

**LOCAL GOVERNMENT
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1993

LGPIDT 02/2012

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

DETERMINATION

1. On 8 August 2012 the Local Government and Pecuniary Interest and Disciplinary Tribunal received from the delegate of the Director General, Department of Premier and Cabinet, Division of Local Government, pursuant to s.468(1) of the *Local Government Act, 1993*, a report of an investigation into a complaint carried out by the Director General.
2. The complaint concerned the allegation that Councillor Martin Ticehurst, a councillor of the City of Lithgow Council, had failed to lodge with the General Manager of the Council within 3 months after 30 June 2011 a return in the form prescribed by the regulations.
3. On 23 October 2012 the Tribunal determined to conduct proceedings into the complaint. On 30 November 2012 the Tribunal conducted a Preliminary Conference in relation to the complaint. At the Preliminary Conference it was agreed between the parties that the proceedings may be determined without a hearing. In subsequent submissions to the Tribunal it was apparent that there are no material facts in dispute between the parties. The Tribunal is of the opinion that public interest considerations do not require a hearing, and accordingly in accordance with s.470 the Tribunal has proceeded to determine the proceedings without a hearing.

THE MATERIAL FACTS

4. As will be more completely set out below, s.449 requires the lodgement of a return within 3 months of a period ending on 30 June. That is, the Annual Return for the year ended 30 June 2011 was required to be lodged by all Councillors with the General Manager by 30 September 2011.
5. The General Manager is required to keep a register of returns: s.450A(1). The returns required to be lodged with the General Manager must be tabled at a meeting of the Council being the first meeting held after the last day for lodgement pursuant to s.449(3): s.450A(2)(b).
6. In so far as the year ending 30 June 2011 is concerned, the material submitted to the Tribunal establishes that on 24 June 2011 the office of the General Manager had issued, in the form of a "mail-merge" letter, a letter to all Councillors advising (or reminding) them of their obligations to submit an Annual Return, and enclosing a copy of that return. Councillor Ticehurst denies that he ever received that letter.
7. At the Ordinary Meeting of the Council held on 10 October 2011 the issue of the non lodgement of the Annual Return by Councillor Ticehurst was identified in the Agenda as Item 25. There was also another Councillor who had not lodged a return, but he subsequently lodged one and this hearing concerns only Councillor Ticehurst.
8. The matter of the non lodgement of the return (Item 25) was discussed during the course of the meeting on 10 October 2011, and a resolution noting the matter was passed: see Minutes 10 October 2011, page 55. Councillor Ticehurst attended the meeting of 10 October 2011, but had departed the meeting prior to Item 25 being considered.

9. The evidence before the Tribunal indicates that at the end of the meeting held on 10 October 2011 Miss Farnsworth, an officer of the Council, placed a copy of the form letter of 24 June 2011 together with the Annual Return form in the "in-tray" of Councillor Ticehurst at the Council offices. As with the mailing of the 24 June 2011 letter, Councillor Ticehurst denies that he received that copy.
10. On 8 December 2011 the Director General through his department wrote to Councillor Ticehurst concerning the failure to have lodged an annual return inviting him to respond to the allegation. On 2 January 2012, and again on 29 January 2012, Councillor Ticehurst responded to the letter from the Director General. In that correspondence he denied the allegation, asserting in support of that denial that he at no time received the reminder letter(s) and that he would lodge an annual return when he was provided with the template letter dated 24 June 2011.
11. At the time of the provision of the report to the Tribunal (8 August 2012) Councillor Ticehurst had still not lodged with the General Manager an Annual Return as required by s.449.
12. On 29 November 2012 Councillor Ticehurst lodged a formal complaint to the Police Department at Lithgow alleging the theft of both the 24 June 2011 letter, and the copy correspondence alleged to have been placed in his in-tray on 10 October 2011.
13. On 20 December 2012 (almost 15 months after the due date) Councillor Ticehurst lodged his Annual Return for the year ended 30 June 2011 with the General Manager. That Annual Return was tabled at the Council Meeting held on 4 February 2013.
14. In material lodged with the Tribunal, Councillor Ticehurst included correspondence concerning the Annual Return for the year ended 30 June 2010 including reminder correspondence, and correspondence and reminder correspondence for the year ended 30 June 2012.

THE OBLIGATION TO LODGE A RETURN

15. Section 449 is clear in its terms. It provides as relevant to the present case, that:
 - “(3) a councillor or designated person holding that 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.”
16. That obligation is an obligation created by *the Local Government Act* and does not depend upon its engagement any correspondence from the General Manager or anyone else in the Council. It is an obligation that resides in the office of every Councillor irrespective of the administrative processes of any particular council.
17. Councillor Ticehurst failed to comply with that provision with respect to the 2011 year until 20 December 2012, almost 15 months after the due date for the provision of the Annual Return.
18. The only reason given by Councillor Ticehurst for failure to comply with that obligation is the assertion that he did not receive the form letter of 24 June 2011 (enclosing the return form) from the General Manager's office until shortly before 20 December 2012. That assertion, assuming it to be true, does not operate as a defence to, nor does it excuse, a breach of s.449(3).
19. In the circumstances set out above it is apparent, and the Tribunal finds, that Councillor Ticehurst has committed a breach of s.449(3) in that he failed to lodge an annual return with respect to the year ending 30 June 2011 within 3 months of the date.

CONSEQUENCE

20. Pursuant to s.482(1):

“The Pecuniary Interest and Disciplinary Tribunal may, if it 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 6 months, or
- d) disqualify the councillor from holding civic office for a period not exceeding 5 years, or
- e) suspend the councillor’s right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period).

21. It is incumbent upon every Councillor to comply with the obligations created by the Statute. The obligations for the lodgement of an annual return do not depend for their operation upon the provision of a form to the Councillor.

22. In so far as Councillor Ticehurst is concerned, he is a very experienced Councillor, having been a Councillor with the Lithgow City Council since 1999. Disclosure obligations, including the requirement to lodge an Annual Return, had been in place since that time and Councillor Ticehurst has lodged annual returns with the General Manager since that time.

23. It is insufficient to establish any defence to the breach of s.449 to simply say that he did not receive either the form letter of 24 June 2011 or the copy of that letter provided in his in-tray at some time following the

Council Meeting of 10 October 2011. Councillor Ticehurst should have been aware of his obligations which operate independently of the provision of any such letter.

- 24.** In any case he was without doubt reminded of that obligation at the least by the Council Agenda and Minutes of meeting of 10 October 2011. As referred above, the matter of the non lodgement of the return (Item 25) was discussed during the course of the Council meeting held on 10 October 2011, and a resolution noting the matter was passed: see Minutes 10 October 2011, page 55. Councillor Ticehurst attended the meeting of 10 October 2011, but had departed the meeting prior to Item 25 being considered. Nonetheless there is no evidence to suggest that he was not provided with a copy of the Agenda for that meeting (and hence had the opportunity to note that he had been identified as a person who had not lodged an Annual Return), nor that he was not provided with the copy of the minutes of that meeting at which Item 25 was discussed, and about which a resolution had been passed.
- 25.** Councillor Ticehurst was further reminded of the obligation by the Director General's letter of 8 December 2011. As referred above he responded to that letter. On 11 July 2012 Councillor Ticehurst was advised of the complaint concerning his alleged breach of s.449(3). On 23 October 2012 Councillor Ticehurst was sent this Tribunal's Notice of Decision to Conduct Proceedings and Notice of Preliminary Conference in relation to the very issue of his failure to lodge a return. On 30 November 2012 Councillor Ticehurst attended the Preliminary Conference before this Tribunal. On 4 December 2012 Councillor Ticehurst was provided with Directions made at that Preliminary Conference. Yet throughout all of this period Councillor Ticehurst continued to fail to lodge an Annual Return. It was only (apparently) following the provision to him by the Director General on 10 December 2012 of a copy of the mail-merge letter, that, some ten days later, Councillor Ticehurst lodged his annual return.

26. Councillor Ticehurst's conduct in failing to lodge an annual return for a period of almost 15 months after the due date constitutes a flagrant breach of the obligation to lodge an annual return. It is insufficient merely for him to say that the return will be lodged upon receipt of the form letter to all Councillors. The obligation operates independently of the provision of any such correspondence. The form is readily available – it comprises Schedule 3 of the *Local Government (General) Regulation*, which is readily publicly available. Even if it was not readily available it would have been no, or little, effort at all to have asked for a form and submit it.
27. Councillor Ticehurst claims in mitigation factors including the provision of reminder correspondence for the 2010 and 2012 years, his consistent position that he would lodge his return upon being provided with the form letter, his position that he did not receive the form letter nor the copy of it following the council meeting on 10 October 2011, and an assertion of bias in the General Manager in so far as Councillor Ticehurst is concerned. None of these matters in the Tribunal's opinion operates to reduce the seriousness of the breach, or its ongoing nature. As referred above the breach may be taken to have been a flagrant one, particularly after the issue of the breach was raised (repeatedly) with Councillor Ticehurst.
28. In *Councillor Longbottom - Lane Council* (1/2004, 7 April 2005) the Tribunal was concerned with the failure to lodge an annual return, it ultimately being lodged 7 months late. It was said by the relevant councillor that there was an oversight in relation to the lodgement of the return. There were also some aspects of the return which did not comprise a complete disclosure. Nonetheless, particularly having regard to finding of the good character and the other matters concerning the hearing, the Tribunal reprimanded the Councillor.
29. At [44] the Tribunal noted that it was no excuse for Councillors to ignore the clear terms of the legislation in so far as the obligation to lodge annual returns was concerned. The Tribunal also noted that it had been

urging this position since *Cotter's* case in 1998. And at [49] the Tribunal observed the importance of the role of lodgement of annual returns in the legislative scheme.

30. In the Tribunal decision of *Councillor Stott – Ashfield Council* (3/2005, 10 September 2006) the Tribunal considered a breach of s.449(3). In that matter the annual return was lodged on receipt of the request to show cause by the Director General and Councillor Stott submitted that the failure to lodge the return was an oversight. The Tribunal found that there were extenuating circumstances concerning the failure to lodge the return and ultimately imposed a consequence of counselling the councillor. At [15] the Tribunal noted the importance in the legislative scheme of the lodgement of an annual return, reiterating its comments in the decision of *Longbottom – Lane Cove Council*.
31. In the circumstances of the present case it is difficult to conclude that there should be any significant weight given to the position of Councillor Ticehurst that he would only lodge the return upon the receipt of the form letter. As referred above the obligations are clear and they exist independently of the provision of any such letter. Even notwithstanding the non provision of the form letter, Councillor Ticehurst was reminded of the breach of the act on many occasions before he ultimately lodged the return on 20 December 2012. It is apparent that he only did so when the circumstances in which he said he would do so, namely the receipt of the form letter, were satisfied. It is not for councillors to dictate the circumstances in which they will comply with clear obligations in the Act. The continuing nature of the breach in the face of such reminders means that in the circumstances counselling or a reprimand is not an appropriate consequence.
32. The ongoing nature of the breach particularly in the light of the many reminders of the breach means that an Order under s.482 which is commensurate with the seriousness of it is appropriate. It is appropriate in the present circumstances that a suspension Order be made. The

duration of the suspension Order in this case has been reduced having regard to the absence of any assertion that the annual return would have disclosed matters that might have affected aspects of the pecuniary interest during the period in which the annual return had not been lodged, being a matter that might be said to mitigate any consequence.

33. Taking into account all of the relevant aspects of the matter, the Tribunal determines that pursuant to s.482(1)(c) it will suspend Councillor Ticehurst from civic office for a period of two (2) months, with effect from the date of this Determination.
34. The Tribunal will make Orders accordingly.

Dated: 14 May 2013



Adrian Galasso SC

Local Government Pecuniary Interest and Disciplinary Tribunal

**LOCAL GOVERNMENT
PECUNIARY INTEREST & DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT, 1993

LGPIDT 02/2012

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

ORDERS

The Tribunal makes the following Orders:

1. Pursuant to s.482A(1)(c) of the *Local Government Act*, the Tribunal **ORDERS** that Councillor Martin Ticehurst be and is hereby suspended from civic office for a period of two (2) months from the date of these Orders.
2. Copies of the Tribunal's Determination and Order will be provided to the General Manager, Lithgow City Council pursuant to s.484(3).
3. The Tribunal's Determination and Order will be made publicly available pursuant to s.484(3) forthwith.

Date: 14 May 2013



ADRIAN GALASSO SC

Local Government Pecuniary Interest & Disciplinary Tribunal

**ITEM MAYORAL MINUTE - 23/8/10 - CODE OF MEETING
PRACTICE, SUSPENDED COUNCILLOR**

REFERENCE

NIL

SUMMARY

As indicated in Item 2 of the agenda Councillor Martin Ticehurst has been suspended from Council by the Local Government Pecuniary Interest and Disciplinary Tribunal. During Councillor Ticehurst's previous period of suspension he chose to use the public forum of Council to ask questions of Council. Questions have now been asked about the ability of a suspended councillor to be able to do this and legal advice was sought. This Mayoral Minute provides clarification on this matter.

COMMENTARY

The legal advice provided outlines that:

The Local Government (LG) Act 1993, Section(§)440N makes provision for the Director-General to refer a Code of Conduct(the Code) matter that is the subject of a request or report under LG Act 1993 §440H for consideration by the Pecuniary Interest and Disciplinary Tribunal(PIDT). The PIDT, refer to LG Act 1993 §470B, is required to consider a report from the Division of Local Government. After considering a report presented to it under §440N and any other document or other material lodged with or provided to the Tribunal in relation to the report, PIDT may determine the proceedings and impose a penalty. Under §482(A) the PIDT may, amongst other things suspend Councillor from civic office for a period not exceeding six(6) months.

The LG Act 1993 defines civic office “ - - the office of councillor or mayor or, in the case of a county council, the office of chairperson or member.” In a practical sense this means that the Councillor is still an elected Councillor but during the period of suspension cannot undertake the roles and responsibilities of an elected councillor. To use a sporting analogy, the councillor is in the sinbin and cannot take the field. Upon completion of the period of suspension the Councillor is entitled to resume the exercise of civic office.

Attendance at Meetings

The LG Act 1993 is silent as to the extent of the practical restrictions placed upon of the suspended Councillor. While there are some obvious restrictions, for example a Councillor seeking to sit in the Chamber at an Ordinary Meeting of Council would be seeking to exercise civic office, establishing the boundaries between civic office and an interested party could be difficult. In regard to the attendance at the public forum of meetings the following points should be taken into consideration:-

- i. any member of the public is entitled to attend the public session of a Council Meeting;*

- ii. *unless a person has been expelled from the meeting he is entitled to remain in the open session;*
- iii. *it is not possible to prohibit a person from a meeting in anticipation that they may cause disorder; you have to wait until they breach the public order*
- iv. *addressing the Council at a public forum is not a statutory right but may be granted in the Code of Meeting Practice;*
- v. *if granted in a Code of Meeting Practice then it is available to members of the public in attendance and in accordance with the Code of Meeting Practice;*
- vi. *a Councillor is not a member of the public;*
- vii. *a Councillor, as they are not a member of the public, has not the right to exercise any privileges available to the public under the public access rules;*
- viii. *a suspended Councillor is still a Councillor and not a member of the public;*
- ix. *therefore, the Chair should refuse to accept a question from a suspended Councillor on the grounds that they are not a member of the public*

In addition to the above the additional points can also be considered:-

- i. *the public forum is still a part of the Council meeting;*
- ii. *seeking to ask a question(s) in the meeting even from the public gallery is a form of participation in the Council Meeting;*
- iii. *a Councillor seeking to ask a question(s) from the public gallery is seeking to participate in the meeting;*
- iv. *a suspended Councillor seeking to participate in a meeting is attempting to exercise civic office;*
- v. *a suspended Councillor is not permitted to exercise a civic office*
- vi. *the Chair should not accept questions from a suspended Councillor as it would be permitting the suspended Councillor to exercise civic office*

It would be a breach of the Chair's responsibilities to permit a breach of the LG Act 1993.

In order to avoid any confusion over the matter the advice provided a recommendation that there be a Mayoral Minute at the start of the meeting and before the public forum begins.

POLICY IMPLICATIONS

NIL

FINANCIAL IMPLICATIONS

NIL

LEGAL IMPLICATIONS

In addition to the above, should a suspended councillor seek to dispute the motion or participate in the Council meeting then such should be ruled out of order.

The Mayor should make it clear that the suspended Councillor is not permitted to participate in the meeting, even to oppose the Mayoral Minute.

Seeking to participate as a suspended Councillor is considered to be in breach of the LG Act 1993. The Mayor can not assist the suspended councillor to break the law therefore the Mayor has no alternative but to rule that the suspended Councillor is out of order. The suspended Councillor should either leave the meeting or if they opt to stay they must remain silent.

The Councillor, should they persist be formally warned that the continued behaviour could constitute a breach of the Code of Meeting Practice, leading to public disorder. If expelled from the meeting it could also be a potential breach of the Council's the Code of Conduct.

RECOMMENDATION

THAT Council:

1. Note the Mayoral Minute and that advice has been received that a suspended councillor cannot participate in a Council meeting in any way; and
2. Not accept any contribution from a suspended councillor during the Council meeting, including during the Public Forum as a suspended councillor is not considered a member of the public under these purposes.

**ITEM 22 - MAYORAL MINUTE - CODE OF MEETING PRACTICE,
SUSPENDED COUNCILLOR**

10-344 RESOLVED

THAT Council:

1. Note the Mayoral Minute and that advice has been received that a suspended councillor cannot participate in a Council meeting in any way; and
2. Not accept any contribution from a suspended councillor during the Council meeting, including during the Public Forum as a suspended councillor is not considered a member of the public under these purposes.

MOVED: Councillor R Thompson **SECONDED:** Councillor H K Fisher.