trust and the person nevertheless engaged in the conduct.

- (4) Further guidance is provided on the interpretation of similar words in other Tribunal decisions in the context of professional disciplinary matters; *the Victorian Bar Incorporated v Molyneux (Legal Practice)* ([2006] VCAT 1417) and *Aaron Zaitman v Law Institute of Victoria (Unreported, Supreme Court of Victoria, JD Philips J, 9 December 1994)* as referred to in *Molyneux*.



The Tribunal concluded that for the purposes of the present case it was sufficient to note that the ordinary meaning of the words ‘knowingly or recklessly’ and that the words were apparently not intended by the legislature to constrain the application of a breach of trust.

Read the [Councillor Conduct Tribunal decisions](#).

