

**LOCAL GOVERNMENT
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL
LOCAL GOVERNMENT ACT 1993**

LGPIDT 07/2012

**DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET
RE: COUNCILLOR MARTIN TICEHURST, CITY OF LITHGOW COUNCIL**

DETERMINATION

1. This matter concerns an allegation of misbehaviour made by the Director General, Department of Premier and Cabinet, Division of Local Government with respect to Councillor Martin Ticehurst, a Councillor of the City of Lithgow Council.
2. On 22 November 2012 the Tribunal received from the Director General, through his Delegate, a Departmental Report prepared pursuant to s.440J of the *Local Government Act* with respect to alleged incidents of misbehaviour at Council Meetings held on 10 October 2011 and 31 October 2011.
3. On 12 December 2012 the Tribunal issued its Notice of Decision to Conduct Proceedings with respect to one of those council meetings, the council meeting held on 10 October 2011. The hearing with respect to that Council meeting was conducted before the Tribunal on 5 April 2013 at which Councillor Ticehurst appeared on his own behalf and the Director General was represented by Mr Barley.

THE COUNCIL MEETING

4. The meeting of the Council held on 10 October 2011 was an Ordinary Meeting of the Council. As part of the preparation of the Agenda and Business

Papers for that meeting Councillor Ticehurst had submitted a Notice of Motion which was contained in the Agenda as Item 5, entitled "Defamation and the right to political communication – Councillor M F Ticehurst". The agenda item made reference to an article entitled "Defamation and the right to political communication" as published on the NSW State Parliament website, giving a reference to the website address. The agenda item then contained a "commentary" concerning various aspects of that article referring to certain reported decisions, in particular of the High Court, concerning the subject matter of the article. The recommendation (drafted by Councillor Ticehurst) at the conclusion of the agenda item was "that the information be noted".

5. The Agenda and Business Papers were circulated to Councillors prior to the meeting. All Councillors (except one), including Councillor Ticehurst, attended the Ordinary Meeting of the Council on 10 October 2011.
6. The minutes of the meeting record that Item 5 (as identified above) was reached and with respect to the motion "that the information be noted", Councillor Ticehurst moved the motion, and the motion was seconded by another Councillor, Councillor McGinnes.
7. The minutes then record the following:

"Councillor Ticehurst persistently interrupted and attempted to speak over the Mayor when comments and observations were being made by the Mayor. Councillor Ticehurst continued to loudly interject stating that he will not allow the Mayor to make such comments or allow the Mayor to continue. During this time the Mayor informed Councillor Ticehurst that he was out of order.

Councillor Ticehurst called a point of order. The Mayor heard the point of order and overruled it.

Councillor Ticehurst then continued to loudly interject. The Mayor continued to advise Councillor Ticehurst that he was out of order.

Councillor Ticehurst called a further point of order dissenting from the Mayor's earlier ruling.

The Mayor put the point of order to the Council. The point of order was overruled by the Council.

Councillor Ticehurst continued to loudly state that he would not allow the Mayor to continue. Councillor Ticehurst rose to his feet and continued to loudly interject whilst the Mayor was speaking.

The Mayor requested Councillor Ticehurst to resume his seat and come to order.

After numerous calls which were ignored by Councillor Ticehurst for him to come to order, the following resolution was made:"

8. The resolution that was then made was in the following terms:

"That Councillor Martin Ticehurst be ejected from the Chambers for persistent disorder."

9. Following that resolution the minutes record the following:

"The Mayor requested Councillor Ticehurst leave the Chamber. Councillor Ticehurst refused to leave.

The Mayor called an adjournment for 5 minutes at 7:38pm due to Councillor Ticehurst refusing to leave the Council Chamber.

The Council reassembled at 7:45pm with all of the aforementioned Councillors present

...

Councillor Ticehurst remained in his seat in the Chamber

..."

10. The minutes then record a further invitation from the Mayor to Councillor Ticehurst to depart the meeting, with the sanction that if he did not the Police will be called, a further adjournment, and the ultimate reconvening of the meeting at 7:55pm with all Councillors originally present, with the exception of Councillor Ticehurst.
11. The subsequent meeting of the Council was the Ordinary Meeting of Council held on 31 October 2011. All Councillors including Councillor Ticehurst (with the exception of one other Councillor) were present at that meeting. The Council resolved, by majority (Councillors Ticehurst and McGinnes against) that the minutes of the Ordinary Meeting held on 10 October 2011 were taken as read and confirmed.

12. The minutes of the Council Meeting of 10 October 2011, of course, do not constitute a transcript of what occurred at the council meeting.
13. In statements of evidence obtained by the Director General and contained in the Departmental Report tendered before the Tribunal it was apparent that upon Councillor Ticehurst moving the motion that his agenda item be noted, the Mayor then began to read from a report about what was considered to be a defamation case. It was upon that course being taken that Councillor Ticehurst was said to have wished to stop the Mayor from continuing and spoke over him saying the words to the effect "I won't let you quote from that or read that passage" .
14. Further, whilst the points of order were taken (as recorded in the minutes and as referred above) Councillor Ticehurst rose to his feet on many occasions and reiterated that he would not permit the Mayor to read the passage. In particular, one Councillor recalled that Councillor Ticehurst had said words during the interchange to the effect "Mayor be quiet"; "you don't have the right to say that"; "you can't continue". Another Councillor recalled Councillor Ticehurst saying to the Mayor words to the effect "while you continue to speak on that matter, I'll continue to speak over the top of you".
15. In evidence and submissions before the Tribunal it became apparent that the matter which the Mayor was purporting to make commentary about concerned a journalist, Mr Andrew Bolt. The report, probably being a report from the Australian Newspaper of 28 September 2011, concerned a report that the Herald Sun Columnist Andrew Bolt had lost an action brought in the Federal Court of Australia in which he was accused of breaching the *Racial Discrimination Act*. Councillor Ticehurst's concern, or contention, was that the Bolt Matter was not a defamation case, as seemed to be a part of the Mayor's statement concerning it, but rather was a racial vilification case.
16. Irrespective of the difference of opinion concerning the agenda item and the article about which the Mayor wished to make a statement, the Director General has referred the conduct of Councillor Ticehurst in his interactions

with the Mayor as an alleged matter of misbehaviour as defined in Chapter 14 of the *Local Government Act*.

MISBEHAVIOUR

17. Division 3 of Part 1 as contained in Chapter 14 of the *Local Government Act* is entitled "Misbehaviour". Pursuant to s.440F(1) in that Division (as relevant to this proceeding):

"Misbehaviour of a Councillor means any of the following:

- a) a contravention by the councillor of this Act or the Regulation,
 - b) a failure by the councillor to comply with an applicable requirement of a code of conduct as required under s.440(5),
 - c) an act of disorder committed by the councillor at a meeting of the council or a committee of the council ..."
18. Pursuant to s.440I the grounds on which a councillor may be suspended from civic office under Division 3 are:

"a) the councillor's behaviour has:

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

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

19. The Director General submits, in the alternative, that either s.440I(1)(a) or (b) is applicable to the circumstances of the present case.

20. As referred above, and as relevant to this proceeding, misbehaviour is constituted either by a contravention of the Act or Regulations, a failure to comply with an applicable code of conduct, or an act of disorder.

21. Paragraph 440F(1)(a) establishes as misbehaviour, *inter alia*, a contravention by the councillor of the Regulations.

22. Clause 255 of the *Local Government (General) Regulation 2005* is concerned with the topic of “questions of order”. Those provisions essentially mirror the provisions of Clause 40 of the Code of Meeting Practice adopted by the Council (as set out below), but most relevantly for present purposes is clause 255(4) which provides, with respect to questions of order, that:

“The chairperson’s ruling must be obeyed unless a motion dissenting from the ruling is passed”.

23. Paragraph 440F(1)(b) establishes as misbehaviour a failure to comply with a code of conduct. On 14 December 2009 the City of Lithgow Council resolved to adopt as its Code of Conduct (for the purposes of s.440(5)) the Model Code of Conduct.

24. As relevant to this proceeding the Model Code of Conduct (and hence the Council’s Code of Conduct) contains the following provisions:

“Clause 6.1

You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office in disrepute. Specifically, you must not act in a way that:

- a) contravenes the Act, associated Regulations, council’s relevant administrative requirements and policies
- b) is detrimental to the pursuit of the charter of a council
- c) is improper or unethical...

Clause 6.3

You must treat others with respect at all times.

Clause 9.5

You must act in accordance with Council’s Code of Meeting Practice, if council has adopted one, and the *Local Government (General) Regulation 2005* during council and committee meetings.

Clause 9.6

You must show respect to the chair, other council officials and any members of the public present during council and committee meetings or other formal proceedings of the council.”

25. As is apparent from the terms of those clauses, and as conceded by the Director General, there is some duplication in and with respect to the obligations in them, and in and with respect to the obligations in those clauses and s.440F(1).
26. As referred above, Clause 9.5 of the Code of Conduct imports an obligation to act in accordance with the Council’s Code of Meeting Practice, if the Council has adopted one. On 27 January 2009 the Lithgow City Council adopted a Code of Meeting Practice. As relevant to this proceeding are the following clauses of that Code of Meeting Practice:

“12 Chairperson to have precedence

When the chairperson rises or speaks during the meeting of Council:

- i. any Councillor then speaking or seeking to speak must, if standing, immediately resume his or her seat;
- ii. every Councillor present must be silent to enable the Chairperson to be heard without interruption.

....

40 Questions of order

- i. the Chairperson, without the intervention of any other Councillor, may call any Councillor to order whenever, in the opinion of the chairperson, it is necessary to do so.
- ii. a Councillor who claims that another Councillor has committed an act of disorder, or is out of order, may call the attention of the Chairperson to the matter.
- iii. the Chairperson must rule on a question of order immediately after it is raised but, before doing so, may invite the opinion of the Council.

iv. The Chairperson's ruling must be obeyed unless a motion dissenting the ruling is passed.

27. Clause 41 of the Code of Meeting Practice also sets out provisions concerning "acts of disorder", which provisions, in main, mirror those contained in Clause 256 of the Regulation (as set out below).

28. As referred above s.440F(1)(c) includes as misbehaviour an act of disorder. Pursuant to Clause 194 of the Regulations, for the purposes of that provision the acts of disorder specified in Clause 256(1) (of the Regulation) are prescribed as acts of disorder.

29. As relevant to this proceeding, pursuant to Clause 256(1):

"a councillor commits an act of disorder if the councillor at a meeting of the council or committee of a council:

....

d) insults or makes personal reflections on or imputes improper motives to any other councillor, or

e) says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring council or committee into contempt."

30. I note that in the summary set out above concerning the events that occurred at the Ordinary Meeting of the Council held on 10 October 2011 a reference was made to a resolution being passed to expel Councillor Ticehurst from the meeting, and his refusal (at least at the initial adjournment) to leave the meeting. The Director General specifically does not rely upon that conduct for the purposes of the complaint about misbehaviour at the meeting, on the grounds of a procedural and pre-conditional defect in the making of that resolution sufficient for it to have not have been a valid one.

31. Whilst the Director General submits that nonetheless that conduct should be taken into account in determining the matters raised in this hearing, on basis of the concession of the Director General of the defect in the resolution I propose to disregard it for all purposes.

WAS THERE MISBEHAVIOUR?

- 32.** The circumstances of the meeting held on 10 October 2011 set out above make it clear in my view that the conduct of Councillor Ticehurst constituted misbehaviour as defined in s.440F(1), for the following reasons.
- 33.** Firstly, in so far as s.440F(1)(a) is concerned, namely a contravention of the Regulations, as set out above Clause 255(4) of the Regulation provides that the Chairperson's ruling (on a question of order) must be obeyed unless a motion dissenting from the ruling is passed.
- 34.** The Mayor had made more than one ruling on the question of order concerning Councillor Ticehurst's conduct. None of them were obeyed. Whilst Councillor Ticehurst did question as a question of order the Mayor's conduct (correctly) by calling a further point of order dissenting from the Mayor's earlier ruling, the minutes record that that point of order was put to the Council and was overruled. Nonetheless Councillor Ticehurst continued to refuse to comply with the Mayor's points of order. Hence s.440F(1)(a) is satisfied.
- 35.** Secondly, in so far as s.440F(1)(b) is concerned, I am satisfied that various clauses of the Code of Conduct have been breached in Councillor Ticehurst's conduct. His conduct may be considered to have been improper (Clause 6.1(c)), it is apparent by his continual talking over the top of the Mayor and his refusal to comply with the rulings of the point of order that he may be said to have not treated the Mayor with respect (Clause 6.3), and hence has also breached Clause 9.6 by failing to show respect to the Chair (the Mayor).
- 36.** Furthermore, in so far as Clause 9.5 requires compliance with the Council's Code of Meeting Practice Councillor Ticehurst may be said to have breached Clause 12 in that he did not resume his seat nor be silent so as to enable the Chairperson to be heard without interruption. To this extent the minutes record that the Mayor specifically asked Councillor Ticehurst to resume to his

seat, even despite the requirements of Clause 12 of the Code of Meeting Practice.

37. Accordingly Section 440F(1)(b) is satisfied.
38. In so far as s.440F(1)(c) is concerned the conduct of Councillor Ticehurst was inconsistent with maintaining order at the Ordinary Council Meeting held on 10 October 2011, and hence constituted an act of disorder as provided in Clause 256(1)(e). Accordingly s.440F(1)(c) is also satisfied.
39. The engagement of the various paragraphs of s.440F(1) as I have identified above is by reference to the same set of factual circumstances, and hence to a large extent there is a significant degree of overlap in the findings with respect to each of those paragraphs. This notwithstanding I am satisfied that for the purposes of s.440F(1) Councillor Ticehurst's conduct constituted misbehaviour as defined in the Act.

ARE THERE GROUNDS FOR SUSPENSION?

40. As referred above s.440I(1) provides as grounds for the suspension of a councillor for misbehaviour under Division 3 either behaviour that has been disruptive over a period and involved more than one incident of misbehaviour during the period, or a single incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.
41. The Director General, through Mr Barley, submits that the interjections and statements made by Councillor Ticehurst during the course of the meeting constitutes a "period" and a series of "incidents of misbehaviour" (and "a pattern of behaviour during that period") for the purposes of s.440I(1)(a). I do not agree. Whilst undoubtedly every time that Councillor Ticehurst made a statement, or opened his mouth, or did not sit, or stood, etc there were separate physical acts, for the purposes of s.440I(1)(a) they are not, viewed in a proper and balanced way, to be regarded as incidents of misbehaviour undertaken over a period sufficient to establish a pattern of behaviour.

42. The Director General submitted, in the alternative, that there was a single incident of misbehaviour and that s.440I(1)(b) is nonetheless satisfied. I agree.
43. If the various physical things done by Councillor Ticehurst at the Ordinary Meeting of 10 October 2011 (with the exception of the refusal to depart the meeting following the resolution, as above referred) are to be regarded as a single incident of misbehaviour, as in my opinion they should be, it is apparent that that one incident of misbehaviour was of such a sufficient serious nature as to warrant the Councillor's suspension. The obligations of a Councillor are, in so far as complying with rulings on points of order and respect to the Chair, very clear. The fact that I have identified above the result that the one series of conduct may be said to breach not only Regulations made under the Act, but also the Model Code, and the Code of Meeting Practice makes it abundantly clear that the common thread throughout is to comply with rulings from the Chair, and abide by resolutions made by the Council with respect to points of order. Councillor Ticehurst failed abjectly to comply with those requirements.
44. Accordingly, in the circumstances of his conduct at the meeting of 10 October 2011 I am satisfied that there was one incident of misbehaviour that was of sufficiently serious nature as to warrant Councillor Ticehurst's suspension.

CONSEQUENCE

45. Pursuant to s.482A(2):

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

- a) Counsel the councillor, or
- b) Reprimand the councillor, or
- c) Suspend the councillor from civic office for a period not exceeding 6 months, or

d) Suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period)."

46. As referred in this Tribunal's decision delivered on 25 June 2013 in *Councillor Martin Ticehurst, City of Lithgow Council* (LGPIDT 05/2012) at [82]-[85], s.482A has been amended to insert a new s.482A(3). As this matter was referred to the Tribunal prior to the commencement of operation of that subsection, this matter is to be determined without reference to that new subsection.
47. With respect to the matter of consequence Councillor Ticehurst tendered certain material before the Tribunal and made submissions raising the following matters.
48. Firstly he submitted that his agenda item was in anticipation of his expectation that the matter of a Code of Conduct inquiry (concerning him) would be tabled at the meeting of 10 October 2011. In fact it was not. However, Councillor Ticehurst submitted that he wished to make it clear to Councillors who may be (in the future) voting on the code of conduct inquiry (presumably to deal with matters related to the notion of freedom of speech) that there was or were articles and decisions concerning the political right to freedom of speech. He then reacted when he observed that the Mayor in turn referred to an article concerning Mr Bolt which did not concern that matter but rather was about racial vilification and that that was irrelevant to the matter that he wished to raise in the agenda item.
49. The distinction between the two topics may well be true, but I do not propose to determine for the purposes of this hearing which is right or wrong. That is because it is the conduct of Councillor Ticehurst, rather than the motivation for it, that is the subject of the findings set out above concerning misbehaviour. One does not deal with the disagreement of a matter said by the Chair, or for that matter any other councillor, by the conduct exhibited by Councillor Ticehurst at the meeting. Rather, the various obligations that I have set out

above, and derived from the legislative framework, make it plain that meetings are to be undertaken in an orderly and structured manner, without the manner of interaction exhibited by Councillor Ticehurst.

- 50.** Councillor Ticehurst also submitted that there was an issue concerning the correctness of the minutes. He did this by reference to correspondence that had been sent to the General Manager by a Mr Philips in which it was said that certain conduct of the Mayor, and certain inflections in the way the Mayor had said things at the meeting, had not been recorded in the minutes. Whether or not that is true, it remains the fact that the minutes were considered by the majority of the council at the subsequent meeting held on 31 October 2011 to be correct. It was unclear as to who Mr Philips was, but his correspondence was answered by the General Manager in a manner sufficient to demonstrate that his complaints were not ones which necessitated any correction to the minutes, let alone in any significant way. In any case, the fact remains, as set out above, that Councillor Ticehurst failed to comply with rulings on order by the Chairman and conducted himself in a manner that was inconsistent with the keeping of order at the council meeting.
- 51.** Although he (correctly) sought to have a point of order taken with respect the Mayor's own conduct, that point of order was rejected by the council, as reflected in the minutes. That should have been the end of the matter. However Councillor Ticehurst continued to fail to comply with the point of order made by the Mayor.
- 52.** Councillor Ticehurst made reference to material alleging bias against him by other Councillors and the General Manager. Such material does not, the circumstances of the meeting, excuse his conduct at the Council meeting.
- 53.** In addition he referred to another circumstance in which the Director General did not refer his conduct to this Tribunal. However, on analysis that matter concerned a very different factual circumstance than the one that concerns the circumstances of this case.

54. In the circumstances of the present case the alternatives for consequence as contained in s.482A(2)(a) and (b) are inappropriate, both in terms of Councillor Ticehurst and in terms of any appropriate decision on the matter of consequence more generally.
55. Neither party has made any submission concerning a consequence as contemplated by s.482A(2)(d). On that basis I do not propose to do so in this Determination. However, it will be abundantly clear that there will, even despite this Determination, be a series of suspension orders that have been made against Councillor Ticehurst. There may come a time in the future when an order pursuant to s.482A(2)(d) is appropriate in order to ensure that the conduct of Councillor Ticehurst, or any councillor whose conduct has been the subject of multiple hearings by this Tribunal, is compliant with his or her obligations under the *Local Government Act*.
56. I consider that it is appropriate to make an order of suspension pursuant to s.482A(2)(c). Having regard to all of the circumstances of this matter that period of suspension should be for a period of two (2) months.
57. In its decision delivered on 14 May 2013 (LGPIDT 02/2012) the Tribunal determined the complaint lodged by the Director General against Councillor Ticehurst for failure to lodge an annual return. In determining a breach of the Act with respect to that complaint the Tribunal imposed a suspension order for a period of two months from the date of those Orders (14 May 2013). In the Tribunal's decision dated 25 June 2013 (LGPIDT 05/2012) the Tribunal made an Order pursuant to s.482A(2)(c) suspending Councillor Ticehurst from civic office for a period of four (4) months from 15 July 2013. That Determination concerned Councillor Ticehurst's failure to comply with resolutions requiring him to leave certain Council meetings. In the Tribunal's decision dated 27 June 2013 (LGPIDT 06/2012) the Tribunal made an Order pursuant to s.482A(2)(c) suspending Councillor Ticehurst from civic office for a period of two (2) months from 15 November 2013. That Determination concerned Councillor Ticehurst's failure to comply with a resolution requiring him to issue

an apology following the sending of emails to Councillors and the General Manager of another Council.

- 58.** In each of the last two of those decisions the Tribunal made reference to the fact that the circumstances and the subject matter of each of those Determinations was sufficiently different to the earlier one(s) for it to have been inappropriate that the order of suspension coincide with the earlier, and extant, period of suspension. The same may be said about the circumstances of the present case. Each of the decisions relates to a different incident sufficient for it to be inappropriate that the order of suspension coincide with any extant order of suspension.
- 59.** Accordingly the order of suspension for a period of two (2) months shall commence on and from 15 January 2014.

Date: 2 July 2013



**Adrian Galasso SC
Local Government Pecuniary Interest and Disciplinary Tribunal**