

**LOCAL GOVERNMENT
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1983

LGPIDT 09/2010

DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET

**RE: COUNCILLOR MAXWELL WALKER, MID-WESTERN
REGIONAL COUNCIL**

DETERMINATION

1. This proceeding concerns a complaint pursuant to Chapter 14 of the *Local Government Act*, 1993 in relation to Councillor Maxwell Walker, a councillor of the Mid-Western Regional Council.
2. The complaint concerns certain action undertaken by Cllr Walker at an ordinary meeting of the council held on 18 November 2009 when the Council considered a Mayoral Minute relating to the cost of water to be supplied by the council to the Mudgee Racecourse Club Inc. At the time of the meeting Cllr Walker was the Chairman of the Mudgee Race Club and the Mayoral Minute concerned a reduction in the water rates to be paid by the Mudgee Race Club. Cllr Walker declared an interest in the matter the subject of the Mayoral Minute, but that notwithstanding proceeded to make a statement to the councillors at the meeting and thereafter left the meeting for debate on the Mayoral Minute and voting on it.

3. That conduct raises issues concerning whether there has been a breach of Chapter 14 of the *Local Government Act* and, if so, whether there should be any orders in consequence of that breach.
4. At the hearing before the Tribunal held on 14 July 2011 Clr Walker was represented by Mr Whitehouse, Solicitor, and the Director General was represented by Mr Robinson of Counsel.
5. Following the hearing the Director General requested that a further submission be provided to the Tribunal concerning one of the issues raised at the hearing. On 9 September 2011 the Tribunal determined to allow that course and indicated to the parties that it would provide reasons for that decision as part of its determination of the matter, as set out herein.
6. For the reasons set out below the Tribunal has determined that at the meeting on 18 November 2009 Clr Walker did breach Chapter 14 of the *Local Government Act* and that the appropriate consequence pursuant to s.482 is that Clr Walker be counselled.

FACTUAL BACKGROUND

7. Clr Walker was elected to the council on 25 March 2006 and at all material times has held the position of Deputy Mayor. Clr Walker had also served as a Councillor on the former Mudgee Shire Council between 16 February 2002 until the date of its dissolution in late May 2004.
8. Clr Walker has also been the Chairman of the Mudgee Race Club Incorporated for approximately 10 years. The Mudgee Race Club Inc is an incorporated association that undertakes racing events at the Mudgee Racecourse.

9. The Mudgee Racecourse is within the Mudgee Memorial Sportsground which is an area of Crown land managed by a Trust known as the Mudgee Memorial Sportsground Trust. Water for the purposes of use at the Sportsground is supplied by the council, and in previous years separate rates notices for the supply of water had been issued to the Trust, the Mudgee Race Club, and the Mudgee & District Greyhound Club.
10. In the current year (2009) tax invoices for water consumption had been issued solely to the Trust with respect to approximately three water metres that were present at the showground.
11. The more significant user of water at the showground was the Mudgee Race Club and the Trust had apparently sought and collected from the race club monies representing its share of the charges for water that had been made against the Trust by the Council.
12. So as to ensure that the racecourse was in a condition acceptable to licensing authorities and in a condition which would promote an appropriate racecourse for events, the race club was required to continually use relatively significant amounts of water.
13. On 3 November 2009 the Mudgee Race Club wrote to the General Manager of the Council requesting that the Council "address the water charges" and requesting that the council consider charging the race club for water at a particular rate and that that charge be retrospective for the past six (6) months. The letter from the Mudgee Race Club identified Clr Walker as the Chairman and his wife as the Secretary.
14. Clr Walker's Chairmanship of the race club was known to the Council. In a series of annual returns completed by Clr Walker pursuant to s.449(1) Clr Walker had identified himself as Chairman of the Mudgee Race Club Inc.

15. An ordinary meeting of the Council was due to be held on the 18 November 2009 and approximately the week prior notice of the meeting was given to councillors together with copies of the business papers for that meeting. The business papers did not contain a Mayoral Minute, nor did the business papers have any reference to the request by the Mudgee Race Club, as referred to above.
16. In the afternoon of 18 November 2009 there was a briefing session for councillors which was held before the formal Council meeting began. Following the completion of the briefing session the General Manager distributed to all councillors a copy of a Mayoral Minute. That item was to be included in the business to be determined by the Council at the meeting to commence later that evening.
17. The Mayoral Minute concerned the request from Mudgee Race Club and contained a detailed report addressing the ownership of the land in which the racecourse is located, the history concerning the charging of rates for water usage, the particular request from the racecourse and the financial consequences of acceding to that request, being that if the council accepts the recommendation contained in the report there would be a loss of income to the water account for the Council for the previous financial year ending 30 June 2009 in the amount of \$6,270, and a similar amount for the year ending 30 June 2010. The Mayoral Minute recommended that the Mudgee Race Club Inc be charged at the rate sought by it in its letter, that the General Manager commence negotiations with the club to enter into an agreement for the supply of raw water, and that the council agree that the amount \$6,270 be held in credit to the Mudgee Race Club to pay for future water usage.

18. Another Councillor, Cllr Kennedy, upon receipt of the Mayoral Minute asked Cllr Walker if he would explain the minute to the Council, a matter with which Cllr Walker agreed.
19. The minutes of the meeting identify that Cllr Walker was present at the meeting and that the matter of the Mayoral Minute was the fourth item on the agenda. Following the consideration of apologies (Item 1), the confirmation of minutes of the meeting held on 21 October 2009 (Item 2 - the motion for confirmation of which was seconded by Cllr Walker) and the matter of "disclosures of interest" (Item 3), Item 4 entitled "Mayoral Minute, cost of water – Mudgee Race Club Inc" was considered.
20. Item 3 of the minutes of the meeting, "Disclosures of Interest", disclose that:

"Councillor Walker advised that he had a conflict of interest in the Mayoral Minute as he was Chairman of the Mudgee Race Club. He intended to leave the room for the debate but intended to make a statement prior to leaving".
21. Further, within the minutes in relation to Item 4 it was also recorded that:

"Councillor Walker advised that he had a conflict of interest on this matter as he was the Chairman of the Mudgee Race Club. He made a statement and left the meeting at 6:06pm".
22. A motion representing the recommendation in the Mayoral Minute was put and an amendment to that motion was put and lost. However the original motion was put and carried. The minutes record the Cllr Walker returning to the meeting at 6:34pm.
23. Notwithstanding the disclosure of an interest by Cllr Walker and notwithstanding that he left the meeting in the circumstances of the nature of the disclosure made by him and the fact that he made a

statement to the councillors before leaving, the Director General alleges breaches of s.451(1) and (2) of the *Local Government Act*.

DUTIES OF DISCLOSURE

24. Division 3 of Chapter 14 of the *Local Government Act* is concerned with "Disclosure of pecuniary interests at meetings". That Division contains two (2) requirements, the first is to disclose the nature of an interest, and second is to not participate in the meeting of the council in relation to the subject matter of the disclosure. In terms, s.451(1), dealing with disclosure, is as follows:

"(1) A councillor or a member of council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable."

25. In so far as duties after the disclosure are concerned, s.451(2) in terms provides as follows:

"(2) The councillor or member must not be present at, or in sight of, the meeting of the council or committee:

- (a) at any time during which the matter is being considered or discussed by the council or committee, or
- (b) at any time during which the council or committee is voting on any question in relation to the matter."

26. The duties contained in s.451(1) and (2) are, for the purposes of Chapter 14, mutually exclusive. Simply because there may be a disclosure of interest does not mean that one does not also need to comply with the obligation in s.451(2) to not participate in the meeting. As identified above, there in fact was a disclosure made by Cllr Walker, and he did leave the meeting; however the issues in this matter are more concerned with whether the disclosure was sufficient, and (regardless to the answer of that question) whether he satisfied the requirement to leave the meeting.

27. Both s.451 (1) and (2) however are predicated upon a councillor having a "pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council at which the matter is being considered". Fundamental to that notion, for it is common ground that Cllr Walker was present at the council meeting, is the question of whether Cllr had a pecuniary interest in the matter with which the council is concerned. Cllr Walker at the hearing before the Tribunal contended that he had no such interest.

A PECUNIARY INTEREST

28. The concept of a "pecuniary interest" is specifically defined in s.442 of the Act as follows:

"(1) For the purposes of this Chapter, a "pecuniary interest" is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person."

29. The concept of a pecuniary interest is not absolute and a qualification is contained in s.442(2) which provides:

"A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448."

30. In terms of s.442(2) the exceptions relate to remoteness or insignificance on the one hand, or a particular nature of interest on the other (as identified in s.448).

Whilst s.442(1), which defines a pecuniary interest, in its terms directs attention to an appreciable financial gain or loss "to the person", the person to whom the gain or loss extends for the purposes of Chapter 14 is expanded in s.443. Relevant to the circumstances of this case s.443(1) provides that: "For the purposes of this Chapter, a person has a pecuniary interest in a matter if the pecuniary interest is the interest of...

c) a company or other body of which the person, or nominee, partner or employer of the person, is a member.”

31. That situation is modified however by s.443 (3) which provides as follows:

“However, a person is not taken to have a pecuniary interest in a matter as referred to in subsection (1)(b) or (c):

.....

(c) just because the person is a member of ... a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body.”

32. Accordingly, whilst s.442(1) appears to limit the concept of a pecuniary interest to a gain or loss to the particular person (in this case a councillor), that concept is extended by s.443(1)(c) where the interest is of a company or other body of which the person is a member; however that position is then arguably ameliorated by s.443(3)(c) by reference to beneficial interest in any shares of the company or body.

33. In the circumstances of this case the pecuniary interest submitted by the Director General was not an appreciable financial gain or loss to Clr Walker (s.442(1)), but rather the pecuniary interest of a company or other body of which Clr Walker is a member, namely the Mudgee Race Club.

34. Pecuniary interest itself is one in which there needs to be “a reasonable likelihood or expectation of appreciable financial gain or loss”. The Tribunal is satisfied, subject to addressing a submission by Clr Walker below, that in the consideration of the matter before the council, namely, the request by the Mudgee Race Club to reduce the rates charged by the council for the supply of water that there was, if the recommendation was passed, a reasonable likelihood of financial gain to Mudgee Race Club in the form of savings for money to be paid

for water supplied, and that the quantum involved (some \$6000 per annum) was an appreciable financial gain.

35. Thus, subject to the other matters raised by Clr Walker and addressed below, *prima facie* s.442(1), by operation of s.443(1)(c) is satisfied in the circumstances of this case.
36. That leaves the operation of s.443(3), the terms of which as relevant to this case has been set out above. In its operation s.443(3) excludes the deeming effect of s.443(1) in certain circumstances. In the case of being a member of a company or other body the exclusion operates "so long as the person has no beneficial interest in any shares of the company or body".
37. The Mudgee Race Club Inc is an incorporated association and Clr Walker was a member of that incorporated association. An incorporated association is a "company" for the purposes of Chapter 14 of the *Local Government Act*: see s.8 *Associations Incorporation Act*, 2009. Alternatively, even if it is not it is clear that as an incorporated association, or even an association, it would satisfy the description of an "other body".
38. There appeared to be no issue but that Clr Walker's involvement with the Mudgee Race Club was on a voluntary basis and there was no evidence that he held any beneficial interest in any shares of the Mudgee Race Club Inc, whether that entity be a company or body for the purposes of s.443(3). Accordingly the submission that the effect of s.443(3) is to exclude Clr Walker from being taken to have a pecuniary interest in the matter relating to the race club is at least *prima facie* available.
39. However, s.443(3)(c) does not operate in an absolute way. The relevant phrase in s.443(3)(c) is the phrase "just because ...". That

same phrase is used in s.443(3)(b), but not in (a). The effect of the use of the phrase is that the deeming effect of s.443(1) cannot be taken to exist simply because of membership of an entity provided there is no beneficial interest in the shares of that entity; and so it would be said that Clr Walker was a member of the entity and held no beneficial interest in any shares of the entity.

40. However, it is not simply the case that Clr Walker is said to have had a pecuniary interest in the matter before the council as a mere member of the Mudgee Race Club. Clr Walker was and had been for many years the Chairman of the Mudgee Race Club. On that basis it is not said that Clr Walker is taken to have a pecuniary interest just because of his membership with the Mudgee Race Club; but rather it is because of his holding of the position of Chairman of the race club that he may be said to have a more relevant relationship with the race club. Such a construction is consistent with the Tribunal's decision in *Clr Wilton (Wollongong City Council)* PIT 3/1994 (28 September 1995) at [5] page 12.

41. Such a construction is also consistent with the other provisions of Chapter 14, in particular s.448 which, as set out above, is a section specifically dealing with interests which do not need to be disclosed. Pursuant to s.448(e) an interest which does not have to be disclosed for the purposes of Chapter 14 is:

"an interest as a member of a club or other organisation or association, unless the interest is as the holder of an office in the club or organisation (whether remunerated or not)".

42. Interests relating to corporations (s.448(h)), and corporations or associations or partnerships (s.448(i)) are also addressed in particular ways.

43. Because of Clr Walker's holding of the position of Chairman of the Mudgee Race Club accordingly it cannot be said, for the purposes of

s.443(3), that he is taken to have a pecuniary interest just because he is a member of the company or other body, but rather because he is not only a member but also chairman (an office holder) of that company or other body. Accordingly, for the purposes of s.443(1)(c) Clr Walker is a person who has a pecuniary interest in the matter before the council being the interest of a company or other body of which he is a member, but not just because he is a member (s.443(3)(c)).

44. That leaves the factual submission made by Clr Walker to the effect that there was no evidentiary support for the proposition that there an appreciable financial gain to the Mudgee Race Club to be derived from the matter of the subject of the Mayoral Minute. That submission was founded upon the proposition that the land to which the water was supplied was Crown land, that the Trust was created pursuant to the *Crown Lands Act*, and that the Trust was exempt from the payment of rates; or alternatively on the face of the water rates notices the Trust was liable to pay for water but not the Mudgee Race Club.
45. In so far as the matter of the Trust being exempt from payment of rates is concerned, whilst such a proposition may be available in relation to rates in the nature of rates and charges pursuant to the *Local Government Act*, (see s.555(1)(a)) that position is unclear in the circumstance of the present case because the exemption does not apply where the land is leased for private purposes. Furthermore, here the charges which were the subject of the Mayoral Minute were in relation to the supply of water. No such exemption applies in those circumstances. In particular s.556 contains no general exemption in favour of the Crown with respect to "water supply special rates", and no apparent exemption in the circumstances of the present case.

46. Alternatively, if the "rates" are, in reality, service charges for the supply of water by a water supply authority (in this case constituted by the council) the levying of service charges is controlled by the *Water Management Act*, 2000. Pursuant to s. 312 of that Act a water supply authority may not levy service charges in respect of lands described in schedule 4 (s. 312 (1)) and the exemption to that proscription does not extend to the circumstances of the present case: s. 312 (2). Schedule 4, in so far as it relates to Crown land includes item (8) which relates to "land owned by the Crown that... is not leased by the Crown to any person for private purposes," which is in terms, similar to s. 555 (1) (a) of the *Local Government Act*.
47. In the circumstances of the present case it is unclear what the nature of the tenure between the Crown as owner of the Racecourse and the Mudjee Race Club is. In circumstances where the mere submission is made that Crown land is exempt, and in the absence of any evidence or indication as to the nature of the tenure, where there has apparently been for some significant period of time the levying of amounts of money to the Trust for the supply of water, and the Trust (as the Crown) has not raised any objection to that levying and has presumably paid it, and for that matter the race club has contributed to its share of the water usage, the Tribunal is entitled to infer that the exemption from rates pursuant to the *Local Government Act* or pursuant to the *Water Management Act* is not available with respect to the race club land.
48. Clr Walker further submitted that on the face of the tax invoices it was the Trust rather than the Mudjee Race Club that was liable for the charges, and hence any voting in relation to the resolution affected the Trust but not the race club. The difficulty with such a submission is that it is inconsistent with the position represented by the Mudjee Race Club itself. Irrespective of the organisation to whom the tax invoice for water charges was directed, the very matter the subject of

the Mayoral Minute occurred because of the request by the Mudjee Race Club (and not the Trust) for a reduction in rates. It is apparent from that request that whatever rates may be charged to the Trust they were to find their way to the Mudjee Race Club. This was confirmed in a record of interview between Cllr Walker and representatives of the Director General in which Cllr Walker confirmed that the Mudjee Race Club is responsible for the payment of water from one of the meters at the Sportsground (in an apparent arrangement with the Trust.)

49. Furthermore in a statutory declaration tendered in evidence before the Tribunal Cllr Walker stated at [24]:

"I considered the Mayoral Minute did not properly explain the Race Club's request as the Race Club simply wanted a reduction in rates for the one water line that watered the track itself, but they did not seek a reduction of all water supplied to the Race Club premises."

50. Accordingly, the material before the Tribunal supports the conclusion that by whatever arrangement water used by the race club was ultimately paid for by the race club, albeit that the tax invoice for the water usage may have been initially sent by the council to the Trust.

51. In the circumstances set out above, the Tribunal is satisfied that the Mudjee Race Club stood to realise an appreciable financial gain (in the form of a saving) from the matter the subject of the Mayoral Minute, and by the operation of s.442 and s.443 Cllr Walker had a pecuniary interest in the matter before the council.

THE DUTY OF DISCLOSURE

52. The duty of disclosure as set out above, arises from s.451(1). Relevant to the duty is the requirement that a councillor "who has a pecuniary interest in any matter with which the council is concerned

and who is present at a meeting of the council at which the matter is being considered" must "disclose the nature of the interest to the meeting as soon as practicable".

53. For the reasons set out above the Tribunal is satisfied that Cllr Walker had a pecuniary interest in the matter the subject of the Mayoral Minute. The next element is that it must be a matter with which the council is concerned. The Mayoral Minute in terms sought to address the request from the Mudgee Race Club for the reduction in water rates. The Mayoral Minute was the fourth item on the (revised) agenda for the meeting, and the fourth item considered at the meeting of the council. Hence, that element is satisfied.

54. The next element is that the councillor not "be present at the meeting of the council at which the matter is being considered". There is no doubt, by the reference to the minutes of the meeting, that Cllr Walker was present at the meeting, and the minutes record Cllr Walker as having been present upon Item 4 being called as the item for consideration by the council. In fact, as set out above, the minutes record Cllr Walker as having made a statement to the council after the matter had been called.

55. The audio recording of the council meeting confirms that the minutes properly record that sequence of events that is that Item 4 on the agenda was called, being the Mayoral Minute, and that Cllr Walker was present. Accordingly for the purpose of s.451(1) the Tribunal is satisfied that Cllr Walker was present at the meeting of the council at which the matter was being considered.

56. The somewhat unusual circumstances of this case relate however more to the notion of the requirement to "disclose the nature of the interest to the meeting as soon as practicable". As referred above Cllr Walker certainly made a disclosure of some sort. It is also apparent

that he made that disclosure as soon as practicable. As referred above, the Business Papers for the meeting did not contain the Mayoral Minute and it was only after the councillor briefings session in the afternoon of the meeting that the Mayoral Minute was added to the Business Papers by the General Manager. When Item 3, "disclosures of interest", was called by the Mayor, Cllr Walker made a disclosure in relation to Item 4, the Mayoral Minute.

57. In making the disclosure, the minutes of the meeting record Cllr Walker as having described it as a "conflict of interest". That description is contained in Item 3 "disclosures of interest", and also under Item 4, "Mayoral Minute". In his statutory declaration tendered before the Tribunal Cllr Walker identified his disclosure not so much as a "conflict of interest" but rather as a "non-pecuniary conflict of interest". This position is supported by the audio recording in which it is apparent that he described his interest as a "non-pecuniary conflict of interest".
58. In either instance (that is whether by reference to the minutes or the audio recording) the nature of the "conflict of interest" (whether non-pecuniary or not) was because he (Cllr Walker) "was Chairman of the Mudgee Race Club".
59. The Director General submits that the failure to declare a "pecuniary interest" in those precise terms in relation to the Mayoral Minute constituted a breach of s.451(1). To have simply declared a "conflict of interest" was submitted not enough because that does not disclose the nature of the interest; or alternatively to have disclosed it as a "non-pecuniary conflict of interest" was to mislead the council because, by reference to Code of Meeting Practice there is a difference between declaring a pecuniary and a non-pecuniary interest (in the case of a non-pecuniary interest a councillor can stay and talk to the meeting following a resolution by the council members

to that effect, whereas with a pecuniary interest pursuant to Chapter 14 the councillor must leave).

60. Cllr Walker on the other hand submits that there is no magic in the phrase "pecuniary interest" in so far as a disclosure is concerned, and that s.451(1) is not concerned with such labels but rather to a disclosure of the "nature of the interest".
61. In so far as the allegation is made that Cllr Walker breached s.451(1) of the *Local Government Act* the Tribunal is satisfied that such an allegation is not made out. According to the minutes, Cllr Walker is said to have disclosed a "conflict of interest" in the Mayoral Minute. Undoubtedly he did have such a conflict of interest. It is also apparent, by reference to the audio recording and Cllr Walker's statutory declaration, that he actually described it as a "non-pecuniary conflict of interest". He described it in that way because, notwithstanding the operation of s.443 of the Act as addressed above, he was of the view, and is still of the view, that where he stands to achieve no personal financial gain, he does not have a pecuniary interest, believing instead that a pecuniary interest is only concerned with personal gain. As set out above s.443 does not operate in this way, but rather deems as a pecuniary interest of a person the pecuniary interest in someone else.
62. That mislabeling by Cllr Walker explains the use of the adjectival phrase "non-pecuniary" with "conflict of interest". If that observation alone was fundamental to a finding of s.451(1) then it would be sufficient to find that an adequate disclosure had been made.
63. However, more importantly, s.451(1) is not so much concerned with the label "pecuniary interest" as the nature of the interest itself. The legislative intention of s.451(1) is not simply that councillors declare, as a label, "pecuniary interest" in a particular matter, but rather that the nature of the interest be declared. Thus if someone is to stand to

gain or lose personally from a matter then that is to describe "the nature of the interest"; alternatively if in a matter to be considered by council someone's spouse is to gain or lose in a financial way then a reference to that aspect is to describe "the nature of the interest". That is not to say that in some instances a use of the descriptor "I have a pecuniary interest in matter [x]" will not be sufficient, as a function of the particular factual circumstances.

64. However in the circumstances of this case the Tribunal is satisfied that Clr Walker has sufficiently described "the nature of the interest" in the matter before the council. The matter before the council was the request by the Mudgee Race Club for reduction in water rates. Clr Walker was the Chairman of the Mudgee Race Club, and it was because of the holding of that office that (as set out above) he derived his "interest", a pecuniary one, in the matter before the council. He made a disclosure of "conflict", and described the nature of it, and in the circumstances of the present case the Tribunal was satisfied that he complied with the obligations contained in the s.451(1).
65. Although his use of the adjectival phrase "non-pecuniary" may have misled the council, to use the words of the Director General, that does not mean that, viewed objectively, he cannot be found to have satisfied s.451(1). In any case the duty of disclosure, and then the duty of abstinence from the meeting, are duties imposed upon individual councillors, in relation to the later of which will be discussed below, rather than duties which are modified by anything that the council meeting may or may not have been misled into doing or from refraining from doing.
66. Accordingly the Tribunal is satisfied that Clr Walker has made sufficient disclosure for the purposes of s.451(1) of the *Local Government Act*.

THE ROLE OF ANNUAL RETURNS

67. One of the issues raised by the Tribunal during the course of the hearing was whether, if there was a finding of a failure to have disclosed a pecuniary interest, the annual returns lodged by Clr Walker were sufficient for the purposes of s.454 of the Act.
68. S.454 of the Act provides that:
- “A general notice given to the general manager in writing by a councillor to the effect that the councillor is:
- a) a member of a specified company or other body,
- ...
is, unless and until the notice is withdrawn, sufficient disclosure of the councillor’s interest in a matter relating to the specified company, body or person that may be the subject of consideration by the council or council committee after the day of the notice. (only relevant parts included)”
69. In a series of annual returns prepared by Clr Walker pursuant to s.449 (both before and after November 2009) Clr Walker’s holding of an office with the Mudgee Race Club (as Chairman) was disclosed.
70. As the Tribunal has found that Clr Walker has not breached s.451(1) of the Act this issue is not strictly speaking required to be determined.
71. However notwithstanding that position, in the circumstances of the present case the Tribunal is satisfied that the lodgment of returns pursuant to s.449 would not have been sufficient for the purposes of s.454 as a “general notice” given to the General Manager in writing. Both of those sections are contained within the same Chapter, but it is not apparent that the lodgment of an annual return pursuant to s.449 of necessity constitutes a general notice, being arguably a separate process, in s.454.
72. But of more importance is the fact that the duty contained in s.451(1) of disclosure of a pecuniary interest does not in terms exempt the

application of such a duty where an annual return addresses the matter the subject of the duty engaged in s.451(1). In this respect it may be taken that the legislative intention is not only to have required an annual return of interests, but also at point in time in the consideration of a matter of a meeting to require a specific disclosure of pecuniary interest except where there is a written statement made to the General Manager. This may be because such a written statement would operate as an exception rather than a rule (of lodgment of returns) and may, when the Business Papers for a particular meeting are being prepared (presumably by the General Manager) serve to identify a need for a disclosure of an interest.

THE DUTY TO LEAVE THE MEETING

73. As set out above, where there is a pecuniary interest in a matter to be considered by a council, it is insufficient alone to make a disclosure pursuant to s.451(1).
74. Pursuant to s.451(2) the councillor must also not be present at, or in sight of, the meeting of the council at any time of which the matter is being considered or discussed by the council. S.451(2)(b) extends that obligation to "anytime during which the council is voting on any question in relation to the matter". This aspect is not relevant here.
75. In the factual circumstances of the present case Item 4, the Mayoral Minute, was called to be considered by the council. Both before it was called, and upon it being called, Cllr Walker made the disclosure which the Tribunal has addressed above. That notwithstanding he announced that he would leave the room for debate, but intended to make a statement prior to leaving.
76. Because, formally, the matter of the Mayoral Minute had begun to be considered, and because Cllr Walker was present at the meeting of

the council at that time, and there can be no doubt about that, he having made a statement to the council in relation to the matter, the Tribunal is satisfied that Cllr Walker has breached s.451(2) of the *Local Government Act*.

77. In this respect s.451(2) is less concerned with minute distinctions between the making of statements to the council and the participation in the debate concerning the matter. The section is quite clear and it requires a councillor to not be present at or in sight of a meeting at any time in which the matter is being considered or discussed. Upon the matter being called for consideration for the purposes of s.451(2)(a) the matter was being considered or discussed by the council. The clear intention of the section is to ensure councillors who have a pecuniary interest in a matter do not affect or infect the consideration process where the motivation is or might be the appreciable financial gain or loss of themselves or those with whom they are deemed to have the pecuniary interest. It is a process which seeks to ensure objectivity in council decision making. To conceive that one can make a statement upon a matter being commenced to be considered and then leave it for the purposes of the debate is, on one view of the section, quite to the contrary of its intention. To this effect it might be said that upon making the statement the damage had been done in relation to the matter before the council, the particular councillor's position being known as to whether the matter should be passed or not.

78. Furthermore the obligation is absolute. It is not modified by a request by another councillor to explain the Mayoral Minute. Nor is it modified by permission granted by a Mayor to make a statement to the council. Whilst that is undoubtedly a matter relevant to the question of consequence (which will be addressed below), once it is determined that the person has a pecuniary interest the obligation is without any apparent legislative exceptions.

79. Accordingly for the purposes of s.451(2) the Tribunal finds that Cllr Walker has breached that section by failing to be present at or insight of the meeting of the council at any time of which the matter was considered or discussed by the council.

THE DIRECTOR GENERAL'S APPLICATION FOLLOWING THE HEARING

80. As referred to at [5] above, following the hearing the Director General sought leave to make a further submission to the Tribunal with respect to one of the issues that were debated at the hearing on 14 July 2011.
81. That matter related to the question of whether Cllr Walker had a pecuniary interest. At a preliminary conference held by the Tribunal on 18 March 2011, Cllr Walker through his legal representative indicated by way of apparent concession that he held a pecuniary interest in the matter the subject of the meeting considered by the Tribunal above. At the commencement of the hearing on 14 July 2011 Cllr Walker through his legal representative submitted that no such concession had been made; or alternatively applied to withdraw such a concession.
82. At the hearing the Tribunal proceeded upon the basis that if such a concession was made leave be granted to withdraw the concession so that Cllr Walker could put his case submitting that there was no pecuniary interest in the matter the subject of the meeting. This was on the basis that the Director General, through his legal representative, would be able to address that question, effectively without notice because of the apparent concession that had been made at the preliminary conference.

83. During the course of the hearing one of the issues that arose was the interplay between s. 443 and 448 (g), as addressed by the Tribunal above.
84. The Director General's additional submission sought to draw to the Tribunal's attention an earlier decision of the Tribunal (constituted by Mr. Holland QC) in *Clr Wilton (Wollongong City Council)*, 28 September 1995, and in particular pages 11-13, in so far as the matter in which such an interplay had previously been addressed.
85. With a view to providing that information to the Tribunal, on 15 July 2011 the Director General, through his legal representative, sent an email to Clr Walker's legal representative enclosing a copy of the further submission indicating that the Director General proposed to send the submission to the Tribunal as soon as practicable, and seeking to know whether Clr Walker objects to such a course and if so on what basis might be the asserted prejudice. The request was made that any objection should be received by 9am on 18 July 2011.
86. Clr Walker's legal representative responded to that email expressing concern at the desire to forward further material to the Tribunal so soon after the completion of the hearing, and indicated "absent a formal reopening of this matter, if any party sought to contact the Tribunal to canvas the matters relating to the hearing it would in our view constitute serious professional misconduct."
87. Notwithstanding the position expressed by Clr Walker's legal representative, the Director General's legal representative forwarded the additional submission to the Tribunal on 18 July 2011, also forwarding to the Tribunal the email of 15 July to Clr Walker's legal representative and the response on 17 July from Clr Walker's legal representative. Unfortunately though, in forwarding the submission and the additional emails to the Tribunal the Director General's legal

representative did not also copy that communication to Clr Walker's legal representative. Accordingly, Clr Walker's legal representative, and Clr Walker, assumed; as they were entitled to, that their response had the effect of averting the additional submission to the Tribunal.

88. As was known to the parties, immediately following the hearing the Tribunal (as constituted) went on leave. In the circumstances of the omission by the Director General to copy Clr Walker's legal representative into the provision of the further submission to the Tribunal, the assumption by Clr Walker that no further submission be made was compounded by the period of that leave.

89. Upon return from leave, the Tribunal construed the Director General's email as a request to make further submissions. As there did not appear to be any particular reason to refuse the request by the Director General to provide such submissions, provided that Clr Walker be afforded a reasonable period to respond to the submission, the Tribunal advised the parties that it would consider the submission and afforded Clr Walker the opportunity to respond. This communication had the effect of advising Clr Walker, for the first time, that the Director General had in fact made the submission some weeks prior to the communication from the Tribunal. That awareness no doubt came as a surprise to Clr Walker. At the time however it was not apparent in the Tribunal that, in fact, Clr Walker had not been copied into the provision of the submission to the Tribunal and, following further correspondence concerning the matter, the Tribunal determined to re-list the matter so that the issue of the provision of the additional submission could be considered.

90. At the additional hearing held on 9 September 2011 the Tribunal made it clear to the parties that the factual circumstances giving rise to the concern in Clr Walker as to the provision of the material to the Tribunal was understood by the Tribunal. Mr. Robinson, for the

Director General, submitted that that course was undertaken by oversight. No doubt that oversight, or its effect, was compounded by the fact that the Tribunal went on leave following the hearing.

91. It is not unusual for parties in litigation to wish to provide an additional note or an additional submission to the decision maker even after a determination is reserved. This Tribunal does not exercise a judicial function, but even in judicial circumstances such a cause is not unusual. The fundamental premise, however, is that if such a submission is made an opportunity is to be given to all other parties to respond it.
92. At the re-listed hearing there was some concern as to whether what was actually required was an application by the Director General to reopen. Such was the attitude of Clr Walker in his legal representative's response to the Director General on 17 July 2011. It is not apparent that that course was necessary in the circumstances of the present case; however on the assumption that it was, the parties were asked to address the principles relevant where such leave is sought, even to adduce further evidence, before judgment and after evidence has closed. In that situation:

"the principle which should guide the court in determining whether a granted application for leave to reopen is whether the interests of justice are better served by allowing or rejecting an application as the case may be. No doubt it is relevant to take account of a number of matters such as likely prejudice to the party resisting the application and the reasons why the evidence was not lead in the first place, but there is not, in my opinion, any hard and fast rule which requires the court to reject an application where the decision not to call the witness in the party's case was a deliberate one"

See *Urban Transport Authority NSW V Nweiser* (1992) 28 NSWLR471 at 478 per Clarke JA (Mahoney and Meagher JJA agreeing).

93. At the further hearing on 9 September 2011 the Director General in the alternative, formally applied to reopen to adduce the additional submissions. As referred above the Tribunal's position is that that was not strictly required (there being no reopening), as it was rather merely the provision of an additional submission, drawing to the Tribunal's attention a former decision of the Tribunal. Having regard to the discretionary considerations referred to above, the Tribunal determined on 9 September 2011 to permit the additional submission to be made. There did not appear to be, other than the assumption that no additional submission had in fact been made, any particular prejudice to Clr Walker in the making of the additional submission. Further, as to the reasons why this submission had not been made to the Tribunal at the hearing on 14 July 2011, as referred above, on the basis of the indication given by Clr Walker in the preliminary conference the Director General was entitled to assume that a concession had been made as to pecuniary interest.

94. In reply Clr Walker, through his legal representative, had made a written submission in response to the Director General's submission which the Tribunal has taken into account in its consideration of the issues before the Tribunal.

CONSEQUENCE

95. Having determined that Clr Walker has breached s.451(2) the question then becomes what consequence there should be upon such a finding. As referred above, the parties proceeded upon the basis that the Tribunal would determine the issues of breach and consequence.

96. If the Tribunal finds that the complaint against the councillor is proved pursuant to s.482(1) the Tribunal may:

- "a) counsel the councillor or
- b) reprimand the councillor or
- c) suspend the councillor from civic office for a period not exceeding six (6) months
- d) disqualify the councillor from holding civic office for a period not exceeding five (5) years or
- e) 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 the civic office, in respect of a period not exceeding six (6) months (without suspending the councillor from civic office for that period)".

97. The Director General submitted that in the circumstance of this case remedies in the nature of s.482(d) or (e) should be imposed. Clr Walker instead submits that the remedy provided by s.482(1)(a) is appropriate in the circumstances of this case.

98. There are undoubtedly a number of matters which are relevant to the question of consequence. Factors said to support a more onerous order of consequence includes submissions from the Director General to the effect that the breach may be said to have been willful in a sense that the councillor knew the facts and the law (concerning disclosure and the need to not participate in a meeting, albeit not the deeming provisions of the pecuniary interest); that he was an experienced councillor in this and the prior council; that there is no excuse for not knowing the Act and that although they may be described as onerous duties the Parliament has imposed them for powerful policy reasons; that Clr Walker's motive was strong so as to intervene to avoid the dire consequences to the club and the community if the minute was not agreed to for the reduction of water rates; that the councillor had failed to participate in training concerning obligations under the Act; and that a heavy penalty is required to send a strong message to councillors.

99. As against this position factors such as the pecuniary interest being the interest of another in which it is a not for profit organization; that

the councillor was a volunteer; that he did not believe he had a pecuniary interest in the matter but rather thought the pecuniary interest concerned personal gain; that he has gained a salutary lesson in the operation of Chapter 14; that his mistake has been an expensive one (by his need to retain legal representation); that it has involved a stigma upon Cllr Walker in the Mudgee area and that his business has been affected; that there was no financial gain to him; that the matter related to a community facility giving a community benefit; that he has been dedicated to the race club at great personal cost; and that he has since the event undertaken training in relation to Chapter 14.

100. Other aspects are considered by the Tribunal to also be relevant to the question of consequence even if they were not specifically adverted to by the parties. These include the fact that the Mayor had indicated that it was acceptable for Cllr Walker to have made a statement to the meeting. In this respect the Mayor was in any case wrong because even if it was not a pecuniary interest in order for Cllr Walker to have stayed the code of meeting practice required a resolution that he could stay. Even with a resolution (if one was passed) that would not have excluded Cllr Walker from a breach of s.451(2) of the Act, because the duties are expressed, as referred above, without exception.
101. The fact that Cllr Kennedy had asked Cllr Walker to explain the Mayoral Minute to the meeting may also have contributed to his breach of the Act, and also the fact that the Mayoral Minute appeared to have been inserted immediately before the meeting notwithstanding that the Business Papers did not include the Mayoral Minute may have additionally contributed to the breach.
102. Against this is an observation concerning the disclosure of a "non-pecuniary conflict of interest". It is apparent by reference to the code

of meeting conduct that where there is a non-pecuniary interest a person may, notwithstanding that type of interest, continue to participate in the meeting. If Clr Walker did believe he had a non-pecuniary conflict of interest, then his position acknowledging a need to leave the meeting is inconsistent with the consequences of such a characterisation.

103. There are also the added factors complicating this case, namely, that Clr Walker did disclose some sort of interest, and notwithstanding that he made a statement to the meeting did at least appear to attempt to comply with the obligations under of s.451(2).

104. The Tribunal is often required to make statements such as those contained in the Tribunal's decision in *Clr Fernance (Moree Plains Council)* (PIDT1/2005) that persons who seek and gain election as local councillors have an obligation to the community to take adequate steps to fully and properly acquaint themselves with a nature and extent of their legal obligations in relation to the pecuniary interest provisions of the Act, and that it is not sufficient merely to have some general understanding that the provisions are there or what they may stand for.

105. Having regard to previous Tribunal decisions concerning breach of s.451, but for the Tribunal's finding concerning the disclosure of interest as set out above (s.451 (1)) the Tribunal would have determined that the appropriate consequence was a reprimand.

106. However, having regard to all the matters set out above the Tribunal is of the view that the appropriate course is that pursuant to s.482(1)(a) Clr Walker be counselled. In the circumstances of the present case on the basis of the matter set out in this determination, and on the basis of the training sessions that Clr Walker has undertaken since November 2009, the Tribunal is satisfied that Clr

Walker has been satisfactorily counselled in relation to his breach of s.451(2) of the Act.

Date: 28 October 2011

A handwritten signature in black ink, appearing to read 'Adrian Galasso', with a horizontal line drawn underneath the name.

Adrian Galasso SC

Local Government Pecuniary Interest