

**LOCAL GOVERNMENT
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1993

LGPIDT 02/2013

DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET

**RE: COUNCILLOR HANS ALLGAYER, GUNNEDAH SHIRE
COUNCIL**

DETERMINATION

1. This matter concerns an appeal pursuant to s.440M of the *Local Government Act* brought by Councillor Hans Allgayer, a councillor of the Gunnedah Shire Council.
2. The appeal is brought against an order of suspension made by the delegate of the Director General of the Department of Premier and Cabinet suspending Councillor Allgayer from civic office for a period of one (1) month commencing on 4 February 2013. That order of suspension is made in relation to the participation by Councillor Allgayer in an Extra-Ordinary Council meeting held on 4 February 2009, and in particular his participation in the consideration of voting on a particular development application more fully described below.
3. This appeal was heard concurrently with an appeal brought by another Councillor of the Council, Councillor Stephen Smith. A separate Determination is made with respect to that appeal.

LEGISLATIVE AMENDMENTS

4. As referred above, this appeal is pursuant to s.440M. That section is contained within Chapter 14, Part 1, Division 3 of the *Local Government Act*.
5. *The Local Government Amendment (Conduct) Act 2012* replaced that Division with a new Division. In so far as s.440M is concerned however the operative parts of that section essentially remain repeated, and re-enacted as s.440L.
6. The amending Act also effected changes to Schedule 8 of the *Local Government Act* (dealing with savings, transitional and other provisions consequent on the enactment of certain Acts). The effect of that amendment was the inclusion of new Part 35 into Schedule 8, which included Clause 104(4) to Schedule 8. That Clause provides that the amendments made by the Amending Act do not apply to proceedings that were referred to this Tribunal or that were commenced in this Tribunal before the commencement of those amendments. The amendments to the division commenced on 1 March 2013.
7. The appeal made to this Tribunal was effected by Councillor Allgayer, through his agent Mr Holmes, on 7 January 2013. Accordingly, pursuant to Clause 104 of Schedule 8 of the *Local Government Act* the appeal is to be determined pursuant to the previous provisions of the Division.

THE SUSPENSION ORDER

8. As referred above, on 11 December 2012 the Director General, pursuant to s.440K, ordered that Councillor Allgayer be suspended from civic office for a period of one (1) month commencing on 4 February 2013.
9. That Order of Suspension was made following consideration of a Departmental Report prepared pursuant s.440J. In issuing the

Suspension Order the Director General also issued a "Statement of Reasons" pursuant to s.440Q representing his satisfaction that grounds exist that warrant that the Councillor's suspension.

10. Pursuant to s.440M(1):

"A councillor against whom an order of suspension is made by the Director General may appeal against the order to the Pecuniary Interest and Disciplinary Tribunal."

11. Such an appeal may not be made more than 28 days after the date the order was served on a Councillor (s.440M(2)), which period was satisfied, and pursuant to s.440M(3) the Tribunal has Stayed the Order of Suspension until further Order.

THE FACTUAL CIRCUMSTANCES CONCERNING THE SUSPENSION ORDER

12. As relevant to the determination of this Appeal, and as referred above, the conduct alleged by the Director General as giving rise to the Order of Suspension relates to a development application lodged with the Gunnedah Shire Council.

13. On 22 September 2008 a development application was lodged with the Council by "Blackjack Carbon Pty Ltd". That development application concerned the carrying out of development on land then owned by the Council for what was described as the "construction and operation of a Coal devolatilising plant incorporating importation of coal by road and dispatch of char by road and rail and all ancillary activities."

14. The precise nature of the processes involved in such a plant are not particularly relevant to this appeal, but in essence they involved the processing of coal to produce "char".

15. Accompanying the development application was a statement of environmental effects in which, in terms, it was said that:

“The applicant, Blackjack Carbon Pty Ltd, is a joint venture company between Modderriver Minerals Pty Ltd and Whitehaven Coal Limited

...

Whitehaven Coal Limited is the parent company for a number of companies operating coal mines in the Gunnedah Basin ...” [1.3]

16. At all relevant times Councillor Allgayer was employed by Narrabri Coal Operations Pty Ltd. That corporation was, as to 70%, owned by “Whitehaven”.
17. There was some not insignificant confusion at the hearing of this appeal as to which corporations were wholly owned subsidiaries of each other (within the Whitehaven Group). However, and notwithstanding that confusion, it was apparent that Councillor Allgayer was not employed by the corporation that formed the joint venture for the proponent for the development application, but was employed by a corporation also ultimately majority owned by the principal corporation within the group of companies of which that corporation formed part.
18. Company extracts from ASIC searches forming part of the Departmental Report establish that Blackjack Carbon Pty Ltd was 50% owned by Whitehaven Blackjack Pty Ltd. Whitehaven Blackjack Pty Ltd was 100% owned by Whitehaven Coal Mining Ltd. Whitehaven Coal Mining Ltd has as its ultimate holding company Whitehaven Coal Ltd.
19. The development application was considered by the council on occasions prior to 4 February 2009, however, on 4 February 2009 at an Extra-Ordinary Meeting of the Council the Development Application was presented to the Council (the Councillors) for determination. Councillor Allgayer was in attendance at that meeting and, as recorded in the

minutes of the Council meeting, voted in favour of a grant of development consent.

20. As was alleged in the Departmental Report tendered to the Tribunal, and as Councillor Allgayer conceded in evidence before the Tribunal, during the course of the Council meeting Councillor Allgayer interacted with the consultant of the proponent with whom he acknowledged he was acquainted.
21. He indicated that he was not satisfied with the environmental restrictions contained in the proposal. He told the Tribunal that during the course of the debate he passed the representative of the consultant of the proponent a note indicating to them that he would not vote in favour of the development unless a change was effected to the development application. They indicated that they would, although that change was not reflected in the terms of the development consent. He indicated that he was prepared to "take their word" on the subject, and accordingly voted in favour of the proposal.
22. The Director General considered that Councillor Allgayer's failure to declare a conflict of interest, and his actions during the meeting, constituted breach of the Councils' Code of Conduct and that, in the circumstances, that gave rise to the order of suspension.
23. As referred above the appeal to this Tribunal is pursuant to s.440M. That appeal is unconstrained as to form and constitutes, in effect, an all grounds appeal.

DIVISION 3 - MISBEHAVIOUR

24. The appeal, as referred above, is concerned with Division 3 of Part 1, Chapter 14 of the *Local Government Act*. That Division is headed "Misbehaviour".

25. As relevant to this appeal, pursuant s.440F(1) "misbehaviour" of a Councillor means:

"(b) a failure by the councillor to comply with an applicable requirement of a code of conduct as required under s.440(5)".

26. Pursuant to s.440(5) councillors must comply with applicable provisions of the Council's adopted code (except to the extent of any inconsistency of that Code with the Model Code – as that term is defined).

27. On 18 December 2008 the Council adopted its Code of Conduct which code was, so far as relevant to this appeal, said by the Director General to be not inconsistent with the Model Code.

28. Chapter 7 of the Code was concerned with "conflict of interests". As relevant to this appeal were the following provisions:

"7.1 A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.

7.2 You must avoid or appropriately manage any conflict of interests. The onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty.

7.3 Any conflict of interests must be managed to uphold the probity of the council decision-making. When considering whether or not you have a conflict of interests, it is always important to think about how others would view your situation.

7.4 Private interests can be of two types: pecuniary or non-pecuniary".

29. Clauses 7.5 - 7.9 then deal with "pecuniary interests". It is not claimed in this appeal that there is any aspect of pecuniary interest (whether as addressed in the Code of Conduct, or under Chapter 14) in relation to the subject meeting.

30. Clauses 7.10 – 7.20 then address non-pecuniary conflict of interests (as relevant to this appeal) as follows:

“What is a non-pecuniary conflict of interests?”

- 7.10 Non-pecuniary interests are private or personal interests the Council official has that do not amount to pecuniary interest as defined in the Act. These commonly arise out of family, or personal relationships, or involvement in sporting, social or other cultural groups and associations and may include an interest of a financial nature.

....

Managing non-pecuniary conflict of interests

- 7.13 Where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing, even if the conflict is not significant. You must do this as soon as practicable.
- 7.14 If a disclosure is made at a Council or Committee Meeting, both the disclosure and the nature of the interest must be recorded in the minutes. This disclosure constitutes disclosure in writing for the purposes of Clause 7.13.
- 7.15 How you manage a non-pecuniary conflict of interests will depend on whether or not it significant.
- 7.16 As a general rule, a non-pecuniary conflict of interests will be significant where a matter does not raise a pecuniary interest but it involves:
- a) A relationship between a council official and another person that is particularly close, for example, parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or the person's spouse, current or former spouse of partner, de facto or other person living in the same household
 - b) Other relationships that are particularly close, such as friendships and business relationships. Closeness is defined by the nature of the friendship or business relationship, the frequency of contact and the duration of the friendship or relationship
 - c) An affiliation between the council official and an organisation, sporting body, club, corporation or association that is particularly strong.

7.17 If you are a council official, other than a member of staff of council, and you have disclosed that a significant non-pecuniary conflict of interest exists, you must manage it in one of two ways:

- a) Remove the source of the conflict, by relinquishing or divesting the interest that creates the conflict, or reallocating the conflicting duties to another council official
- b) Have no involvement in the matter, by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in s.451(2) of the Act apply

7.18 If you determine that a non-pecuniary conflict of interest is less than significant and does not require further action, you must provide an explanation of why you consider that conflict does not require further action in the circumstances.”

31. As referred above, s.440F(1) provides that misbehaviour means, *inter alia*, a failure by the councillor to comply with an applicable requirement of a code of conduct. Pursuant to s.440F(2) that extends to an omission or failure to do something.

32. The process for the suspension of the councillor from civic office is as addressed in s.440H, being procedural matters all of which were satisfied in the circumstances of this case.

33. Pursuant to s.440I the grounds on which a councillor may be suspended from civic office under Division 3 (being Misbehaviour) are that (as relevant to this case):

“b) The councillor’s behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor’s suspension”.

34. Section 440J provides that the Director General may arrange for investigation and a Department Report in relation to an alleged incident of misbehaviour. Ultimately, pursuant to s.440K(1):

“The Director General may by order in writing suspend a councillor from civic office for a period not exceeding one month:

a) If the Director General has considered a departmental report into the matter concerned and is satisfied that grounds exist that warrant the councillor's suspension ...”

35. As referred above, s.440M provides for an appeal to this Tribunal against such an order. In determining the appeal the Tribunal may confirm the order, quash the order, or amend the order consistently with the powers of the Director General. Section 440M will be more fully addressed below.
36. In summary therefore in order for the order of suspension to be upheld on an appeal the Tribunal must be satisfied that there is misbehaviour, in this instance constituted by failure to comply with an applicable requirement of a Code of Conduct (s.440F(1)(b)), that such behaviour has involved one incident of misbehaviour that is of such sufficiently serious nature as to warrant the councillor's suspension (s.440I(1)(b)), and be satisfied that grounds exist that warrant the councillor's suspension (s.440K(1)(a)).

THE APPLICABLE CODE OF CONDUCT

37. I have set out above what were alleged by the Director General, through his representative Mr Barley, to comprise the relevant provisions of the adopted code of conduct.
38. The principle provision is Clause 7.1 which provides that:
- “A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.”
39. If such an interest exists, and where it is a non-pecuniary interest, there must be a disclosure of that interest: Clauses 7.13 and 7.14.
40. In the circumstances of the present case much turns upon whether Councillor Allgayer's employment by a corporation which was not the

ultimate corporation that formed part of the joint venture is nonetheless sufficient such that a "reasonable and informed person" would perceive that you (he) could be influenced by a private interest when carrying out your (his) public duty.

41. The argument advanced by Councillor Allgayer, through his agent Mr Holmes, was that his employment by a corporation distinct from the proponent for development (or the corporation that formed part of the joint venture corporation that was itself the proponent for development) was sufficient to disconnect him from having any private interest in the matter the subject of the development application.
42. A number of things should be observed about a provision such as Clause 7.1. The first is that it is an objective test, to be viewed through the eyes of "a reasonable and informed person". The second is that the perception of that person is not that the councillor would or must be influenced by private interest when carrying out a public duty, but that he or she "could" be.
43. In the circumstances of the present case it seemed abundantly clear that the proponent for the development application considered by the council was a joint venture corporation in which a corporate entity within the Whitehaven Mining Group was a joint venture partner. It is also sufficiently clear that at all material times Councillor Allgayer was an employee of a corporation which was also a joint venture partly owned by the Whitehaven Group, and was employed in one of the mines undertaken by that group.
44. Whilst the test posed by Clause 7.1 is a "reasonable and informed person" it is inappropriate to consider that person as necessarily cognisant of the nuances concerned with corporation law, and notions of a corporate veil, sufficient to conclude a necessary disconnect between Councillor Allgayer's employer and the ultimate venture joint corporation.

45. In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 Mason CJ and Brennan J stated at [87] that “In assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case.”
46. In *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, Basten JA, in dealing at [79] – [83] with what he described as the three concepts which inhere in such a proposition, referred to the suggestion by Kirby P in *Australian National Industries* that “care should be taken against attributing to the hypothetical reasonable observer a level of sophistication which may be enjoyed by judges and other lawyers (or by specially educated or informed citizens or even by the parties involved)”.
47. In the circumstances of the present case it is unlikely that the fair-minded observer would necessarily distinguish the employer of Councillor Allgayer from the proponent for development which he was considering with the other councillors. It would be sufficient for the fair-minded observer to be aware that Councillor Allgayer was employed by a joint venture corporation the ownership of which included a corporation that formed part of the joint venture seeking development consent. The reasonable man informed of such a circumstance in my opinion would perceive that a councillor could be influenced by a private interest when carrying out his public duty as a councillor.
48. In those circumstances the obligation, created by Clause 7.13, was for the disclosure of the interest and the nature of the interest, so that it could be recorded in the minutes: Clause 7.14 of the Code. This was not done. Accordingly, for the purposes of s.440F(1)(b) Councillor Allgayer has failed to comply with the applicable requirement of the code of conduct.
49. The code of conduct then distinguishes between what are described as “significant” and “not significant” conflicts. Irrespective of whether the

conflict is significant or not, common to both is or was the obligation of disclosure.

50. Clause 7.16 set outs what it describes as “a general rule” for the determination of whether a conflict of interest is significant or not. In essence those provisions would have as significant conflict of interests conflicts where there is a relationship or an affiliation between a councillor and, as relevant to this case, the corporation the subject of the matter before the council.
51. Although not critical to the conclusions in this appeal, in my opinion the conflict in the circumstances of this case was a significant conflict of interest. This is because, in the circumstances of the development application, despite the distinction between the corporations that employed Councillor Allgayer and the corporation that was the joint venture partner for the development consent, in broad terms Councillor Allgayer was employed within the same group as was the coal miner and as was the joint venture partner for the processing plant. This, as contemplated by Clause 7.16(c), demonstrates an affiliation between the council official and the corporation that may be regarded as particularly strong.
52. The consequences of such a conclusion is that, in addition to disclosure, Councillor Allgayer should have absented himself from participation in the meeting, as if s.451(2) of the Act applied: Clause 7.17(b) of the Code.
53. The next step is that contained in s.440I. That section, as referred above, provides that one of the grounds on which a councillor may be suspended from civic office under Division 3 is that the behaviour involved one incident of misbehaviour that is of sufficiently serious nature as to warrant the councillor's suspension.
54. In circumstances of this case in my opinion s.440I(1)(b) is satisfied.

55. Firstly, it is abundantly clear that the involvement of Whitehaven in the development application was, or ought to have been, quite apparent to Councillor Allgayer. The involvement of Whitehaven was specifically represented in the statement of environmental effects accompanying the development application.
56. In the minutes of the meeting one of the objectors who spoke to the council meeting referred to a “perception in the community that the relationship between Council and Whitehaven Mining is inappropriate, as a couple of councillors are employed by the company ...”. In the report to council of the proposal (repeated in the Council Minutes) the relationship between the proposed development and the sourcing of materials from the Whitehaven Coal Handling and Preparation Plant was made abundantly clear. Even if Councillor Allgayer did not read the Statement of Environmental effects the Whitehaven involvement in the development application being considered by the Council was thus abundantly clear from what was before the Council meeting.
57. Furthermore, prior to the subject meeting, at a meeting of the council held on 15 October 2008 the involvement of Whitehaven in the development application was made quite clear.
58. Finally, in evidence before the Tribunal Councillor Allgayer conceded that it was well known that Whitehaven was involved in the project the subject of the development application. Although he was employed by Narrabri Coal, that company was a company associated with Whitehaven.
59. In such circumstances it was wholly inappropriate for Councillor Allgayer to not have, at the least, disclosed a non-pecuniary interest in the subject matter. Accordingly in my opinion the behaviour involved one incident of misbehaviour that was of such a serious nature as to warrant the councillor’s suspension.

60. Furthermore, the additional matter relating to Councillor Allgayer's passing of notes to the consultant for the proponent supports the Tribunal's conclusion set out above concerning what a reasonable and informed person would perceive. Even despite the combination of this interaction, during the course of the debate, with knowledge of the employment of Councillor Allgayer by corporation that formed part of the group, this conduct alone would have been sufficient to have caused concern in the mind of the reasonable bystander.
61. It is inappropriate for councillors to conduct themselves in this manner. In this respect it cannot be said that Councillor Allgayer appropriately managed the conflict in accordance with Clause 7.2 of the Code. If there is a matter that is insufficient in the terms of an application, or insufficient in a manner in which an application is assessed, the matter should be raised for consideration of all councillors in a transparent way so that the matter can be assessed or dismissed, as appropriate. If it is a matter that requires an amendment to an application it can then be incorporated into the development consent, or may itself be the subject of an amendment of the application. But it is wholly inappropriate that the matter be left to an assumption that a proponent will be "kept to their word", whatever that may mean in the scheme of the grant of a development consent which does not reflect that word.
62. Furthermore, this conduct makes it abundantly clear that the circumstances with respect to Councillor Allgayer's conduct constitute one incident of misbehaviour that is of such a sufficient serious nature to warrant the councillor's suspension.
63. Finally, in consideration of the matters outlined above as derived from the Department Report I am satisfied that grounds exist that warrant the councillor's suspension.
64. In submissions to the Tribunal Councillor Allgayer raised the following principal submissions against the findings set out above.

65. The first concerned the submission that the subject matter was the exercise of a regulatory power. The submission was that the suspension order was an administrative action, and that as the matter before the Tribunal was an appeal, it still remained for the Director General to establish that the suspension order was exercised pursuant to a valid regulatory power. By reference to the reasons for the making of the order it was submitted that if any one of the reasons was wrong that was sufficient to dispense with the appeal.
66. To a certain extent the submission was internally inconsistent. As set out above the Tribunal has approached this appeal on the basis of it being all grounds appeal rather than limiting it to establishing error in the exercise of the suspension order.
67. Secondly it was said that the standard of proof required in circumstances where the allegation is a serious one should be applied with what is commonly known as the *Briginshaw* Test where, in essence, before any adverse finding is made there should be direct evidence rather than indirect evidence, particularly given the seriousness of the allegation.
68. In determining matters before the Tribunal the standard of proof is on the balance of probabilities: s.483. Whilst in the application of that standard there is scope for *Briginshaw* type considerations, the circumstances of the determination of this appeal are derived primarily from the relevant clauses in the code of conduct, which have been addressed above. In those circumstances, viewed objectively, for the reasons set out above the Tribunal is of the view that Councillor Allgayer failed to comply with the relevant code.
69. Thirdly, it was said that pursuant to the *Environmental Planning and Assessment Act* there is no obligation on a councillor to seek to lift the corporate veil; rather simply to deal with each proponent as presented to the council. This of course is correct. The *Environmental Planning and Assessment Act* is concerned more with acts to be done rather than the

identity of the proponent. However, notwithstanding the operation of that Act, the matter to be determined in this appeal is or are the obligations of the councillor pursuant to a Code of Conduct. That in precise terms is less concerned with the corporate veil but more concerned with what the reasonable person may consider in the circumstances of the council meeting.

70. This notwithstanding it is, in passing, of interest to note that Councillor Allgayer himself did not appear to be caught up in the nuances of the corporate veil. In his Annual Return lodged with the council pursuant to s.449 he identified (essentially as his employer) "Whitehaven", which was in fact not his employer, as well as Narrabri Coal Operations".

71. Next it was submitted that one cannot ignore the corporate veil and that each corporation is a legal entity in its own right and must be presumed to operate independently. Again, this is a proposition that is correct at law. But again this proposition is to be addressed in the circumstances of the council meeting in which a councillor in the employ of a joint venture corporation part owned within a group which also part owned the joint venture party which was the proponent for development. That does not involve any concept of the lifting of any corporate veil but rather is concerned with the recognition of the relationship between the corporations and what the reasonable observer may consider having regard to commonality between them, and especially the councillor. It is unlikely that the reasonable informed person would conclude the absence of a non-pecuniary conflict of interest because he or she would consider that the independence of the corporations, although they are within the same group, disconnects the councillor sufficiently from the subject matter to be able to say that he might not be influenced by a private interest when carrying out his public duty.

72. In the Departmental Report and the Statement of Reasons, (and in evidence before the Tribunal, presumably in response to those two sources) reference was made to Councillor Allgayer's alleged knowledge

and/or friendship with a Mr Burgess, the General Manager New Projects for Whitehaven Coal Limited. In the circumstances set out above the Tribunal has not relied on such a relationship, denied by Councillor Allgayer as a "friendship" in evidence before the Tribunal, as a ground for a breach of the Code of Conduct.

73. Finally, additional submissions were made by reference to Tribunal decisions concerning employment relationship establishing a pecuniary interest: *PIDT2/97 Councillor Miller, Orange Council*. That case involved a pecuniary interest, whereas the present appeal is concerned with non disclosure of non-pecuniary interest in breach of a Code of Conduct.

CONSEQUENCE

74. Pursuant to s.440M(4) this Tribunal may:

- a) confirm the order, or
- b) quash the order, or
- c) amend the order consistently with the powers of the Director General.

75. In the circumstances set out above the Tribunal has determined that the appeal against the order should not be allowed. Accordingly, s.440M(4)(b) is inappropriate.

76. Section 440K(1) permits the Director General to suspend a councillor from civic office "for a period not exceeding one (1) month". That presumably includes a period less than one (1) month. The suspension order was for one (1) month.

77. In the Statement of Reasons accompanying the Suspension Order the Director General referred to the fact the Councillor Allgayer is an experienced councillor, and had an awareness in relation to his obligations with regard to declaring and managing a conflict interest. The Director General also referred to the proposition that Councillor

Allgayer's actions have had a negative impact on the community confidence in Council's decision making process.

78. Section 440M limits this Tribunal's Orders to the suspension powers that reside in the Director General. In the circumstances of the conduct set out above concerning Councilor Allgayer passing a note(s) to the representatives of the proponent during consideration of the development application by the Council, and in the absence of the constraint against relief as contained in s.440M(4), the Tribunal would have imposed a far greater order of suspension against Councillor Allgayer.
79. That notwithstanding, in the circumstances, pursuant to s.440M(4)(a) the Tribunal confirms the order of suspension made by the Director General on 11 December 2012.
80. Pursuant to its Order made on 1 February 2013 the Stay of the Director General's Order of Suspension dated 11 December 2012 is revoked on and from 24 June 2013.

Dated: 19 June 2013



Adrian Galasso SC

Local Government Pecuniary Interest and Disciplinary Tribunal