

**LOCAL GOVERNMENT PECUNIARY INTEREST & DISCIPLINARY
TRIBUNAL**

LOCAL GOVERNMENT ACT, 1993

PIDT No 1/2008

**DIRECTOR-GENERAL, DEPARTMENT OF LOCAL
GOVERNMENT**

**RE: COUNCILLOR MARTIN TICEHURST, LITHGOW
CITY COUNCIL**

DETERMINATION (CONSEQUENCE)

1. On 7 May 2009, the Tribunal made and published its Determination in relation to an alleged breach of Division 3 of Chapter 14 of the *Local Government Act* by Councillor Martin Ticehurst, a councillor of the Lithgow City Council. As set out in that Determination, the Tribunal determined pursuant to s.482A that Mr Ticehurst has engaged in conduct constituting misbehaviour for the purposes of Division 3 of Chapter 14 of the Act: [156]. At [157] the Tribunal was of the view that the behaviour concerned might warrant action pursuant to s.482A and made certain directions concerning its consideration of whether action should be taken pursuant to s.482A.
2. The process contemplated at [157] had as alternatives a further hearing in relation to that question, or the provision of written submissions. The parties (the Director-General and Mr Ticehurst) proceeded via written submissions and complied with the timetable set out in subparagraph 3 of [157], with an

extended timetable as agreed between them of a reply by the Director-General to Mr Ticehurst's submission and then a final right of reply to Mr Ticehurst.

Relevant Legislative Provisions

3. As set out in its earlier Determination, the matter before the Tribunal was referred to it pursuant to s.440N (a matter which, for the reasons set out below, requires consideration). The Hearing before the Tribunal was conducted pursuant to Divisions 3 and 4 of Part 3 of Chapter 14.
4. Subsection 482A(1) provides for the application of s.482A where a matter has been referred to the Tribunal under s.440N. Pursuant to s.482A(2):

“The Tribunal may, if it finds that the behaviour concerned warrants action under this section:

- (a) counsel the councillor, or
 - (b) reprimand the councillor, or
 - (c) suspend the councillor from civic office for a period not exceeding six months, or
 - (d) suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of that civic office, in respect of a period not exceeding six months (without suspending the councillor from civic office for that period).”
5. Section 482A(2) is different to the penalty provision concerned with pecuniary interest matters as set out in s.482(1) in that, whilst there is a discretion in the Tribunal to direct certain consequences, that discretion is enlivened in the case of a pecuniary interest matter “if it (the Tribunal) finds a complaint against a councillor is proved”, whereas in the case of a misbehaviour matter the consequence provisions exist as a discretion in the

Tribunal “if it (the Tribunal) finds that the behaviour concerned warrants action under this section”.

6. In some respects it may be thought implicit in the course chosen with respect to consequence that the Tribunal also forms the view that action under the section is warranted; but the words of the statute do differ and hence it is appropriate that the finding (of action being warranted under s.482A(2)) be made. Of course, if such a finding is made, then the appropriate consequence provision under s.482A(2) must also be determined.

The Submissions of the Parties

7. As referred above, the parties to the proceeding in a cooperative way proceeded to put before the Tribunal matters relevant to the question of consequence by way of written submissions. So that Mr Ticehurst would be afforded the final right of reply, the initial Directions concerning such course and the parties’ agreement for further submissions were made so as to achieve such a result.
8. In the Director-General’s first submission, the Director-General set out the available courses for consequence pursuant to s.482A and submitted to the Tribunal that the appropriate consequence was for the suspension of Mr Ticehurst for “a significant period”. The Director-General made no submission as to what that period might be. Where the period for suspension pursuant to s.482A(2)(c) is a maximum period of six months, then despite no specific submission being made, the Tribunal infers that the Director-General’s submission is that the notion of a “significant period” would tend to suggest a submission towards the maximum end of such a range, rather than the minimum end.

9. The Director-General also made submissions regarding general considerations concerning the appropriate consequence including a reference to s.439 of the Act concerning the general “duty” of councillors to act honestly and exercise a reasonable degree of care and diligence in carrying out his functions under this Act. The Director-General then referred to parts of the Second Reading speech which introduced the misbehaviour provisions into the *Local Government Act* (Hansard, Legislative Council, 22 September 2004), albeit as part of a submission in which it was said that there was no identified relevant ambiguity in the new relevant misbehaviour provisions. Those matters though were more of general policy and are arguably self evident from the terms of the misbehaviour provisions of the Act.

10. More specifically the Director-General submitted that the breach was a serious breach of a relatively new and important provision of Chapter 14 of the Act, that the breach ought to have been apparent to Mr Ticehurst, that the breach was a continuing breach in the sense that it had remained (on the website) for many months, even after Council Resolutions which sought to remove the material from the website, that the breach was said to be “flagrant” in the sense that the facts which gave rise to the breach were patent for all to see or at least all who cared to properly apply their minds to the questions raised by the provisions of the Act, that the Councillor was personally well aware of the terms of the Code of Conduct, and that Mr Ticehurst was an experienced councillor and had received educational material in relation to his obligations. The Director-General also submitted that Mr Ticehurst was well aware of the contents of the Code of Conduct having been a participating councillor in the creation of and passing of the first version of the Council’s Model Code of Conduct. The Director-General also submitted that Mr Ticehurst had an opportunity to set the record straight and remove or cause the removal of the offending material from the website, which he refused to do for some time. Finally the Director-General submitted that Mr Ticehurst has shown no

remorse but rather open defiance and “a disturbing lack of insight has been consistently demonstrated”.

11. Mr Ticehurst’s submissions were received by the Tribunal in two parts.
12. In his first submission Mr Ticehurst sought leave to request the Tribunal to formally dismiss the matter on the basis of “a serious error of law and/or miscarriage of justice”.
13. In that submission Mr Ticehurst raised what was in essence a submission going to the jurisdiction of the Tribunal concerned with s.440N. In summary (the detail of which will be addressed more completely below) Mr Ticehurst directed the Tribunal’s attention to s.440N(2) which operated according to his submission to render the proceedings before the Tribunal as nugatory. Section 440N(2) provides as follows:-

“However, a matter that is the subject of a request by a Council may not be referred to the Tribunal unless the Councillor concerned has previously been suspended under this Chapter for misbehaviour.”
14. Mr Ticehurst submitted that the matter that was before the Tribunal was one that was the subject of a request by the Lithgow City Council. He also pointed to the fact that there was no evidence before the Tribunal to show that, to use the words of s.440N(2), Mr Ticehurst “has previously been suspended under this Chapter for misbehaviour” (which he described as a “rap sheet”). In this respect there appears to be no suggestion, and certainly there was no evidence before the Tribunal, of any such previous suspension of Mr Ticehurst under the Chapter for misbehaviour.
15. In Mr Ticehurst’s second submission he made further submissions concerning the matter of consequence.

16. The first additional submission concerned the matter of “precedent” in which Mr Ticehurst referred to the decision of Biscoe J of the Land and Environment Court in *Shellharbour City Council v. Stewart* [2008] NSWLEC 151. Mr Ticehurst referred to that part of Biscoe J’s decision in which, in a case where Biscoe J found that Councillor Stewart had breached s.664(1) of the *Local Government Act*, Biscoe J determined that it was sufficient for substantive relief in relation to such a breach that there be a declaration of breach, and nothing further. Mr Ticehurst’s submission was that as there was no formal penalty in that case, similarly there should not be in the present case.
17. The next submission involved the concept of “double jeopardy” in which Mr Ticehurst argued that as the matter which was before the Tribunal had already been before the Lithgow City Council’s Code of Conduct Committee, for the Tribunal to proceed to determine the same matter would constitute double jeopardy.
18. Finally Mr Ticehurst submitted that relevant to the matter of consequence was the fact that the Council itself did not proceed effectively to prosecute Mr Ticehurst in relation to the breach of s.664 of the *Local Government Act*. He denied that the breach should be considered by the Tribunal as “flagrant” as submitted by the Director-General. He supported this submission by observing that he was legally entitled at all times to protest his innocence to all allegations made against him. He submitted that he was entitled to rely upon the statutory declaration of Mr Ellis in the consideration of the matter by the Lithgow City Council Code of Conduct Committee, and that he was denied natural justice in the hearing before the Tribunal by the Lithgow City Council because in a vote before the Council in which the question of legal assistance to Mr Ticehurst was considered certain persons participated who were essentially conflicted from that vote.

19. The parties agreed, particularly in the light of the fact that Mr Ticehurst had raised a jurisdictional matter, to exchange further submissions in reply.
20. In the Director-General's further submissions, the Director-General invited the Tribunal to not entertain Mr Ticehurst's application for leave to request that the Tribunal formally dismiss the matter on the jurisdictional grounds, but that if the Tribunal did proceed to consider the matter, that there was an important factual distinction enlivening the jurisdiction in the circumstances of the present case, namely that the proper jurisdictional basis for the referral of the matter to the Tribunal was on the basis of a request by the Director-General pursuant to s.440H(1)(b) of the Act. This matter is more completely addressed in this Determination below. The Director-General otherwise made no response to matters going directly to consequence beyond the jurisdictional matter.
21. Mr Ticehurst was afforded the final right of reply and in that submission he reiterated his position concerning jurisdiction. In particular he rejected the Director-General's original submissions referring to the Second Reading speech submitting that there was no relevant ambiguity which permitted or warranted recourse to them. He submitted though that if one was to have recourse to the Second Reading speech then it should be done for the purposes of the jurisdiction argument and the Second Reading speeches made it clear that the intention of the legislative scheme was that where the complaint originated from the Council the matter of suspension was to be dealt with by the Director-General rather than referring the matter to the Tribunal. This was because of the concern that majorities on councils might misuse their referral power to silence minority representation.
22. Mr Ticehurst submitted that the proceedings therefore should be dismissed as beyond jurisdiction.

The Serious Error of Law/Jurisdictional Matter

23. It is usual in proceedings in any forum for matters going to jurisdiction to be raised in the early stages of any proceedings or hearings. One obvious reason for that is that if it is indeed the case that the relevant Tribunal is of the view that it does not have the jurisdiction to hear a matter, then that decision can be taken and the time and cost associated with the conduct of any further proceedings or hearings can be avoided. If, later, the submission concerning jurisdiction is made and accepted, then that time and cost would obviously have been wasted.

24. Whilst it is customary for jurisdictional matters to be raised at the earliest possible time, there is no rule that they should be, nor is there any rule that if they are not raised early they cannot be raised. Although the recent High Court decision of *AON Risk Services Australia Ltd v. Australian National University* [2009] HCA 27 discussed generally the effect of attempting to raise a new matter late in proceedings, the matter of jurisdiction is important, if not fundamental and may not be affected by similar considerations.

25. Even though it is preferable to consider the matters early in proceedings, the Tribunal will nonetheless consider the matter raised by Mr Ticehurst in relation to jurisdiction, because it is an important matter which would operate as a complete answer to the complaint against him, not so much as a matter of breach of Chapter 14, but insofar as this Tribunal has the jurisdiction to consider that breach. Of course if it is the case that the Tribunal does not have jurisdiction to consider the matter, then it may well be that others (in particular the Director-General) is able to consider that matter. Mr Ticehurst is also self represented and the preference to raise jurisdictional matters early may not have been apparent to him, even though he had brought a strike-out application (on a different point).

26. Furthermore simply proceeding upon an assumed position of jurisdiction does not limit a decision maker from reconsidering that position if it is of the view that it has proceeded beyond power: *Minister for Immigration v. Bhardwaj* (2002) 209 CLR 597 at [51]-[53] per Gaudron and Gummow JJ.
27. In proceeding to hear the alleged complaint against Mr Ticehurst the Tribunal self evidently proceeded in purport of jurisdiction pursuant to s.440N.
28. The process for the consideration of a report presented to the Tribunal pursuant to s.440N is governed by Division 3 of Part 3 of Chapter 14. Pursuant to s.470A(1) the Tribunal may decide to conduct proceedings into a matter “after considering a report presented to it under s.440N in relation to a referred matter”. As recorded in its previous Determination at [2] on 19 May 2008 the Tribunal received from the Director-General the referral of the matter by provision of a report. On 13 June 2008 the Tribunal issued a Notice of Decision to Conduct Proceedings pursuant to s.470A: [3]. In determining to conduct proceedings the Tribunal had regard to the jurisdictional matter now raised by Mr Ticehurst, but did not provide a statement of its decision in that respect as one is only required to be provided where the decision is not to conduct proceedings into a referred matter: s.470A(2).
29. Division 3 of Part 1 of Chapter 14 governs “misbehaviour”. Section 440F defines the concept of misbehaviour, not relevant for present purposes, but as referred in the Tribunal’s earlier Determination. Pursuant to s.440G a council may by resolution at a meeting formally censure a councillor for misbehaviour. Certain conditions precedent to that resolution are provided in s.440G, and in the formal censure resolution the grounds upon which the council is satisfied that the councillor should be censured must be specified: s.440G(4).

30. Section 440H is entitled “How is the process for suspension of a councillor for misbehaviour initiated?”. Subsection 440H(1) provides as follows:-

- “(1) The process for the suspension of a councillor from civic office is initiated by:
- a) a request made by the council by resolution communicated to the Director-General, in which the council states its belief that grounds may exist that warrant the councillor’s suspension; or
 - b) a request made by the Director-General to the council for a report from the council in relation to the councillor’s alleged misbehaviour; or
 - c) a report made by the Ombudsman in which the Ombudsman states that the Ombudsman is satisfied that grounds exist that warrant the councillor’s suspension; or
 - d) a report made by the Independent Commission Against Corruption in which the Commission recommends that consideration be given to suspending the councillor under this Division.”

31. Thus, as alternatives, the suspension of a councillor from civic office is initiated by action taken by one of four persons; the Council, the Director-General, the Ombudsman, or the Independent Commission Against Corruption. The last two of those persons initiate the process by a report (as set out in s.440H(1)(c)(d)), and the report is a report made to the Director-General: s.440H(3).

32. That process, namely the process for the suspension of a councillor from civic office, is one *prima facie* residing in the Director-General. Pursuant to s.440K it is the Director-General who may order the suspension of a councillor from civic office. He may do so for a period not exceeding one month. He may do so only if satisfied that grounds exist that warrant the councillor’s suspension after he considers a departmental report into the matters concerned; or alternatively if the Ombudsman or the Independent Commission Against

Corruption states in a report that they are satisfied that grounds exist that warrant the councillor's suspension. Section 440J provides for the making of reports.

33. Section 440I(1) though is relevant to the Director-General's decision under s.440K. It provides:

“(1) The grounds on which a councillor may be suspended from civic office under this Division are that:

- a) the councillor's behaviour has:
 - i) been disruptive over a period, and
 - ii) involved more than one incident of misbehaviour during that period, and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension, or
- b) the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.”

34. Thus the phrase “...that grounds exist that warrant the councillor's suspension” refers, on the statutory scheme, to the grounds identified in s.440I.

35. Although not strictly within the notion of “the grounds on which a councillor may be suspended”, s.440I(2) is a provision which governs the initiation of the process for the suspension of a councillor as contemplated by S.440H(1)(a). Section 440I(2) provides as follows:

“(2) The process for the suspension of a councillor from civic office cannot be initiated by a request made by the council unless:

- a) where subsection (1)(a) applies — the councillor has:
 - i) on two or more occasions been formally censured for incidents of misbehaviour that occurred during the period concerned, or
 - ii) on at least one occasion been expelled from a meeting of the council or a committee of the council

for an incident of misbehaviour during the period concerned, or

- b) where subsection (1)(b) applies — the councillor has:
 - i) been formally censured for the incident of misbehaviour concerned, or
 - ii) been expelled from a meeting of the council or a committee of the council for the incident of misbehaviour concerned.”

36. In its terms s.440I(2), as a matter of substance, operates as a precondition to the initiation of a request made by a council where either the councillor’s behaviour has been disruptive over a period, or there is one incident of a serious nature.

37. Relevant to the matter raised by Mr Ticehurst are the final provisions of s.440I which are as follows:-

“(3) Subsection (2) does not affect the Director-General’s power to initiate the process for the suspension of a councillor from civic office.

(4) Furthermore, subsection (2) does not prevent the Director-General from initiating the process for the suspension of a councillor from civic office as a result of a request or report referred to in section 440H.”

38. These subsections demonstrate that the alternatives for the initiation of the process in s.440H(1) are not mutually exclusive insofar as the matter in s.440H(1)(b) is concerned.

39. In the material tendered before the Tribunal, and in particular in the Report of Investigation, it is apparent that by letter dated 3 May 2007 the Mayor of Lithgow City Council, Mr Neville Castle, wrote to the Director-General with a request from the Council “...to take the necessary actions to consider the suspension of one of my councillors, Councillor Martin Ticehurst...”. In that letter the Mayor stated that the Council is of the opinion that the behaviour of

Mr Ticehurst has been and continues to be disruptive and has resulted in Council having to formally censure Mr Ticehurst on two occasions for breach of Council's Code of Conduct, and that the Council resolved at its last meeting to refer the matter to the Department of Local Government to enable the suspension proceedings to be considered. The letter enclosed certain material, including the Resolution of the Council.

40. Mr Ticehurst's submission on the matter of jurisdiction is directed to s.440N. Pursuant to s.440N(1), as an alternative to himself suspending the Councillor concerned under Division 3, the Director-General may refer a matter that is the subject of a request or a report referred to in s.440H for consideration by the Tribunal: s.440N(1). There is an important constraint to that ability as contained in s.440N(2) which provides as follows:-

“(2) However, a matter that is the subject of a request by a council may not be referred to the Tribunal unless the councillor concerned has previously been suspended under this Chapter for misbehaviour.”

41. Mr Ticehurst's submission was that, firstly, he has not previously been suspended under the Chapter for misbehaviour, that, secondly, the matter before the Tribunal was the subject of a request by a council and that accordingly the Director-General was not empowered to refer the matter to the Tribunal.
42. As referred above, there is no evidence that Mr Ticehurst has previously been suspended under Chapter 14 for misbehaviour. Hence one of the elements in s.440N(2) exists.
43. The real issue is whether the matter is “a matter that is the subject of a request by a council” for the purposes of s.440N(2). If it is, then the matter was not able to be referred to the Tribunal pursuant to s.440N(1).

44. For the reasons set out below the Tribunal is of the view that the matter is not one that “is the subject of a request by a council”.
45. Firstly, and *prima facie*, it is obvious that by the Council’s letter dated 3 May 2007, it purported to refer the matter of the misbehaviour of Mr Ticehurst to the Director-General. In this *prima facie* way it may be thought that that is sufficient to constitute the element of s.440N(2) that limits the Director-General’s power of referral to the Tribunal.
46. The words of s.440N(2) concerned with this element are “a matter that is the subject of a request by a council...”. That matter, in terms of Division 3, and more importantly that “request” is the request referred to in s.440H(1)(a). That request is a request for the initiation of a process for the suspension of a councillor “... made by the council by resolution communicated to the Director-General, in which the council states its belief that grounds may exist that warrant the councillor’s suspension”. The Resolution made by the Council on 16 April 2007 relevant to the matter of initiation was in the following terms:-
- “2. Councillor Ticehurst’s breach of the Code be referred to the Department of Local Government and the Minister for further consideration as this is his second breach of the Code”.
47. As part of that the first Resolution was that “Councillor Ticehurst be censured”.
48. In terms of the requirements set out in s.440H(1)(a), in its terms the Resolution did not constitute a request for the initiation of the process for the suspension of a councillor. In its terms the Resolution sought that the breach of the Code “be referred to the Department of Local Government and the Minister for further consideration”. Strictly speaking the Resolution did not constitute a request for the initiation of the process for the suspension of a

councillor – but rather simply referred (or deferred) the matter to the Department or the Minister.

49. Importantly also, and absent from the Resolution, is a statement (as required by s.440H(1)(a)) by the Council in the Resolution of a belief, by the Council, that grounds may exist that warrant the Councillor's suspension. Although the words "... As this is his second breach of the Code...." are contained in the Resolution, and although they may be seen to be words which may be taken to be an expression of grounds to warrant a suspension, the specific legislative requirement in this respect, as with the matter of the request, is absent.
50. Accordingly the combination of the two important aspects required by s.440H(1)(a) characterises the communication between the Council and the Director-General as one not made pursuant to s.440H(1)(a). This was a position adopted by the Director-General who advised Mr Ticehurst in a letter dated 7 January 2008 that he had "determined not to proceed with the Council's first referral relating to its Resolutions of 16 October 2006 and 16 April 2007".
51. In that same letter, and in a letter of the same date to the Council, the Director-General purported to take action pursuant to s.440H(1)(b) the provisions of which provide for:-

"A request made by the Director-General to the council for a report from the council in relation to the councillor's alleged misbehaviour".
52. That report was subsequently provided by the Council and it was on the basis of that report that the matter proceeded.
53. There is also a practical matter to take into consideration regarding the strict interpretation of s.440I(1)(a). Presumably neither the Director-General, the

Ombudsman, nor the Independent Commission Against Corruption operate in a vacuum of referral of matters to them concerning behaviour of councillors. On many, if not most, occasions the complaint may originate from the council itself. If a broad construction were to be adopted of s.440I(1)(a), then whenever a matter is referred to either of those three persons by a council and the matter comes to be referred pursuant to s.440N(1), there would be a constraint upon the power of the Director-General to refer the matter directly to the Tribunal. It is difficult to see how in the real world that would operate as it would in a de facto sense curtail the discretion of the Director-General set out in s.440N(1).

54. In the event that the Tribunal is wrong in its construction of the Resolution, there are two additional provisions of Division 3 which, on a proper reading of Chapter 14 as a whole, would tend to indicate that insofar as s.440H(1)(a) and (b) are concerned they are particularly not mutually exclusive, and that where the Director-General has taken action pursuant to s.440H(1)(b) it may constitute the appropriate initiation of a process for the suspension of a councillor. As set out above s.440I(3) and (4) are as follows:

“(3) Subsection (2) does not affect the Director-General’s power to initiate the process for the suspension of a councillor from civic office.

(4) Furthermore, subsection (2) does not prevent the Director-General from initiating the process for the suspension of a councillor from civic office as a result of a request or report referred to in section 440H.”

55. Subsection 440I(3) provides that the constraint upon a council initiating a process for the suspension of a councillor by reference to a period of behaviour, or a single event of a serious nature, does not affect the Director-General’s power to initiate the process for the suspension of a councillor from civic office. On its own this would tend to suggest that the two alternatives in s.440H(1)(a) and (b) can exist at the same time. Subsection 440I(4) arguably

extends this by providing that the constraint upon a council's initiation of a process does not prevent the Director-General from initiating the process as a result of a request or report referred to in s.440H. This subsection is of importance because it specifically contemplates a request (any request, including a request from a council), pursuant to s.440H, and then the Director-General himself initiating the process for the suspension of a councillor. Hence, reading the provisions together, it could be said that there may well be a request from a council, but pursuant to s.440I(4) the Director-General may initiate the process himself. In such an instance, as has occurred here, the initiation of a process is by a request made by the Director-General to the Council for a report pursuant to s.440H(1)(b), not by the Council of its own request.

56. For the reasons set out above, the Tribunal is of the view that the request by the Council was defective in its terms to be constituted as a request pursuant to s.440H(1)(a) because it did not constitute a request by resolution for the initiation of the process for the suspension of a councillor and the Resolution did not contain a statement by the Council of its belief that grounds may exist that warrant the Councillor's suspension.
57. The subsequent course by the Director-General to request a report pursuant to s.440H(1)(b) constituted the true initiation of the process for the suspension of a councillor pursuant to Division 3, and as such the constraint contained in s.440N(2) did not arise.
58. For these reasons, the referral of the matter by the Director-General pursuant to s.440N(1) was not affected by the constraints set out in s.440N(2).

The Double Jeopardy Submission

59. As with the jurisdictional submission, the double jeopardy submission is one that ordinarily ought to be addressed as a preliminary matter before a hearing, or certainly at the early stages of the consideration.
60. Broadly stated it is concerned with the “conviction” or “acquittal” of the same person for the same offence on only one occasion.
61. Mr Ticehurst assisted the Tribunal with an extensive submission on the law concerning double jeopardy. The essence of his submission was that because the matter had been considered by the Council’s Code of Conduct Committee and he had been found to have breached the Code of Conduct by that Committee (and/or the Council) any finding by the Tribunal would be another finding of breach by another person, and hence a double jeopardy.
62. The difficulty with the submission though is that the Code of Conduct Committee and its findings were not findings that were relevant to the Tribunal’s consideration of whether there had been a breach. The history of the matter set out in the Tribunal’s previous Determination sets out and records the fact that the matter of the breach of the Code of Conduct was considered by the Committee, and certain recommendations were made to the Council, which were adopted by it.
63. The role of the Tribunal pursuant to Chapter 14 though, aside from determining a breach of a Code of Conduct adopted by a council pursuant to that Chapter, is quite distinct from, and removed from any consideration by a Code of Conduct Committee established by the Council. Amongst other things the powers of the Tribunal in s.482A are not powers that reside within a Code of Conduct Committee. In a strict sense there is no occasion for there to be a double jeopardy in the sense contended by Mr Ticehurst.

64. Quite aside from that broad observation concerning whether double jeopardy exists in the present case, the legislative provisions make it abundantly clear that actions by a council relating to the same alleged instance of misbehaviour would not operate to create a double jeopardy situation. In fact consideration and determination by a council of misbehaviour operates as a precondition to grounds existing for the suspension of a councillor from civic office. Section 440I(2) actually contemplates the formal censuring of a councillor by a council as a condition precedent to the initiation of a process by a council for the suspension of that councillor. If the double jeopardy submission existed then that previous decision by the council would operate to estop any subsequent consideration by the Director-General, or the Tribunal, in relation to that incident. Because the legislature provides that the previous determination by the council is a condition precedent, and that once that condition is satisfied the Director-General or the Tribunal may proceed to determine matters in relation to that same incident, it is difficult to see how in the legislative scheme the double jeopardy situation arises as contended by Mr Ticehurst.
65. For these reasons the Tribunal rejects the submission of Mr Ticehurst concerning double jeopardy insofar as it is said to give rise to the dismissal of the proceedings. It will though be considered as part of the general matters going to consequence as set out below.

Is an Order under s.482A Warranted?

66. As set out above s.482A provides for certain available consequences where the Tribunal is satisfied that the behaviour concerned warrants action under that section. The alternatives include the counselling of the councillor, a reprimand of the councillor, a suspension of the councillor from civic office for a period not exceeding six months, or the suspension of the councillor's

right to be paid any fee or other remuneration without suspending the councillor from civic office.

67. These alternatives are available where a matter has been referred to the Tribunal under s.440N: s.482A(1).
68. Curiously, where, instead, the Director-General determines the matter pursuant to s.440K, the consequence available to the Director-General is limited to a suspension of the councillor from civic office for a period not exceeding one month: s.440K(1). Alternatives to that course are available to the Director-General pursuant to s.440O and those alternatives include a decision to take no further action, or referring the matter to the council with recommendations as to how the council might resolve the matter by alternative dispute resolution or otherwise: s.440O(1) and (2). There is the additional alternative, namely referral of the matter to the Tribunal pursuant to s.440N: s.440N(1) and s.440O(2).
69. Where the Director-General makes an order of suspension, the councillor may appeal to the Tribunal against such an order: s.440M(1). In such an appeal though the powers of the Tribunal are limited by s.440M(4) to either a confirmation of the order, the quashing of the order, or an amendment of the order consistent with the powers of the Director-General. Those powers are the powers identified above which range from a suspension for a period not exceeding one month, or a referral to the council with a recommendation as to how the matter might be resolved.
70. Thus in an appeal situation where the Director-General has made an order suspending the councillor, the suspension power of the Tribunal is limited to a one month period. This is in contrast to the powers of the Tribunal pursuant to s.482A which are for a larger period, and as set out above.

71. Although Mr Ticehurst made no specific submission in this respect, treating the proceedings before the Tribunal as if an appeal to the Tribunal from an order of the Director-General to suspend Mr Ticehurst, such a matter may be considered relevant to the period of suspension where the referral is from a council in a practical sense but not in a statutory formal sense because of a defect in the Resolution.

72. At [8]-[10] and [20] above, the Tribunal set out the general and specific submissions of the Director-General in respect of any possible consequence under s.482A. At [12]-[18] and [21]-[22] above the Tribunal has recorded in some reform the submissions of Mr Ticehurst.

73. Insofar as the matter of precedent is concerned, whilst Mr Ticehurst's reference to the Land and Environment Court decision of *Shellharbour City Council v. Stewart* [2008] NSWLEC 151 is to a finding of that court in relation to a breach of s.664, that Decision is distinguishable for the following reasons:-

- The proceedings before the Tribunal involve a breach of a Code of Conduct adopted by the Council, which also amounted to a breach of s.664 whereas the proceedings before Biscoe J was limited to a breach of s.664;
- The proceedings before the Land and Environment Court were not brought pursuant to Chapter 14 of the *Local Government Act*;
- The proceedings before the Land and Environment Court involved an exercise of that Court's civil jurisdiction in which the Court's powers were to make such order as it thinks fit "...to remedy or restrain..." the breach (of the Act): s.676(1). Courses such as those contained in s.482A were not, *prima facie*, available to the Court;
- No specific prayer for relief concerning a "penalty" type provision was sought by the Council (and arguably nor could it be) other than an order restraining any further leaks of confidential information, and the delivery up of the released information. It was in that context that Biscoe J limited the relief to a declaration of breach (of s.664).

74. Mr Ticehurst also raised the matters of time and money in relation to the proceedings against him. Insofar as money was concerned, the estimated amounts related to the cost of the proceedings before the Tribunal, being costs borne either by the Director-General or the Council, rather than costs that he himself incurred. Insofar as the Tribunal is aware Mr Ticehurst has remained unrepresented and has not incurred legal costs himself; however he has undoubtedly expended personal time in the defence of the allegations.
75. The matter of time is of some relevance to the matter of consequence, it being some four years since the confidential material was discussed in a closed session, three years since the Council's first censure motion against Mr Ticehurst, two and a half years since the second censure motion and the complaint to the Director-General, and some eighteen months since the Director-General requested a report from the Council pursuant to the s.440H(1)(b). This timeline is undoubtedly regrettable but is not of itself sufficient to necessarily negate any of the alternative consequences available under s.482A.
76. In relation to the miscellaneous matters that were raised by Mr Ticehurst, it is the case that Mr Ticehurst was legally entitled to defend his position, which he was given opportunity to do. The Director-General observed no contrition on the part of Mr Ticehurst and there is not apparently any contrition expressed – but this is somewhat consistent with Mr Ticehurst's position of defending the alleged breach. It may be said that it is difficult to claim innocence and at the same time show contrition for an offence, although one may show contrition if it be a fact that the offence is proved. In judicial authorities dealing with criminal prosecutions, although not strictly relevant here, courts have expressed the view that where there are pleas of guilty (again not necessarily strictly relevant in this Tribunal) persons are entitled to a "discount" in

sentencing; and equally the existence or non existence of contrition on the part of the relevant person also affects any sentencing posed.

77. Mr Ticehurst also submitted that he was entitled to rely upon a statutory declaration in the consideration of the matter by the Lithgow City Council Code of Conduct Committee and expected that it would make reasonable enquiries before making a recommendation and that it would act fairly and without bias. As set out in its earlier Determination, the Tribunal is not concerned with conducting a review of that Committee's recommendation or conduct. Strictly speaking it is irrelevant to the proceedings before the Tribunal. It may be though that if the Committee undertook different investigations or further investigations the possibility existed that their recommendation may have been different, and consequently the Council's position with respect to the complaint to the Director-General concerning Mr Ticehurst's conduct may have been different. For the reasons set out in the Tribunal's Determination though, the matter was considered afresh, particularly with respect to the statutory declaration of Mr Ellis, and it is difficult to conclude any real connection between any notion of procedural fairness before the Code of Conduct Committee and any action warranted under s.482A as imposed by the Tribunal.
78. Finally, Mr Ticehurst complained that he was denied natural justice before the Tribunal in essence by the vote in the Lithgow City Council against a resolution to provide legal assistance to Mr Ticehurst. It is said that the Resolution was denied in circumstances where persons voting in relation to it ought not to have participated in that vote. The matter of that vote is not a matter before the Tribunal and although Mr Ticehurst raises it as a matter which he describes as a denial of procedural fairness to him, the proceedings before the Tribunal were conducted in a way which afforded to Mr Ticehurst at every available opportunity avenues for the consideration of any matters that he wished to put before it.

79. This is the first matter considered by the Tribunal under Chapter 14 concerning misbehaviour and hence there is no prior Determination which can operate as a guide.
80. Having regard to the circumstances of the alleged conduct by Mr Ticehurst as set out in the Tribunal's earlier Determination and the matters set out above, the Tribunal is of the view that pursuant to s.482A, action is warranted thereunder. The alternatives of counselling Mr Ticehurst or a reprimand do not appear to be appropriate in the circumstances of the present case primarily because of Mr Ticehurst's refusal to accept, apparently, that the conduct in publishing material on a website where the material is of a confidential nature, or at the very least part of the business of the Council, was not a breach of the Code of Conduct or of the *Local Government Act*. In addition there had been censure motions by the Council which did not appear to have the effect of procuring the removal of the material.
81. Insofar as s.482A(2)(d) is concerned there is no evidence before the Tribunal that Mr Ticehurst is being paid any fee or other remuneration relevantly to which such an order can be directed.
82. In the circumstances of the proceeding overall, the Tribunal is of the view that the behaviour concerned warrants action under s.482A(2)(c), namely a suspension of Mr Ticehurst from civic office. The maximum period permitted under s.482(2)(c) is a period not exceeding six (6) months. Having regard to the matters set out in its earlier Determination, and this Determination, especially having regard to the arguable ambiguity concerning whether the Code of Conduct Committee's report was confidential information, or whether it lost that flavour because of its provision to Mr Ellis, and the nature of the report itself, the Tribunal is of the view that pursuant to s.482A(2)(c) the behaviour of Mr Ticehurst warrants action such that the Tribunal will

suspend Mr Ticehurst from civic office for a period of one (1) month from the date of this Determination.

83. The Tribunal will make a formal Order in this respect

Date: 28 August 2009



ADRIAN GALASSO SC

Local Government

Pecuniary Interest and Disciplinary Tribunal