

**LOCAL GOVERNMENT PECUNIARY INTEREST & DISCIPLINARY
TRIBUNAL**

LOCAL GOVERNMENT ACT, 1993

PIDT No 1/2006

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

**RE: COUNCILLOR JOANNE MORRIS,
HURSTVILLE CITY COUNCIL**

(PRELIMINARY) DETERMINATION

1. On 8 February 2008 the Tribunal received from the Director-General, Department of Local Government (“Director-General”) pursuant to s468 of the *Local Government Act*, a Report of an investigation into a complaint carried out by the Director-General.
2. The complaint the subject of the Report conducted by the Director-General concerned whether Ms Joanne Morris, previously an elected member of Hurstville City Council, lodged a written disclosure of interests return for the period 1 July 2003 to 30 June 2004 knowing it to be false.
3. On 20 March 2008 Pursuant to s469 of the *Local Government Act*, after considering the Report presented to it in relation to the complaint, the Tribunal decided to conduct proceedings into the complaint and issued a Notice to that effect.

4. In determining to conduct proceedings into the complaint the Tribunal invited the parties to consider whether the proceedings may be conducted without a hearing as envisaged by s470 of the *Local Government Act*, and subject to the Tribunal forming the opinion required by s. 470(1)(c).
5. By consent of the parties as at 19 June 2008, pursuant to s470(1)(a) the parties have agreed that the proceedings may be determined without a hearing, and by the filing of a Statement of Agreed Facts (19 June 2008) there are no material facts in dispute between the person who made the complaint and the person against whom the complaint is made in accordance with s.470(1)(b).
6. Having regard to the nature of the alleged breach (to be addressed below), and the position of the parties with respect to ss470(1)(a) and (b), in the opinion of the Tribunal in accordance with s470(1)(c) public interest considerations do not require a hearing into these proceedings. This determination is hence made pursuant to s470.

APPLICABLE PROVISIONS

7. Ms Morris' position as a councillor with the Hurstville City Council is pursuant to the provision of the *Local Government Act*, 1993.
8. Amongst the various other duties of a councilor holding that position under the *Local Government Act* is the duty to prepare and submit written returns of interest. Pursuant to s444 of the *Local Government Act* (as relevant to this matter):
 - "A councillor,
 - (a) Must prepare and submit written returns of interest in accordance with s449 and;
 - (b) Must disclose pecuniary interest in accordance with s451."

9. This proceeding is concerned with s444(a). As referred in that section s449 imposes a duty to complete and lodge a return disclosing interests of the councillor. The relevant provisions of s449 are as follows:

“(1) A councillor ... must complete and lodge with the General Manager within 3 months of becoming a councillor ... a return in the form prescribed by the regulations.

(1A) A person must not lodge a return that the person knows or ought reasonably to know is false or misleading in a material particular.

...

(3) A councillor ... holding the position at 30 June in any year must complete and lodge with the General Manager within 3 months after that date a return in the form prescribed by the regulations.

...”

10. As referred in s449(3) the requirements of such a return are as may be contained in a form prescribed by the regulations. As at the dates material to this proceeding (30 June 2004 and end September 2004) cl 40G of the *Local Government (General) Regulation 1999* (as relevant) provided that:

“(1) A person making a return must disclose:

- (a) the name and address of each corporation in which he or she had an interest or held a position (whether remunerated or not) on the return date (in the case of a return under s449(1) of the Act) or at any time since the last return under Part 2 of Chapter 14 of the Act was made (in the case of a return under s449(3) of the Act, and
- (b) the nature of the interest, or the position held, in each of the corporations, and
- (c) a description of the principal objects of each of the corporations, except in the case of a public company.

- (2) An interest in or a position held in a corporation need not be disclosed if the corporation is:
 - (a) formed for the purpose of providing recreational amusement or for promoting commerce, industry, art, science, religion or charity, or for any other community purpose, and
 - (b) required to apply its profits or other income in promoting its objects, and
 - (c) prohibited from paying any dividend to its members.

- (3) An interest in a corporation need not be disclosed if the interest is a beneficial interest in shares in a company that does not exceed 10% of the voting rights in that company.”

THE AGREED FACTS

11. As referred above, on 19 June 2008 the parties filed with the Tribunal a Statement of Agreed Facts. By consent the parties have agreed that the Tribunal is to determine as a preliminary matter the question of whether there has been any breach of the provisions set out above the Tribunal is hence addressing that question as a, and in this, Preliminary Determination.

12. From the Statement of Agreed Facts relevant to this Preliminary Determination are the following facts:
 - (a) Ms Morris was first elected to the Hurstville City Council on 11 September 1999. She was re-elected on 27 March 2004. Ms Morris was Mayor of Hurstville Council from 14 April 2004 to 14 September 2005. Ms Morris has resigned her position as a councillor effective from 1 October 2007.

- (b) Ms Morris was appointed the sole director and secretary of a corporation by the name Manners Investments Pty Limited (“Manners”) from 5 April 2004 to 26 August 2007, when Manners was deregistered (following lodgment of an application for voluntary deregistration with ASIC on 5 August 2005).
- (c) Manners was appointed the Trustee of the JNM Trust on 5 April 2004, that being a discretionary family trust in which Ms Morris and her families were beneficiaries. Manners did not otherwise trade except as Trustee of the JNM Trust. The JNM Trust itself never traded.
- (d) Australian Franchisees Alliance (AFA) Pty Limited (“AFA”) was registered as a company on 17 March 2004, and Ms Morris became a director and secretary of AFA from 5 April 2004 until 19 November 2004. AFA had an issued share capital of 100 ordinary shares, of which Manners held 30 shares between the period 5 April 2004 and 9 December 2004. AFA was appointed the Trustee of the Australian Franchisees Alliance (AFA) Unit Trust on 5 April 2004, which was a fixed unit trust. On 5 April 2004 the JNM Trust was allocated 30 units in the AFA Unit Trust. The AFA Trust was established to assist franchisees in their relationship with franchisors.
- (e) On 14 September 2004 Ms Morris signed a written disclosure of interests return for the period 1 July 2003 to 30 June 2004.
- (f) The written disclosure of interest return disclosed that she held the position as a director of Manners. That return (although not specifically addressed in the agreed facts but to which the Tribunal has had regard on the basis that it forms the foundation for the complaint and this proceeding, and is specifically referred to in the Statement of Agreed

Facts) also identified her interest in that corporation as “director” and set out the principal objects of the corporation.

- (g) The written disclosure of interest does not disclose that Ms Morris held the positions of company secretary and director of AFA during part of the period the subject of the return.
- (h) The written disclosure of interest does not disclose that Ms Morris had an interest in AFA during part of the period the subject of the return.

Certain other facts contained in the Statement of Agreed Facts concerning the circumstances of the identification of the claimed failure to properly lodge a return, the financial consequences of the corporations identified above, and the co-operation of Ms Morris in relation to the Report are relevant to the proceedings overall but more so in relation to the consequences of any breach (if found by the Tribunal) and accordingly will not be addressed in this Preliminary Determination other than to note that they exist to be addressed at a subsequent time.

- 13. As may be gleaned from the agreed facts set out above the essence of this complaint is that on 14 September 2004 Ms Morris signed a written disclosure of interest for the period 1 July 2003 to 30 June 2004, which was lodged with the Hurstville City Council prior to the due date of 30 September 2004, which return discloses that Ms Morris was a director of Manners, as she was, but the return does not disclose that Ms Morris was also a director and company secretary of AFA during part of the period covered by the return, nor that she had an interest in AFA during part of the period covered by the return.

BREACH OF THE ACT

- 14. As referred above the obligation to lodge a return is sourced in ss444 and 449 of the *Local Government Act*. Subsection 449(3) prescribes, by reference to the

Regulations, the form of the return to be lodged. By reference to cl 40G of the *Local Government Act (General) Regulation* the elements for disclosure in the circumstances of this case include:

- the name and address of each corporation in which a councillor had a interest;
- the name and address of each corporation in which a councillor held a position (whether remunerated or not);
- the nature of the interest, or the position held, in each of the corporations and
- a description of the principal objects of each of the corporations, except in the case of a public company.

15. This complaint is directed to the corporation known as AFA. On the basis of the agreed facts, and in particular that Ms Morris was a director and secretary of AFA from 5 April 2004 until 19 November 2004, the Tribunal is satisfied that in lodging the return of interest for the financial year ending 30 June 2004, Ms Morris failed to disclose the name and address of each corporation in which she held the position, the nature of the position held, and the description of the principal objects of each of the corporations (in particular AFA), in breach of cl 40G of the Regulation, and in turn ss449 and 444 of the *Local Government Act*.
16. As referred above cl 40G also requires disclosure of the name and address of each corporation in which a councillor held an interest. The Statement of Agreed Facts acknowledges that in lodging the return of interest Ms Morris also failed to disclose that she had an interest in AFA. In that added respect the Tribunal is also satisfied that Ms Morris has breached cl 40G of the Regulation, and in turn ss449 and 444 of the *Local Government Act*.
17. Subsection 449(1A), introduced into the Local Government Act in 2000 (Act No 112 of 2000) proscribes a person from lodging a return that the person knows or ought reasonably to know is false or misleading in a material particular. Whilst the

agreed facts do not address whether Ms Morris actually knew the return to be false in so far as AFA was concerned, the Tribunal is satisfied:

- a. that the return was false in a material respect, namely that it did not disclose her interest in AFA nor the positions she held in AFA (nor the objects of AFA); and
- b. Ms Morris ought reasonably to have known that the form was false or misleading having regard to the facts that she was the sole director of AFA, that her role in AFA was temporally coincident with her role in Manners (which she did disclose in her return), and that AFA was a corporation which operated as the trustee of a trust which traded in assistance of franchisees, which presumably was an active role that Ms Morris participated in.

The Tribunal is thus satisfied that Ms Morris breached s 449(1A) of the Act.

18. These findings are in the main consistent with the forthright acknowledgment by Ms Morris in the Statement of Agreed Facts that she breached the identified provisions of the Act and Regulations.
19. It is to be noted that cl 40G of the Regulation provides for 2 exceptions to the duty of disclosure.
20. The first exception is a broader one exempting the duty to disclose either an interest or a position held in a corporation if the corporation is, in essence, a non-profit or charitable corporation: cl 40G(2). There are no facts in this case which have been adduced to the Tribunal which would operate to engage this exemption, and it hence does not apply.
21. The second exemption is a narrower one in that it operates only in relation to the duty to disclose an interest in a corporation (as distinct from the requirement to also disclose a position held in a corporation): cl 40G(3). In that respect this exemption cannot operate in relation to the failure of Ms Morris to disclose that she held certain positions in AFA, and hence it does not, and could not, operate as an

exemption to that duty in relation to which the Tribunal has identified a breach (above).

22. In terms of the scope of the available exemption, the clause exempts the requirement to disclose an interest in a corporation if the interest is a beneficial interest in shares in a company that does not exceed 10% of the voting rights of the company. As set out above, AFA had an issued share capital of 100 ordinary shares, of which 30 had been issued to Manners. The Tribunal is unaware of the ownership of the remaining 70 shares.
23. Assuming that the voting rights mirrored the quantum of shares issued, strictly speaking Ms Morris did not own any shares in AFA. However the terms of cl 40G(3) are concerned not so much with ownership *per se* but with a “beneficial interest in shares in a company”. On the basis that Manners held 30% of the issued ordinary shares in AFA, and Ms Morris held 100% of the issued shares in Manners, the Tribunal is satisfied that Ms Morris held a beneficial interest in the shares of AFA that exceeded 10%, and hence the exemption contained in cl 40G(3) is not engaged.
24. For the reasons set out above the Tribunal finds that Ms Morris has breached the provisions of the Local Government Act and Regulation as set out above.
25. As addressed at the outset, this Preliminary Determination is concerned with the issue of breach. Before issuing the formal findings and Orders of the Tribunal on that issue, and the issue of the consequences that flow from that breach pursuant to s 482, as requested by the parties the Tribunal will afford an opportunity to the parties to adduce evidence and make submissions on that latter matter. Accordingly the Tribunal makes the following Direction:

1. This matter be Listed for Mention and Directions in relation to the question of consequences on **25 July 2008 at 9:30am** at the offices of the Tribunal.

30 June 2008



ADRIAN GALASSO SC

**Local Government Pecuniary Interest and
Disciplinary Tribunal**

