LOCAL GOVERNMENT PECUNIARY INTEREST & DISCIPLINARY TRIBUNAL

LOCAL GOVERNMENT ACT, 1993

PIDT No 1/2007

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: (FORMER) COUNCILLOR JOHN FINKERNAGEL, SHOALHAVEN CITY COUNCIL

DETERMINATION (CONSEQUENCE)

1. By its Determination dated 14 January 2009, the Local Government Pecuniary Interest & Disciplinary Tribunal determined as proved a complaint that Mr John Finkernagel, previously an elected member of the Shoalhaven City Council ("Council"), had a pecuniary interest in the relevant matter that was before the Council on 26 March 2006 and that he thereby committed a breach of s.451 of the *Local Government Act*, 1993. That Determination was concerned solely with the issue of the alleged breach, with the issue of the consequences that flow from any breach that may be proved being agreed between the parties to be addressed separately.

2. This Determination is concerned with the matter of any consequence flowing from the Tribunal's determination of breach pursuant to s.482 of the Act.

Determination of Consequence Without a Hearing

3. In its Determination of 14 January 2009 at [185] the Tribunal invited the Parties to the proceedings to indicate to it whether as part of the Determination of Consequence either party, or both, required an opportunity to make oral submissions. This course was undertaken because of the apparent effect that the hearing in relation to the matter of consequence had upon on Mr Finkernagel, who was unrepresented, and as conveyed to the Tribunal by Mr Finkernagel.

4. In response to that invitation, the Director-General indicated a willingness to have a further hearing of the matter set down for the purposes of consequence.

5. Mr Finkernagel responded shortly following the due date for such indication advising of certain matters, but essentially not responding in relation to the matter of consequence, and in particular whether a further hearing was requested, or rejected. The content of the response of Mr Finkernagel made it apparent to the Tribunal that to conduct a further hearing of the matter would cause additional stress and effect upon Mr Finkernagel, and, accordingly, the Tribunal made Directions for the provision of submissions and material on the question of consequence. As part of those Directions, the Tribunal left open the opportunity to have a further oral hearing, but only if requested by Mr Finkernagel.

6. In response to those Directions, the Parties provided written submissions, addressed below, in relation to the matter of consequence.

7. As referred above, this course has been undertaken primarily having regard to Mr Finkernagel's position.

8. The proceedings concerning the primary issue of breach of the Act were determined following the conducting of a hearing by the Tribunal, and accordingly s.470 of the Act does not apply to the Tribunal's consideration of the matter of consequence.

Determination on Breach

9. As referred above, by its Determination dated 14 January 2009 the Tribunal determined the complaint made by the Director-General concerning certain alleged breaches by Mr Finkernagel of s.451 of the Act. The Tribunal refers to that Determination concerning the matter of breach, but as set out in summary form at [183] the Tribunal found that:

   (a) Mr Finkernagel has not breached s.451 in so far as the meeting of 2 November 2005 is concerned;
   (b) Mr Finkernagel has not breached s.451 in so far as the meeting of 24 January 2006 is concerned; and
   (c) Mr Finkernagel has breached s.451 in so far as the meeting of 28 March 2006 is concerned.

10. As set out at [20]–[32], the meeting of 28 March 2006 in relation to which the Tribunal has found there has been a breach concerned consideration by the Council of the Sussex Inlet Settlement Strategy. That meeting was not the first occasion on which the Settlement Strategy was considered by the Council and the report presented to Councillors in relation to the topic concerned some amendments that had been foreshadowed following consultation in relation to the draft Strategy. During the course of the meeting a Resolution was passed which had the effect of setting in train amendments to the Strategy (and possibly ultimately amendments to the Local Environmental Plan to which the Strategy was ultimately directed) which would have had the effect of

permitting a lower minimum subdivision standard with respect to land owned by Mr Finkernagel and his relatives, and with respect to the subdivided lots permitting a maximum of one dwelling on each of those parcels.

11. For the reasons set out in its Determination of 14 January 2009 the Tribunal determined that Mr Finkernagel's participation in that meeting constituted a breach of s.451 of the Act.

12. Two other alleged breaches of the Act were also the subject of the Determination. Both of those allegations related to the same land in the ownership of Mr Finkernagel and his relatives, but for the reasons set out in its Determination, the Tribunal found that there was no breach of s.451 with respect to those other two matters.

Legislative Provisions

13. Subsection 482(1) of the Act, as relevant to an allegation against a Councillor, provides as follows:

"The Pecuniary Interest and Disciplinary Tribunal may, if finds a complaint against a Councillor is proved:

(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) disqualify the Councillor from holding civic office for a period not exceeding five 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 that civic office, in respect of a period not exceeding six months (without suspending the Councillor from civic office for that period)."

14. Paragraph 482(1)(e) was inserted by the *Local Government Amendment (Discipline) Act, 2004,* and took effect from 1 January 2005: Government Gazette 17 December 2004, page 9621. That insertion preceded the breach of

the Act by Mr Finkernagel to which this Determination is related, and accordingly it, strictly speaking, is available as a possible consequence.

15. As referred at [3] of its Determination dated 14 January 2009, Mr Finkernagel was not re-elected at the State Council Elections held on 13 September 2008. There is no indication in the material provided to the Tribunal that, that notwithstanding, he is the holder of a civic office. Accordingly, having regard to the alternatives for consequence set out in s.482(1), s.482(1)(c) and (e) would not be applicable to Mr Finkernagel at the present time.

16. Accordingly, the alternatives available to the Tribunal in relation to the matter of consequence, having determined that Mr Finkernagel had breached s.451, are:

- counsel the Councillor,
- reprimand the Councillor,
- disqualify the Councillor from holding civic office for a period not exceeding five years; or
- no consequence

17. The last alternative, although not specifically referred to in s.482(1), is an alternative available because of the discretion (evidenced by the use of the word "may") in s.482(1).

The Director-General's Submissions

18. In its written submission on the issue of consequence, the Director-General submitted that the appropriate consequence is that of disqualification from holding civic office for a significant period pursuant to s.482(1)(d). The Director-General did not make any submission as to the duration of the period of such disqualification.

19. That notwithstanding the Director-General submitted that certain factors indicated that a lengthy disqualification was appropriate. After referring the

Tribunal to previous decisions in relation to the matter of consequence (which will be addressed below) the Director-General said that those factors included that:

(a) The breach was a serious breach of a "core provision" of Chapter 14 of the Act;

(b) The breach ought to have been apparent to Mr Finkernagel;

(c) The breach was not of no consequence in that financial gain flowed from it;

(d) The breach was 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 (referring to *Councillor David Taylor, Weddin Shire Council,* PIT 1/2003 dated 22 March 2006 at [35], and *Councillor Ricardo D'Amico, Lane Cove Council,* PIDT 2/2005 dated 19 October 2006 at [41]);

(e) Mr Finkernagel had had a long involvement with the early development of the Sussex Inlet Settlement Strategy and was well aware of its particular and specific connection with the Verons Estate in which he owned property;

(f) Mr Finkernagel was an experienced Councillor and had on previous occasions declared a pecuniary interest as to matters concerning the Verons Estate;

(g) At the meeting in question, Mr Finkernagel had two opportunities to announce a pecuniary interest;

(h) No remorse has been indicated by Mr Finkernagel to date.

<u>Mr Finkernagel's Submissions</u>

20. Mr Finkernagel provided three responses to the Tribunal in writing in relation to the matter of consequence (5 February 2009, 20 March 2009 and 5 April 2009).

21. In those submissions, Mr Finkernagel indicated, as relevant to the matter of consequence, that:

(a) There was no fairness in the process as he had no resources to defend himself against the complaint by the Director-General;

(b) The complaint of breach and the proceedings have already had a detrimental effect on his life and that there was not much more that could be done to his reputation and standing;

(c) He had already been found guilty by the community in which he lived and worked;

(d) The matter has had a serious consequence on his mental health and that he suffers from depression, had to leave his job, and is in financial difficulty;

(e) The Tribunal refused to allow him to call witnesses that he requested, being the Minister for Local Council and the Director-General of the Department of Local Government;

(f) The obligations on a Councillor are legalistic and training provided by the Department of Local Government is not mandatory for Councillors;

(g) He has not gained one dollar from anything that has been before the Council and rejects the submission by the Director-General that the effect of the decision was to receive significant financial gains;

(h) He believed that he had a defence pursuant to s.448(g) of the Act;

(i) The process of the Tribunal was unfair and biased in that:

- It refused to allow him to call witnesses being the Minister for Planning and the Director-General;
- No legal representative was appointed to assist him;

- The Determination has 11 pages of complex legal jargon that no ordinary Councillor would be able to understand without considerable legal training;
- The most frustrating and evident aspect of bias is the fact that he has to submit his submissions to the Tribunal before the date that the Director-General's submission is due.
- The upper end of consequences in s.481(1) are disproportionate when compared to penalties that are imposed upon New South Wales State Government Ministers of Parliament and Federal Government Ministers "when behaving badly", especially having regard to them being full time professional politicians;
- In making submissions, he has revisited the stress that he was undergoing in relation to the matter;

(j) The allegations were politically motivated;

(k) He was proud of his distinguished service for the community and feels somewhat betrayed by the allegations and prosecution of the claims.

Other Matters Relevant to Consequence

22. Although the hearing of the matter of breach was expressed to be limited to that topic, during the course of the proceeding certain matters were raised which might be considered to be relevant to the matter of consequence, as set out below.

23. During the hearing on breach:

(a) Mr Finkernagel conceded that he was given every opportunity to be educated in the pecuniary interest requirements of the Act but that he did not take up those opportunities because he could not

find the time to do so and that he was unable to attend, rather than exercising an election not to. He accepted receipt of a memorandum to him on 5 April 2001 acknowledging receipt of a letter from the Minister and a circular on pecuniary interest matters. He accepted that from time to time pecuniary interest and conflict of interest matters came up. He accepted that the declaration of pecuniary interest could be done either in writing or verbally. He accepted that from time to time he had received circulars from the General Manager and the Department of Local Government in relation to pecuniary interest matters although he noted that in his time as a councillor there was a flood of documents that came to him, including such circulars. He accepted that he either read or scanned or attempted to scan the material that had been sent to him to try and ascertain their relevance, but he had not always read everything because of the sheer volume. He observed that it was a voluntary position and that he would work between 20-40 hours per week as a councillor and tried to juggle those responsibilities with his family, work and other recreation;

(b) Mr Finkernagel stated that it was not mandatory to attend any of the information or education sessions held by the council;

(c) Mr Finkernagel also submitted that the Department of Local Government had failed him in training him and preparing him for his role as a councillor, and that he failed to explain what he describes as 'grey areas' of pecuniary interests, and exemptions to what is a pecuniary interest.

(d) Mr Finkernagel stated that all he ever tried to do was cooperate with the Department and explain why he did not declare an interest. He stated that he made a conscious decision in 2005 to

participate in the meetings. He had previously declared interests as pecuniary interests and having looked at the exemptions in s.448 had formed the view that the matters that he was concerned with fell within those exemptions. He stated that he believed he did the right thing under s.448 and that if the people responsible for the Local Government Act were present before the court (especially the Minister and the Director General) he would have expanded on how their interpretation affected his own interpretation. He added that the people responsible included the Premier and the Minister for Local Government and the Director General;

(e) Mr Finkernagel also observed that there had been some enormous effort expended by the Department of Local Government in prosecuting these proceedings but that he had been provided no resources to defend himself. He felt that he had already been found guilty. He stated that he was no longer a councillor. He stated that he stood at the recent local government elections (in September 2008) but was not elected as a councillor. He was of the view that the current proceedings had killed his public image;

(f) Mr Finkernagel stated that he would never stand for local government again. He lives in a small country town in which he suspects most of the residents would know that he is before the Tribunal, and that he felt that most of the people within his town had found him guilty already. He also claimed that these proceedings were having an adverse effect on his life and that he considered them to be a vindictive smear campaign against him.

Previous Determinations on Consequence

24. In determining the matter of consequence, it is relevant to have regard to other decisions of the Tribunal.

25. In *Councillor Peter Kemper, Uralla Shire Council*, PIT 4/2001, 27 August 2004, the Tribunal found that there was a breach of s.451 of the Act. In that case, the Tribunal found that the Councillor did not understand many matters concerning the obligations under the Act and that the Councillor did not personally profit or gain from the breach of the Act: [19]. The Tribunal determined that a twelve month disqualification pursuant to s.481(1)(d) was appropriate.

26. In the Tribunal decision of *Councillor Ricardo D'Amico, Lane Cove Council,* PIDT 2/2005 dated 19 October 2006, the Tribunal determined that in the circumstances of that case that a breach of s.451 of the Act warranted a five month suspension from civic office pursuant to s.482(1)(d).

27. In the matter of *Councillor Ron Fernance, Moree Plains Shire Council*, PIDT 1/2005, 19 June 2006, the Tribunal determined that a reprimand was an appropriate consequence in circumstances where there was an admission of contravention by the Councillor, a declaration of pecuniary interest but the Councillor addressed the meeting in the public forum.

28. In the matter of *Councillor David Taylor, Weddin Shire Council*, PIT 1/2003 dated 22 March 2006, the Tribunal suspended the Councillor from civic office for a period of four months pursuant to s.482(1)(c). That matter involved a pecuniary interest related to a development application that affected a relative of the Councillor.

29. In *Councillor Lynette Lawry, Great Lakes Council*, PIDT 2/2006, 5 December 2007, the Tribunal determined that a two year disqualification from civic office was appropriate in circumstances where there had been a breach of s.451. The matter before the Council, like the present matter, related to a planning strategy document, and following the resolution, the Councillor

proceeded to sell the subject land, with benefits (in valuation terms) from the effect of that resolution.

Determination on Consequence

30. Certain of the submissions of the Director-General and Mr Finkernagel are necessary to be specifically addressed as part of the Determination of the appropriate consequence.

31. As referred above, the Director-General quite rightly pointed out that the breach was of a core provision of Chapter 14 of the Act. Apart from the matter of misbehaviour, Chapter 14 is concerned with the matter of declaration of pecuniary interest so that the decision making process is not infected by matters that should be unrelated to the proper consideration of Council matters.

32. The Director-General also submitted that the breach ought to have been apparent to Mr Finkernagel, making reference to the Tribunal decision of *Councillor Lynette Lawry, Great Lakes Council*, PIDT 2/2006, 5 December 2007 at [126]. In this respect, the Director-General submitted that the draft Sussex Inlet Settlement Strategy was a necessary and inevitable part of the process for the making of an environmental planning instrument. This was the fundamental matter that Mr Finkernagel rejected, and as repeated in his submissions on the question of consequence, he has continued to assert that because the Sussex Inlet Settlement Strategy was not a document that itself rezoned land it was not something that "effects a change of the permissible uses" of land, and hence constitutes an exception pursuant to s.448(g).

33. The Tribunal has addressed this matter in its Determination of 14 January 2009.

34. Whether or not it ought to have been apparent to the Councillor (as submitted by the Director-General), it is clear that Councillors should be vigilant to proposals, even in their infancy, which relate to matters in which they have a pecuniary interest. Whilst the provisions of s.448 may not, in terms, cover every situation, as a label, concerning what is or is not an exception to the requirement to disclose a pecuniary interest, where a report or study is directed to land which a Councillor owns, either directly or indirectly, then the potential for a pecuniary interest undoubtedly arises.

35. This approach relates also the Director-General's submission that the breach was flagrant and that Mr Finkernagel had a long involvement with the early development of the Strategy and was well aware of its connection to land which he owned.

36. One matter though that is of relevance is what may be described as the dynamic nature of the Council meeting. Whilst in circumstances where an agenda item prior to a meeting undoubtedly would alert a Councillor to the existence of a pecuniary interest, the circumstances of the present case are slightly removed. As the facts set out in the Determination of 14 January 2009 indicate, the primary matter concerning the pecuniary interest of Mr Finkernagel in the relevant meeting arose during the course of the Council meeting. The obligations of Councillors do not stop, or are not determined, by reference to agenda items but are obligations that continue to exist throughout a Council meeting. It is for this reason that Councillors should be very vigilant as to pecuniary interest matters. In the circumstances of the present case however what was clear was that the Sussex Inlet Settlement Strategy was on the agenda for the Council meeting and Mr Finkernagel was well aware that he owned land that was covered by that Settlement Strategy.

37. In so far as Mr Finkernagel's submissions are concerned, factors related to his inability to call witnesses have been addressed in previous Determinations of

this Tribunal. Decisions as to the calling of the Minister for Local Government and the Director-General of the Department of Local Government were taken for reasons previously advanced.

38. It is self-evident that legislative provisions creating obligations on Councillors are "legalistic". Legislative provisions constitute the law. If Councillors are uncertain about the effect of legislative provisions then they can simply ask. In any case, it is apparent to the Tribunal that the Department of Local Government conducts education sessions to assist Councillors with their interpretation of the Act and their obligations under the Act. The evidence before the Tribunal indicates that throughout the long history of Mr Finkernagel's position as a Councillor, many education sessions were held, but that for personal reasons he did not, or could not, attend. Mr Finkernagel submitted that the education sessions were not mandatory, which he said was a matter going to consequence. Whilst that may be true, it is difficult to avoid the conclusion that a person who does not attend an education session is in some respects a master of his own destiny (if that destiny be a breach of the Act). Against this is of course the observation that the role of a Councillor is ordinarily not a professional role. However if someone decides that they wish to be a Councillor, then an inherent part of the honour and entitlement that comes with that position, one would expect, is to at least attend education sessions which seek to do no more than inform the Councillor of his or her obligations that are coincident with that honour and entitlement.

39. In his written submissions, Mr Finkernagel continued to argue the matter of breach, and in that way he has at no time acknowledged a breach of the Act, nor exhibited any remorse. The Tribunal does not propose to revisit the matter of breach of the Act.

40. Mr Finkernagel submitted that the process conducted by the Tribunal was biased and unfair, referring again to his inability to have the Minister for

Local Government and the Director-General summoned to appear before the Tribunal. That matter has been previously addressed. He also submitted as part of the claim to unfairness that it was unfair that he was required to provide his submissions on consequence before the Director-General. In this respect the Directions of the Tribunal provided for the Director-General's submissions on consequences before Mr Finkernagel's albeit there was an ability for the Director-General to reply, the opportunity for which was not taken up by the Director-General.

41. Mr Finkernagel also submitted, as relevant to consequence, the failure to provide him with legal representation. In this respect it is to be observed that the role of the Tribunal is not to provide legal representation for persons the subject of a complaint. There are avenues and opportunities within the state of New South Wales for persons to obtain legal representation in circumstances in which they are unable to independently obtain such representation. That notwithstanding, the Tribunal in its conduct of proceedings attempts to have regard to, and accommodate, the needs and circumstances of unrepresented parties.

42. Mr Finkernagel as set out above also indicated that the complaint was politically motivated. As stated by the Tribunal in previous Determinations, that matter is not relevant to the issue of consequence. Local Government by its nature is a political forum.

43. It is undoubted that the process has had an effect on Mr Finkernagel's personal and work life. This was expressly stated by Mr Finkernagel before the Tribunal and has been reiterated on many occasions in written correspondence constituting submissions to the Tribunal.

44. Whether related to that topic or not, one matter that Mr Finkernagel raised which is of constant concern to the Tribunal is the time taken for matters

concerning alleged breaches to be referred to the Tribunal. In this matter the alleged breaches took place within the period of 2 November 2005 – 28 March 2006. If it was apparent to Mr Finkernagel that there was a pecuniary interest, then it ought to have been apparent to many others (including those making the complaints) that that was also so. That notwithstanding it took a year for a Notification to be received by the Tribunal of an Approval of an Investigation: Determination 14 January 2009 at [2]. It took almost another year for a Report of Investigation to be received by the Tribunal. One of the matters that is of constant concern to the Tribunal is the time lapse between an alleged breach of the Act and the matter being referred to the Tribunal. In the circumstances of the present case, that time has undoubtedly exacerbated the personal stress and effect upon Mr Finkernagel.

45. It is the case that the breach of s.451 was of an important component of Chapter 14 of the Act. It is also the case that the subject matter of the breach would have undoubtedly had an effect upon the value of land owned by Mr Finkernagel and his brothers. It is to be observed of course that Mr Finkernagel voted against the Resolution, but the Act does not distinguish the type of vote in that respect.

46. In the circumstances of the present case the Tribunal does not consider that counselling or a reprimand is an appropriate consequence. That leaves a disqualification pursuant to s.482(1)(d), or no consequence.

47. The matters set out at [45] above make a "no consequence" course inappropriate.

48. The circumstances of the present case bear similarities to the Tribunal's Decision in *Councillor Lynette Lawry, Great Lakes Council*, PIDT 2/2006, 5 December 2007. In that Decision however, consequent upon the breach of the Act, the Councillor petitioned for the purchase of her land at the inflated value

which arguably exacerbated the matter concerning consequence. Another distinguishing factor in this case is that the matter most affecting the quantum of the increase in value of the subject land occurred during the course of the Council meeting.

49. In the circumstances set out above, the Tribunal pursuant to s.482(1)(d), determines that Mr John Finkernagel is disqualified from holding civic office for a period of one year from the date of this Determination.

50. Pursuant to s.484(3) the Tribunal will make its Determination of 14 January 2009 and this Determination publicly available 28 days following the date of this Determination.

THE TRIBUNAL'S ORDERS

51. Accordingly, the Tribunal's Orders are as follows:

1. The Local Government Pecuniary Interest & Disciplinary Tribunal, **FINDS** that a complaint made by the Director-General, Department of Local Government, pursuant to s.460 of the *Local Government Act, 1993,* that (former) Councillor John Finkernagel, being a Councillor of Shoalhaven City Council contravened s.451 of that Act in respect of the consideration by the Council at a meeting on 28 March 2006 has been proved.
2. Pursuant to s.482(1) of the Act, the Tribunal **ORDERS** that Mr John Finkernagel be and is hereby disqualified from holding civic office for a period of one (1) year commencing on 5 June 2009 and expiring on 4 June 2010.

3. The Tribunal's Orders will be provided to Mr Finkernagel and the Director General pursuant to s.484(1) forthwith.

4. A copy of the Tribunal's Determination of 14 January 2009 and this Determination and Order will be provided to the General Manager, Shoalhaven City Council pursuant to s.484(1).

5. The Tribunal's Determination of 14 January 2009 and this Determination and Order will be made publicly available pursuant to s.484(3) 28 days following the date of this Determination.

Date: 5 June 2009

ADRIAN GALASSO SC

Local Government
Pecuniary Interest and Disciplinary Tribunal