

**LOCAL GOVERNMENT
PECURINARY INTEREST & DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT, 1993

PIDT No 1/2010

DIRECTOR-GENERAL, DEPARTMENT OF PREMIER & CABINET

RE: COUNCILLOR MARTIN TICEHURST, LITHGOW CITY COUNCIL

DETERMINATION

1. This proceeding concerns an alleged breach of Division 3 of Chapter 14 of the Local Government Act, 1993, by Councillor Martin Ticehurst, a Councillor of the Lithgow City Council.
2. On 7 January 2010 the Tribunal received from the Deputy Director General (Local Government) as delegate of the Director-General, Department of Premier & Cabinet, the referral of this matter comprising the complaint against Mr Ticehurst pursuant to s.440N of the Act. In accordance with s.440N(4) the referral of the matter was effected by the provision of a report presented to the Tribunal by the Director-General (through his delegate).
3. Following consideration of the report, on 4 February 2010 the Tribunal issued a Notice of Decision to Conduct Proceedings, and Notice of Preliminary Conference, pursuant s.470A of the Act. Following a Preliminary Conference held on 19 March 2010, the hearing of the proceeding was conducted before the Tribunal on 21 May 2010. At

the hearing the Director-General was represented by Mr M. Robinson, of Counsel. Mr Ticehurst did not appear at the hearing, and was not otherwise represented at the hearing, a matter which the Tribunal will address below.

The General Nature of the Complaint

4. Mr Martin Ticehurst was elected as a Councillor on the Lithgow City Council of local government elections in 1999. He was re-elected in 2004. He was then elected in 2008 and is a sitting councillor of the Lithgow City Council.
5. The subject matter of the complaint, which will be addressed more comprehensively below, concerns an appearance by Mr Ticehurst on a program broadcast by Channel Seven by the name of "Today Tonight" on 4 December 2006. In that program an article concerned an alleged use of council resources for the purposes of filling a third person's land, as claimed by Mr Ticehurst (and others) with the knowledge of certain council officials.
6. The broad nature of the complaint to this Tribunal concerns three aspects of alleged breach of the Local Government Act related to that program. The first concern is, broadly, a claim that Mr Ticehurst failed to follow due process with respect to the matters raised in the program by failing to follow requirements contained in the relevant adopted Code of Practice for the Lithgow Council. The second concern is a breach of that code by Mr Ticehurst appearing on the Today Tonight program. The third concern relates Mr Ticehurst's failure to comply with a censure motion made by the council body.

The Conduct of the Hearing

7. As referred above Mr Ticehurst did not appear at the hearing before the Tribunal and was not represented at the Tribunal.

8. Also as referred above, on 4 February 2010 the Tribunal issued to both Mr Ticehurst and the Director-General its Notice of Decision to Conduct Proceedings, and more relevantly its Notice of Preliminary Conference. Those Notices were sent by letters dated 4 February 2010 in which the Tribunal noted that it would conduct a Preliminary Hearing on 19 March 2010, at 9:30am. That letter, together with subsequent correspondence from the Tribunal, was marked as an exhibit at the hearing: Exhibit T1.
9. On 21 February 2010 the Tribunal received from Mr Ticehurst an email formally acknowledging the Tribunal's letter of 4 February 2010, and advising that he was not in any position at the time to further assist or to attend the Tribunal's Preliminary Conference on 19 March 2010. The reasons given for that position relate to the fact (as asserted by Mr Ticehurst) that he was a defendant to proceedings for defamation in relation to the same television article by the person named in it (and another defendant was Channel 7), that the legal proceedings had been mediated between the parties giving rise to a Deed of Settlement, and that one of the terms of the Deed of Settlement was a confidentiality clause signed by all parties. This email was tendered at the hearing: Exhibit 1.
10. On 23 February 2010 Mr Ticehurst sent another email to the Tribunal by which he provided additional details of the Supreme Court Defamation proceedings, including the plaint number, and the parties to the proceeding (which involved three plaintiffs, and Channel 7 and Mr Ticehurst as defendants). This letter became Exhibit 2 in the proceedings.
11. On 26 February 2010 the Tribunal responded to Mr Ticehurst's two emails indicating that it was not apparent to the Tribunal how or why the resolution of private defamation proceedings affects the Tribunal's decision to conduct proceedings or determination of a complaint referred to it. The Tribunal urged Mr Ticehurst to attend at the

Preliminary Conference to be held on 19 March 2010. This letter was part of Exhibit T1.

12. On 19 March 2010 the Tribunal conducted a Preliminary Conference. Mr Robinson of Counsel appeared for the Director-General, and Mr Ticehurst did not appear. This non appearance was consistent with the position expressed by Mr Ticehurst in his letter of 21 February 2010. Attempts were made during the Preliminary Conference to contact Mr Ticehurst by telephone. No contact was made. Having regard to the position expressed by Mr Ticehurst in his email of 21 February 2010, the Tribunal fixed the matter for hearing on 21 May 2010.
13. On the same day as the Preliminary Conference, and following it, on 19 March 2010 the Tribunal wrote to Mr Ticehurst confirming the background of correspondence between the Tribunal and him up until 19 March 2010, and advising Mr Ticehurst that the matter had been fixed for the hearing of all issues identified in the Notice of Decision to Conduct Proceedings on 21 May 2010. This letter formed part of Exhibit T1.
14. On 29 April 2010 Mr Ticehurst sent an email to the Tribunal acknowledging the letter and Orders made on 19 March 2010. Mr Ticehurst included as part of that email what he described as his "Formal Written Submission and fundamental documentation to the Tribunals Notice of Decision to Conduct Proceedings by way of hearing on Friday 21 May 2010". This email became Exhibit 3 in the proceedings. In that email Mr Ticehurst reiterated that due to the inclusion of a "strict" confidentiality clause within the Deed of Settlement, and without any financial opportunity to seek legal advice and wishing to avoid "any entrapment into breaching the legally binding deed of agreement" that he was not in any position to further assist or to attend the Tribunal's public hearing in Sydney.

15. The email (in particular the annexures to the email) was incomplete, and on the same day (29 April 2010) Mr Ticehurst sent by mail a letter dated 27 April 2010 which effectively repeated the substance of his email, and included all of the annexures referred to his written submission. That letter became Exhibit 4 in the proceedings.
16. On 9 May 2010 Mr Ticehurst sent another email to the Tribunal which effectively comprised an email sent to the Director-General comprising a "Further Updated Relevant Submission and fundamental documentation under s.471(2) of the *Local Government Act* to the Tribunals Notice of Decision to Conduct Proceedings by way of hearing on Friday 21 May 2010". That email was tendered as Exhibit 5 in the proceedings, and the attachments to it were tendered as Exhibits 6 to 11 respectively.
17. As implicit in the description of the supplementary written submission, Mr Ticehurst remained well aware of the proposal to conduct the hearing on 21 May 2010. In this respect, on 10 May 2010 the Tribunal wrote again to Mr Ticehurst reiterating that the hearing would be conducted on the 21 May 2010, that he had acknowledged notice of the hearing, and that it was in his interest to attend. The Tribunal advised that if he elected not to attend that the Tribunal might make further orders or directions regarding the hearing of the proceedings in his absence.
18. As referred above the hearing of this matter was conducted on 21 May 2010, and also as referred above Mr Ticehurst neither attended, nor procured the attendance of anyone on his behalf. In attendance in the public gallery was a Mr Jack Ellis, a person known to the Tribunal by reason of the earlier proceedings involving Mr Ticehurst: PIDT 1/2008 (28 August 2009). It was not apparent whether Mr Ellis was in attendance at the request of Mr Ticehurst, and the Tribunal did not proceed upon that basis.

19. The correspondence identified above made it plain to the Tribunal that Mr Ticehurst was well aware of the proposal to conduct the hearing on 21 May 2010, and that he had elected to not attend. The Tribunal also made it plain to Mr Ticehurst that the hearing was to proceed on that date even in the event of his election not to attend.
20. As set out in the correspondence summarised above, notwithstanding that Mr Ticehurst may have executed a Deed of Settlement of the Defamation proceedings (and in this respect the Tribunal does not doubt that he did, notwithstanding that it did not have a copy of any such Deed of Settlement) and even if the Deed of Settlement contained a confidentiality clause, it was not apparent to the Tribunal that that confidentiality clause would have, in the normal course, done anything more than require the confidentiality of terms of the settlement. That is a matter that is quite distinguishable from an obligation upon a person not to further discuss at all the subject matter of the proceedings.
21. Even if that was so, that is even if the confidentiality provision effectively masked Mr Ticehurst's ability to further discuss, ever, the matters surrounding the article published on the television program, that matter is not relevant to and does not curtail the Tribunal's ability, or duty, to consider the matter of a complaint put to it. Even without recourse to the *Local Government Act* such a position would mean that the Tribunal's role would easily be curtailed by the entry into of private confidentiality agreements with the person the subject of the confidentiality obligation claiming that disability to participate in the process because of the terms of the confidentiality agreements.
22. But in any case the Tribunal's role is concerned with consideration of alleged breaches of the *Local Government Act*. Those breaches are not affected by any private law constraint upon the participation of any person. Consistent with this broad notion are the specific provisions of s.477. Firstly, s.477(1) provides that a person appearing before the

Tribunal is not excused from answering any question nor producing any document or thing on account of an incrimination, privilege, on the ground of the duty of secrecy or other restriction on disclosure, or on any other ground. This makes it plain that the position of Mr Ticehurst is not one which would have justified a non appearance or a non participation.

23. Consistent with his first prescription is the effect of s.477(2) which provides that an answer made or document or thing produced at a hearing is not admissible in evidence against the witness in any civil or criminal proceedings or in any disciplinary proceedings. There is an exception contained in s.477(3), but that is only if the person attending or producing the document makes no objection (a matter which is able to be addressed during the course of a hearing, whether upon that person's own insistence, or by the Tribunal on the person's behalf).
24. The combination of s.477(1) and (2) makes it plain that there is a requirement for persons to attend and give evidence without excuse, with the protection given that such attendance and/or production cannot be used against that person in, relevant of the present case, civil proceedings. Thus, even if Mr Ticehurst attended and gave evidence in breach of confidentiality deed, the mechanism in s.477 would have ensured that such a "breach" of the deed could not have been proved by reference to his conduct before the Tribunal.
25. For reasons set out above the Tribunal determined to proceed to complete the hearing of the complaint against Mr Ticehurst in his absence. That decision was made subject to two matters.
26. Firstly, all of the correspondence sent by Mr Ticehurst to the Tribunal was tendered as evidence before the Tribunal, regardless of whether it properly constituted evidence or not. That material has been

considered by the Tribunal, and is further identified in the Tribunal's consideration of the issues set out below.

27. Secondly, despite the position adopted by the Tribunal as set out above, and consistent with Mr Ticehurst's apprehension about the matter of the television program, the Tribunal ordered pursuant to s.480(1)(c) that the DVD recording of the Today Tonight program is not to be published, and that the transcript of the relevant aspect of the Today Tonight program (Exhibit B) was also not to be published. This course was adopted in an effort to address Mr Ticehurst's expressed concern, and as an alternative to the course available to the Tribunal pursuant to s.472, namely the ability to conduct a hearing in private. Having regard to the fact that Mr Ellis was in attendance, and so that it could be conveyed to Mr Ticehurst that the process was so far as possible a fair process to Mr Ticehurst, notwithstanding his election not to attend, the hearing was held in public, but with a s.482 order with respect to the matters that might be subject of the confidentiality obligation in the Deed of Settlement.
28. Notwithstanding the s.482 Order, for the purposes of properly determining the matter the subject of the complaint, the Tribunal has viewed the DVD recording of the Today Tonight program in Chambers.
29. As referred at the outset, and as identified at the Preliminary Conference and in the correspondence to Mr Ticehurst, the Tribunal then proceeded to hear the matter in relation to all issues identified. Those issues were as identified in the Tribunal's Notice of Decision to Conduct Proceedings, and include the matter of any consequence in the event that the Tribunal determines a breach of the Local Government Act by Mr Ticehurst.

Issues for Determination

30. In the Tribunal's Notice of Decision to Conduct Proceedings the Tribunal identified, by reference to the report submitted to it by the Director-General, a series of issues which appeared to the Tribunal to be relevant to the subject matter of the complaint. It is convenient in this determination to address those issues sequentially.
31. As mentioned above due to the non appearance of Mr Ticehurst submissions specifically addressing each of these issues were not received from Mr Ticehurst. This notwithstanding the Tribunal received a series of written submissions by Mr Ticehurst, which will be summarised and addressed below.

The Investigation Report

32. As referred above the complaint was referred to the Tribunal via an Investigation Report submitted by the Director-General, and prepared on behalf of him. The Investigation Report was tendered (subject to the s.482 orders referred to above) as Exhibits A1 and A2.
33. The Investigation Report concerned allegations that Mr Ticehurst had acted in breach of the provisions of Council's Code of Conduct surrounding participation by him in a media item by Channel 7's "Today Tonight" program, that was aired nationally. The item alleged that the council had acted corruptly in providing material, funded by a Commonwealth grant, to a resident for private purposes. Mr Ticehurst was said to have participated in the program, was identified as a Councillor, and in that context made a number of allegations regarding the conduct of the Council and its staff.
34. The actions of Mr Ticehurst gave rise to a complaint alleging a breach of the Code, and subsequently the council considered the report of its Code of Conduct Committee and resolved that Councillor Ticehurst

be required to publicly apologise for the breach, which Mr Ticehurst failed to do. The Investigation Report then particularised the specific alleged breaches of the Code of Conduct.

35. The report also then recorded the Council's resolution of 20 August 2007 pursuant to which the Mayor of the Lithgow City Council thereafter referred the matter to the Department pursuant to s.440H(1)(a) and the subsequent authorisation, on 1 October 2008, by the Director-General of an investigation into the allegations of misbehaviour by Mr Ticehurst pursuant to s.440J of the Act, including the preparation of the Investigation Report. The report recorded that during the preliminary inquiries and investigation into the matter Councillor Ticehurst was advised of the allegations and was afforded the opportunity to put forward his views of the matters raised. This was said to have been done by way of a show cause letter and an invitation to him to attend an interview with departmental officers in the course of the investigation, but that Mr Ticehurst did not respond to the show cause letter and had declined to be interviewed.
36. The Investigation Report indicated that the investigation had established that there was sufficient evidence to support the view that Mr Ticehurst had breached the Code of Conduct and the Local Government Act by his participation in the media item on Channel 7's "Today Tonight" program, and that he thereby committed an act of misbehaviour as defined in s.440F(1)(b), and that by his subsequent failure to apologise, as required by the council's resolution of 20 August 2007, had committed a further act of misbehaviour as defined in s.440(F)(1)(b) of the Act. The report recommended that the Director-General refer the matter to the Tribunal pursuant to s.440N of the Act.
37. The body of the Investigation Report then addressed with greater specificity the matters concerning the circumstances of the "Today

Tonight” program and the complaints and actions that followed the airing of that program.

38. The Investigation Report was, pursuant to a direction made by the Tribunal as part of its Notice of Decision to Conduct Proceedings, served upon Mr Ticehurst. As is referred above Mr Ticehurst provided written submissions to the Tribunal, such submissions effectively being a response to matters contained in the Investigation Report.

Written Submissions by Mr Ticehurst

39. In his written submissions to the Tribunal Mr Ticehurst raised a series of matters not specifically directed to the identified issues but, as referred above, in response to the contents of the Investigation Report. It is convenient to summarise the submissions of Mr Ticehurst at the outset, and, where relevant, refer to them (as relevant) in the determination of each of the specific issues, to be addressed below.
40. In his written submission of 29 April 2010 Mr Ticehurst raised the matter of his inability to attend the hearing by reason of the Defamation Proceedings and the Deed of Settlement.
41. Mr Ticehurst also observed that the Director-General was legally represented but that he was not, and was not able to be. He urged that the proceedings be dismissed, or alternatively that the matter be referred to the Independent Commission Against Corruption.
42. In relation to what he identified as the “Misbehaviour Report” he submitted that it claimed that documentation in it appeared to be “corrupted and false and misleading” and that there is material included which was not previously submitted to the Supreme Court.
43. He requested that the Tribunal formally determine that the previous actions of the Council’s Code of Conduct Committee were “corrupt

and unlawful” and essentially in contempt of the then existing NSW Supreme Court legal proceedings. He also requested that the Tribunal formally determine that the actions of the departmental investigation investigators in their preparations of the Misbehaviour Report were prejudicial or failed to conduct their investigations with due probity balance and fairness in not seeking to make either any contact or conduct in any interviews with other known persons or parties in order to obtain material that may have promoted the position of him. He noted the decision by the ICAC to not conduct any formal investigation and observed that it appeared to be on the basis of information provided by an officer of the council. He requested that the Tribunal become aware contents of his letter of 30 October 2008.

44. That letter was contained in the Investigation Report and was a letter to the Director-General in response to the Director-General’s letter to Mr Ticehurst advising of his decision to request his department to prepare a report in relation to the matter. In the letter he formally declined to participate in the process because of the confidential Deed of Settlement, and that the matters the subject of the investigation were identical matters relating to a Lithgow City Council Code of Conduct Committee investigation. He invited the Director-General in the investigation to then consider a series of matters in and as part of that investigation and included material said to be relevant to seven matters. He also invited the Director-General additionally to consider certain matters and undertake an investigation into three additional topics. The letter was marked as a “protected disclosure”.

45. He then submitted that the Tribunal should consider his letter of 27 January 2009, also attached to the Investigation Report. That letter was again a “protected disclosure” letter to the Director-General in which, further to his letter of 30 October 2008, Mr Ticehurst enclosed “two DVD’s containing extensive footage” of the roadworks.

46. He submitted that the investigators failed to conduct a fair and balanced Record of Interview with certain council officers and that the Record of Interview was biased against him, particularly in so far as questions concerning an apology was concerned. (This matter is further addressed with respect to that specific issue, below).
47. He raised the matter of “arguable ambiguity” by reference to the Tribunal’s previous determination in relation to Mr Ticehurst. This was a reference to the Tribunal’s decision *Councillor Ticehurst* (PIDT 1/2008, 20 August 2009) at [82] in which there was said to be an arguable ambiguity in relation to whether the Code of Conduct Committee’s report was confidential information or whether it lost that character because of its provision to Mr Ellis, and the nature of the report itself. He submitted that the Code of Conduct Committee Report in relation to the subject complaint was equally “arguably ambiguous”, and that the Misbehaviour Report also contained a series undisclosed legal issues of arguable ambiguity.
48. He submitted that the proceedings before the Tribunal, in circumstances in which the subject matter had also be the subject of the Code of Conduct Committee instigation, constituted “double jeopardy”, and that there was further double jeopardy in circumstances of the defamation proceedings.
49. Mr Ticehurst then submitted, by reference to the Tribunal’s decision regarding *Councillor Finkernagel* (PIDT 1/2007, 5 June 2009) that, by reference to a newspaper article there was “political interference” by reason of a commentary by a State Member of Parliament. He submitted that as the decision to investigate occurred some months after the settlement of defamation proceedings it may have been affected or influenced by a political viewpoint.
50. Under the heading “Natural Justice” he observed that the council is not required to provide councillors with any legal representation, and

observed that his written submission was prepared without any formal legal advice, maintaining that it was questionable natural justice. He submitted that in respect of the topic of natural justice he would not have been able to call a council officer because of the settlement of the defamation proceedings and if he did he might have been open to pay witness expenses.

51. He also observed in relation to natural justice the apparent delay in the making of the complaint, the preparation of the report, and the referral of the matter to the Tribunal.
52. In relation to "Public Interest" Mr Ticehurst raised a number of matters including the inability to have statements made by a council officer to investigators in a Record of Interview "firmly clarified", that since misbehaviour provisions have been introduced in the *Local Government Act* he was the only councillor (now twice) to have been brought before the Tribunal. He questioned how this complaint occurred despite ICAC and Director-General holding numerous public inquiries into Local Councils, he questioned why the Council and the Department has expended significant sums in relation to the matter, and referred to a protected disclosure representation and the refusal of the Department to conduct an investigation into the subject matter of that protected disclosure.
53. He then referred to the cost of councillors having to defend themselves in proceedings (including in other courts), as against the ability of councils to participate in such proceedings financially, and concluded by inviting the Tribunal to dismiss the complaint against him.
54. In his written submission of 27 April 2010, Mr Ticehurst repeated many of his earlier submissions and made certain additional submissions.

55. He asserted that the records of interview conducted by departmental officers were biased and unfair and raised this matter especially in respect of the failure in the record of interview to further address the topic of "an apology" raised by a council officer who had been a party to the Defamation Proceedings in respect of the statement that there had been a form of words that was provided by solicitors acting for and on behalf of Channel 7 following a successful defamation matter that he took personally. He also referred to a media report in respect of the ordinary meeting of the Lithgow City Council on Monday 17 March 2008 (published in the Lithgow Mercury on 20 March 2008) in which the relevant council officer was said to have been uncomfortable when councillors sought more information from him and that he was not prepared to breach the restrictions on release of details ordered by the court saying that he was not upset by the result, and that the meeting was told that Channel 7 and Mr Ticehurst had complied with the section of the order relating to the issue of an apology to the officer for their actions. The matter of an apology is relevant to the third aspect of the complaint against Mr Ticehurst, namely his failure to comply with the terms of a censure motion by the council, which included an apology, a matter which will be addressed below.
56. On 9 May 2010 Mr Ticehurst sent to the Tribunal what he described as an updated relevant written submission which was said to be relevant as arising out of the previous week's ICAC Public Hearing into the alleged indictable actions and subsequent adverse public admissions of the State Parliament Member for Perth. That document was tendered as Exhibit 5 in the proceedings. That document attached an Agenda for the Lithgow City Council Meeting held on 2 December 2008 (Tendered as Exhibit 6), Minutes of the Tourism Advisory Committee and the Terms of Reference (Exhibit 7), Minutes of the Policy and Strategy Committee Meeting of the Council held on 2 December 2008 (Exhibit 8), Minutes of the Finance and Service Committee Meeting of Council held on 7 April 2008 (Exhibit 9),

Minutes of Finance and Services Committee Meeting of Council held on 4 February 2008 (Exhibit 10), and the Agenda for Meeting of Finance and Services Committee meeting of Council to be held on 4 February 2008 (Exhibit 11).

Issues Relevant to the Hearing

57. In the Notice of Decision to Conduct Proceedings the Tribunal had formulated by way of preliminary assessment a series of issues to be determined at the Hearing. The Director-General did not seek to amend or alter the issues in any way. Accordingly the Tribunal will address the issues as they as they appear in the Notice of Decision to Conduct Proceedings.
- (i) **Whether the resolution of the council referring the matter to the Director-General constituted a request pursuant to s.440H(1)(a) sufficient for the Tribunal to have jurisdiction to consider the matter the subject of the report.**
58. This issue arose because of a prior reference of the subject matter of the hearing to the Tribunal.
59. On 24 June 2009 the Department of Local Government submitted to the Tribunal the Misbehaviour Investigation Report dated November 2008 which was the subject of the current proceedings. The Tribunal considered the report and the circumstances relating to the submitting of the report to the Tribunal and, on 11 September 2009, returned the report to the Department of Premier and Cabinet on three grounds:
- a) The matter that had been referred to the Tribunal had not been referred by the Director-General nor anyone acting on behalf of the Director-General (whether by delegation or otherwise) contrary to the provisions of s.440N(1).

- b) Doubt was raised as to whether the resolution of the council constituted a resolution for the purposes of s.440H(1)(a).
- c) In any case, if the Tribunal was wrong concerning the characterisation of the resolution, s.440N(2) provides that the matter that is the subject of a request by a council may not be referred to the Tribunal unless the Councillor concerned has previously been suspended under the Chapter for Misbehaviour, and as Mr Ticehurst had not been suspended at the time of the reference that section operated as a barrier to the reference of the matter to the Tribunal.
60. As referred above, by letter dated 23 December 2009, the Deputy Director-General (Local Government) as delegate of the Director-General Department of Premier and Cabinet sent to the Tribunal for its consideration the present misbehaviour report pursuant to s.440N. That letter attached a delegation to the Deputy Director-General from the Director-General, sufficient for the purposes of s.440N, thereby addressing item (a) above.
61. In relation to item (c) above, the following matters are relevant. Firstly, s.440H provides for the initiation of the process for the suspension of a councillor. That can be made either by a request made by the Council (which will be addressed below) or a request made by the Director-General to the Council for a report from the Council in relation to the Councillor's alleged misbehaviour. There are two other aspects which are not relevant here. Section 440N permits the Director-General to refer a matter that is the subject of a request or report referred to in s.440H for consideration by the Tribunal, which is the mechanism by which the subject report was referred to the Tribunal. That notwithstanding, s.440N(2) provides that the matter that is the subject of request by Council may not be referred to the Tribunal unless the Councillor concerned has previously been suspended under the Chapter for Misbehaviour.

62. As in the circumstances of this case the process was not initiated by a request from the Director-General to the Council to provide a report from the Council in relation to the Councillor's alleged misbehaviour (s.440H(1)(b)), the only possible alternative is the s.440H(1)(a) path, namely a request from a Council, which thereby is relevant to s.440N(2). At the time of the earlier reference by the Department to the Tribunal (24 June 2009) Mr Ticehurst had not "previously been suspended under this Chapter [14] for Misbehaviour". This is because, as at that date, the Tribunal had not published its determination or made orders in respect of another, earlier, complaint made against Mr Ticehurst. Whilst the Tribunal had published its determination in relation to the question of breach of the Act (PIDT 1/2008, 7 May 2009) it was not until 28 August 2009 that the Tribunal had published its determination and made orders on the question of consequence (PIDT 1/2008, 28 August 2009). By that later determination the Tribunal had suspended Mr Ticehurst from holding civic office for a period of one month, and hence, for the purposes of s.440N(2) on and from that date Mr Ticehurst had been suspended under Chapter 14 for Misbehaviour. Accordingly, as at 23 December 2009 (the date when the Director-General through his delegate had submitted the report to the Tribunal) the constraint imposed by s.440N(2) was removed. This addresses ground c) referred to at [59] above.

63. That then leaves the matter of the resolution of the Council. In its terms s.440H provides as follows (and as relevant):

"1) The process for suspension of a Councillor from civic office is initiated by:

- a) A request made by the Council by resolution communicated to the Director-General, in which the Council states its belief that grounds may exist that warrant the Councillor's suspension ..."

64. The resolution relied upon in this matter to found the satisfaction of that element is the resolution of the Council on 20 August 2007. In its terms it provides as follows:

- "1. With regard to the complaint received alleging inappropriate conduct by Councillor Martin Ticehurst a finding of the numerous prima facie breaches of the Code Of Conduct as detailed in the Code of Conduct Committee's report arising out of the publications considered in the report is accepted by council and that arising from this:
- a) Councillor Ticehurst be censured for the incidents of misbehaviour; and
 - b) Councillor Ticehurst be referred to the Director-General of Local Government seeking his suspension for a period of 6 months; and
 - c) Council issue a further censure as a consequence of the incidents arising out of the complaints made by the General Manager and the matter be referred on this basis to the Director-General of the Department of Local Government with recommendation for a period of suspension from civic office of 6 months; and
 - d) Council require Councillor Ticehurst to publicly apologise to the [names] for the breaches of the Code of Conduct particularised as detailed in the Code of Conduct Committee report. Such apology to be published, without qualification, in the Lithgow Mercury within 28 days; and
 - e) Council write a letter to the Director-General that should he be of the view that if he finds there has been a technical breach of any of the formal requirements on the part of the Code of Conduct Committee or of Council, the Director-General, himself, initiate the process for suspension of the Councillor from civic office pursuant to subsection 440I(3) of the Local Government Act 1993 having regard to the circumstances of all the circumstances surrounding the disruptive behaviour of the Councillor". (reference removed)

65. In the Tribunal's letter dated 11 September 2009 returning the report when earlier submitted (Exhibit C) the Tribunal identified item 1(b) of resolution and was of the view that the resolution did not constitute a

resolution for the purposes of s.440H(1)(a) according to the terms of that paragraph. In doing so the Tribunal referred to its decision in *Councillor Ticehurst* (PIDT 1/2008, 28 August 2009) at [48] – [50], in relation to a resolution which, as relevant, provided:

“Councillor Ticehurst’s breach of the code be referred to the Department of Local Government and the Minister for further consideration as this is his second breach of the code”.

66. In resubmitting the investigation report on 23 December 2009 the Director-General sought to address the concern raised by the Tribunal with respect to the earlier provision of the report by submitting that the resolution in its entirety satisfies s.440H(1)(a). This was because resolution 1(b) should be read with the introductory paragraph in resolution 1 and that when subparagraph (b) is read in context the council, in accepting the findings of the Code of Conduct Committee, has formed a belief that these findings constitute grounds that may exist that warrant councillor’s suspension, to address that part of s.440H(1)(a) requiring “... belief that grounds may exist that warrant the councillor’s suspension ...”. The Director-General said that this gives effect to the words “... and arising from this ...” which appear at the end of introduction of the resolution and that it is the acceptance of the Committee’s findings of prima facie breaches of the Code of Conduct that is the catalyst for the referral to the Director-General seeking the 6 month suspension of Councillor Ticehurst. The Director-General submitted that it was difficult to see how the acceptance by the council of Committee’s findings does not create a reasonable belief on part of the council that grounds may exist that warrant Councillor Ticehurst’s suspension.
67. At the hearing of this matter that submission was expanded by Mr Robinson who submitted that whilst the resolution does not use the actual words of s.440(1)(a), constructively it has done so and that as a purposive construction the resolution addresses the important elements of s.440H(1)(a). He submitted that the resolution was not

drafted by lawyers and it is not critical that it was not done so, but that the actual resolution was, because of the reference to the period of 6 month suspension, firmly within the scope of the necessary intent of the prescription contained in s.440H(1)(a), and therefore the effect of the resolution was in terms of that paragraph.

68. With the benefit of the Director-General's written submissions and the submissions at the hearing the Tribunal is of the view, notwithstanding the initial position expressed in its letter of 11 September 2009, that for the purposes of s.440H(1)(a) the resolution of the council on 20 August 2007 was sufficient. The important elements of that paragraph comprise a request by the council by resolution communicated to the Director-General, and with it a statement of belief that grounds may exist that warrant a councillor's suspension. There is no doubt that a resolution was passed by the council, and that it was subsequently communicated to the Director-General (on 22 August 2007 – Tab 1 of the investigation report). In terms of the element concerning a belief that grounds may exist that warrant a councillor's suspension, the reference in the preamble to resolution 1 to "finding of the numerous prima facie breaches of the Code of Conduct", in combination with the specific matter of referral to the Director-General (Item 1(b)), and a reference to the concept of "suspension for a period of 6 months", in the opinion of the Tribunal are together sufficient for the purposes of s.440H(1)(a). The resolution certainly in a substantive way addressed the elements in that paragraph even though the precise words of that paragraph were not used.

69. The subject resolution is, it is to be noted, significantly different to the resolution addressed by the Tribunal in *Councillor Ticehurst* (PIDT1/2008, 28 August 2009). As referred above, in the circumstances of that determination the resolution merely spoke of a referral (not to the Director-General, but to the Department and the Minister) for "further consideration". That falls far short of the elements contained in

s.440(1)(a), and is significantly different from the matters of subject of the resolution in the present case.

70. Accordingly for the purposes of Issue (i), the Tribunal is satisfied that the investigation report and the initiation of the process for the suspension of a councillor has been validly commenced.

71. Issue (ii) was directed to whether there were any of matters affecting jurisdiction. No other matters were raised by the Director-General.

(iii) Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by failing to raise concerns regarding the conduct of the council staff through the complaints handling processes contained in Clause 10.1 of the Code.

72. As referred above the central factual element to the complaint concerns the participation by Mr Ticehurst in a television program in which conduct of certain council officers was said to have been unsatisfactory or not proper.

73. This issue depends upon the provisions of an applicable Council Code of Conduct, and whether the actions of Mr Ticehurst may be said to have breached those provisions.

74. Firstly, pursuant to s.440(3) a council must adopt a Code of Conduct (and that Code of Conduct must incorporate provisions of the model code, which may be prescribed by the regulations). The operative obligation on the part of councillors is contained in s.440(5) which provides that councillors must comply with the applicable provisions of the council's adopted code (except to the extent of any inconsistency with the model code) as in force for the time being. That obligation is then relevant to the concept of "misbehaviour" as contained in Chapter 14, and as relevant to these proceedings, because of s.440F(1)(b) which provides that misbehaviour means a failure by the

councillor to comply with an applicable requirement of the Code of Conduct as required under s.440(5).

75. As at the date of the television program (November 2006) the Lithgow City Council had adopted a Code of Conduct the terms of which were included in the investigation report. Issue (iii) identifies, as alleged in the investigation report, Clause 10.1 of the Code. That Clause, contained in Chapter 10 entitled "Reporting breaches, complaint handling procedures and sanctions" is within a subsection entitled "corrupt conduct, maladministration and waste of public resources" and provides as follows:

"You have an obligation to act honestly. You should report any instances of suspected corrupt conduct, maladministration and serious and substantial waste of public resources in accordance with council's internal reporting policy (Protected Disclosure Policy)"

76. That provision accordingly provides (in addition to the obligation to act honestly) an obligation to report instances of maladministration etc in accordance with a reporting policy. That policy was also adopted by the council at the date of the television program and was also contained in the investigation report. That policy is centred around the *Protected Disclosures Act* which permits persons who wish to make disclosures under the Act to receive protection from reprisals and that the matters raised in the disclosures are properly investigated. The policy then deals with certain defined terms, and then describes what disclosures are protected under the *Protected Disclosures Act*.
77. In its terms the policy is, generally speaking, more concerned with advising of the protection that may be afforded to a person who makes a disclosure pursuant to the *Protected Disclosures Act*, following the regime contained therein. In section 8 "Roles and Responsibilities", rather than containing a prescription for disclosures, the policy is more concerned with permitting disclosures be made by certain avenues. Thus "disclosures may be made direct to the

General Manager”, and “the Mayor may receive internal disclosures from any member of staff of the council or any councillor concerning the General Manager or a councillor”. It also talks of “alternative avenues available to staff and councillors for making a protected disclosure under the Act ...”, and then provides for the rights of persons the subject of disclosures.

78. As referred above the code at [10.1] requires that the reporting of any instances of maladministration should be made in accordance with the internal reporting policy. Although that policy does not contain, strictly speaking, prescriptive provisions, read in a purposive way, the obligation in [10.1] is that if there is any suspicion of maladministration it should be reported by the mechanisms provided in the *Protected Disclosures Act* (even though those mechanisms are more about protection rather than prescription for reporting).
79. Mr Ticehurst did not follow any alternative course set out in the policy for reporting any suspected maladministration. Rather he proceeded to communicate that suspicion directly to a media outlet. Whilst the Act, and the code, should not be taken be instruments of suppression of complaints, the Act working in combination with the Code is moreover concerned in this respect with addressing such suspicions in an organised and proper way.
80. This was not undertaken by Mr Ticehurst and for the reasons set out above the Tribunal is satisfied that in his actions Mr Ticehurst had breached [10.1] of the Council's Code of Conduct.

(iv) Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by failing to raise concerns regarding the conduct of Council staff through the protected disclosures process as required by Clause 10.2 of the Code.

81. This Issue (iv) was taken from the investigation report. Clause 10.2 of the Council's Code of Conduct provides as follows:

"The *Protected Disclosures Act 1994* provides certain protections against reprisals for council officials who report such matters. It is an offence to take detrimental action against people who make such reports".

82. At the hearing the Tribunal observed that Clause 10.2 was more in the nature of an advisory provision. Viewed in that way it was not a provision which contains an obligation, and hence could not be a provision of the code which was able to be breached. This Issue (iv) is accordingly not relevant to the hearing.

(v) Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by failing to report concerns regarding the conduct of General Manager to the Mayor as required by Clause 10.4 of the Code.

83. Clause 10.4 of the Code of Conduct provides as follows:

"Where you believe that the General Manager has failed to comply with this Code, you should report the matter to the Mayor, preferably in writing, who will report the matter to the conduct committee."

84. This paragraph follows and is in consequence of Clause 10.3 of the Code of Conduct which provides as follows:

"You should report suspected breaches of the Code of Conduct to the General Manager, in writing. You should read and follow the guidelines for reporting alleged breaches of the Code of Conduct attached as an appendix to this code."

85. Hence, in consequence of Clause 10.1 (addressed in issue (iii)), where a Councillor wishes to report instances of maladministration

and the like the person to whom such reporting should be undertaken is, at the first instance, to the General Manager pursuant to Clause 10.3. Alternatively, if it is thought that the maladministration is by the General Manager then the reporting should be to the Mayor.

86. In the circumstances of the present case the General Manager was, amongst others, the subject of complaint as contained in the television report. The television report itself was a concern about maladministration within the council. In those circumstances the requirement for the reporting of the matter was to the Mayor pursuant to Clause 10.4.

87. Contained within the investigation report is a Record of Interview with the then Mayor of the Lithgow City Council, Mr Neville Lindsay Castle (Tab 17). In the Record of Interview Mr Castle gave evidence regarding the matter the subject of the television report that:

“Councillor Ticehurst had never contacted me in that regard as far as that matter or any other matter goes in fact in the last four years”

88. The interview took place in November 2008, and hence that evidence would cover the requisite period.

89. For the purposes of Clause 10.4 then if Mr Ticehurst was concerned that there was maladministration then the obligation was to report the matter to the Mayor. In the circumstances of this proceeding the Tribunal is satisfied that requirement was not complied with.

90. One matter raised by the Tribunal during the hearing was whether the obligation in Clause 10.4 arises only if the councillor is the person who has the suspicion or belief of a failure to comply with the code. This is because it is apparent that within the television report, another person was also a person who was making the same allegations. The Director-General submitted that the fact that the allegation is made by

someone else initially is irrelevant, and that what is relevant is that the councillor, having the belief referred to in Clause 10.4, is thereby obliged to follow the course set out in Clause 10.4. In addition, as is apparent from the television article, whether or not Mr Ticehurst was the initial complainant did not matter because Mr Ticehurst was making the allegations effectively afresh.

91. The Tribunal accepts this construction of Clause 10.4. If it was the case that Mr Ticehurst was of the belief that the General Manager had failed to comply with the code then Clause 10.4 required that the matter be referred to the Mayor who was then to have reported the matter to the Conduct Committee.
92. For the reasons set out above the Tribunal is satisfied that Mr Ticehurst has breached Clause 10.4 of the Code.
- (vi) **Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by appearing on national television alleging that Council staff had acted contrary to the code and had acted corruptly, as provided by Clause 5.1 of the Code.**
- (vii) **Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by treating Council officials with disrespect through comments made in the "Today Tonight" media piece contrary to Clause 5.1 of the Code.**
- and
- (viii) **Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by bringing the Council into disrepute through comments made by him in the "Today Tonight" media piece contrary to Clause 5.1 of the Code.**

93. As with the previous issues, these issues reflect assertions made in the investigation report.

94. In its terms, and as identified as relevant by the Director-General at the hearing, the provisions of Clause 5.1 relevant to issues (vi) and (vii) are as follows:

“You must avoid behaviour that could constitute an act of disorder or misbehaviour.

5.1.1 Specifically, you must avoid conduct that:

.....

- Is an abuse of power or otherwise amounts to misconduct.

.....

5.1.3 You must treat others with respect at all times.”

95. The obligations identified above are within a broader chapter entitled “general conduct obligations”. These general matters are then more specifically addressed in the balance of the code, in particular in the paragraphs that have already been addressed by the Tribunal.
96. In the circumstances of this proceeding it was said that Mr Ticehurst breached the fourth bullet within Clause 5.1.1 (identified above) because of his breach of Clause 10.1, addressed above. There is necessarily a degree of duplication in this submission and, having determined that Mr Ticehurst did breach Clause 10.1 (and for that matter Clause 10.4) the Tribunal does not consider that in the circumstances there is independently of those breaches a breach of Clause 5.1.1.
97. With respect to Clause 5.1.3 it was said that the reference by Mr Ticehurst to the salary of the General Manager during the television interview constituted a breach of this Clause because the amount of his salary was a confidential matter as between the Councillor and the General Manager. The matter concerning the publication of the General Manager’s salary package was specifically the subject of a complaint to Mr Ticehurst by the Council in its letter dated 24 January 2007 at [4]. It was said that the General Manager’s salary package

“was to remain confidential until its usual publication in the 2006/2007 Annual Report”.

98. The salary of the General Manager was not ultimately to remain confidential but rather would remain confidential until publication in the 2006/2007 Annual Report. The Director-General accepted that the 2006/2007 Annual Report was due to be prepared within five months of the end of each year: s.428.
99. Although possibly constituting a disclosure of a confidential matter (although in this respect the Tribunal notes that it was a matter which was to have been disclosed in any case) it is difficult to see how that part of the television program constitutes a separate breach above and beyond the breaches found with respect to Clauses 10.1 and 10.4. Importantly for the purposes of the issue it is difficult for the Tribunal to conclude that there was constituted by the television report breaches of Clause 5.1 independently of the other breaches.
100. In terms of issue (viii) which focuses upon the notion of bringing the council into disrepute, if it was the case that Mr Ticehurst had a belief that there was a breach of the code then there is no question but that that breach should be reported to the appropriate person. Making a complaint per se is not self evidently bringing the council or the person of subject of the complaint into disrepute, especially if, ultimately, there is substance to the complaint. The real issue in this proceeding though is not so much the complaint or its substance, but rather the fact that the proper procedure was not adopted by Mr Ticehurst. Instead that he took it upon himself to bypass the complaint handling procedure set out in the code.
101. In doing so there is much to be said for the assertion that Mr Ticehurst in fact did bring the council into disrepute through comments made by him in the television article. This can then be said to contravene elements of Clause 5.1.1 including conduct that:

“Is detrimental to the pursuit of the Charter of the Council;

- is improper or unethical,”

and probably also conflicts Clause 5.1.3 requiring that others be treated with respect at all times. As referred above this matter is not so much about the complaint or its substance but rather that there is in place a regime for the dealing with complaints and that persons the subject of the complaint are at least entitled to the course provided in the Code of Conduct rather than the complaint being dramatised on national television to the exception of that process.

102. For the reasons set out above the Tribunal is satisfied that Mr Ticehurst has breached Clause 5.1 of the Code of Conduct (issue viii).

(ix) **Whether Councillor Ticehurst breached the Council’s Code and s.440(5) of the Act in pressuring staff in performance of their work through comments made by him in the “Today Tonight” media piece contrary to Clause 8.8 of the Code.**

103. Clause 8.8 of the Code is headed “inappropriate interactions”. The provision then provides that:

“The following interactions are inappropriate:

- Councillors being overbearing or threatening to council staff;
 - Councillors directing or pressuring council staff in the performance of their work, or recommendations they should make;
- “

104. There are a number of other inappropriate interactions that are identified, however the two identified above are those identified by the Director-General at the hearing.

105. It was said that by the attendance on the television program Mr Ticehurst had effectively pressured council staff in the performance of

their work, presumably by making allegations adverse to their conduct. It was also said that the television program “effectively tarred all senior management”.

106. Clause 8.8 of the Code is probably more directed to a direct interaction between a Councillor and council staff, especially in so far as the two elements that have been identified. To be overbearing or threatening to council staff or to direct or pressure council staff in performance of their work or recommendations they should make is more probably in the realm of a direct interaction as between a councillor and council staff.

107. In the circumstances of the present case although the consequences of the attendance at the television program was to have impugned the conduct of council staff and for that matter senior management it is not conduct which appears to the Tribunal to be sought to be addressed by Clause 8.8.

108. For the reasons set out above the Tribunal is not satisfied that there has been a relevant breach of Clause 8.8 of the Code.

(x) Whether Councillor Ticehurst breached the Council’s Code and s.440(5) of the Act by creating the impression that council property and official services were being improperly used for another person’s private benefit or gain through comments made by him in the “Today Tonight” media piece contrary to Clause 9.17 of the Code.

109. Clause 9.17 of the Code provides as follows:

“You must avoid any action or situation which could create the impression that council property, official services or public facilities are being improperly used for your own or any other personal body’s private benefit or gain.”

110. Self evidently from the terms of Clause 9.17 it should not be taken to be an obligation in isolation. If it in fact was the case that council property, official services or public facilities were being improperly

used for a person's private benefit or gain then, to take the Clause at its literal construction, a councillor would be entitled to say nothing. Such a construction would be a nonsense in the scheme of the Act, and for that matter the scheme of the code, which as addressed above prescribes obligations of honesty.

111. A proper construction of Clause 9.17 would suggest that it operates and works with other provisions within the code, especially the provisions that have been addressed above, namely the requirement that complaints be addressed to either the General Manager or to the Mayor, both for investigation. To this effect, as referred above, Clause 10.1 specifically provides that a councillor "should report any instances of suspected corrupt conduct, maladministration and serious and substantial waste of public resources" (in accordance with a certain procedure).

112. Viewed in this balanced way it is the self evident corollary of breach of Clauses 10.1 and 10.4 that Mr Ticehurst had also breached Clause 9.17. Leaving aside the question of whether or not the complaint was with substance or foundation, the clear result of his participation in the television program was the creation of an impression that council property, official services or public facilities were being improperly used for a person's private benefit or gain. Accordingly and for the reason set out above the Tribunal is satisfied that implicit in the breach of Clause 10.1 and 10.4 is the breach of Clause 9.17.

(xi) Whether Councillor Ticehurst breached the Council's Code and s.440(5) of the Act by failing to apologise as required by the Council's resolution of 20 August 2007 contrary to Clause 5.1 of the Code.

113. Following the broadcasting of the television report the subject of this proceeding a complaint was made to the council by the General Manager. In accordance with the Code of Conduct, a Code of Conduct Committee was constituted and that committee resolved to

investigate the matter. Mr Ticehurst was informed of the complaints (by the Council's solicitor) and invited to respond in writing. A process was then undertaken culminating in the preparation of a report by the Code of Conduct Committee to the council. It is to be noted that in Mr Ticehurst's submissions he complained of the process adopted by that Code of Conduct Committee.

114. Leaving aside that matter (which the Tribunal has indicated is not relevant to the proceedings before it), the council ultimately passed a resolution on 20 August 2007 which included the following matter:

"(d) Council require Councillor Ticehurst to publicly apologise to the General Manager, [Name] and senior staff for the breaches of the Code of Conduct particularised as details in the Code of Conduct Committee report. Such apology to be published, without qualification, in the Lithgow Mercury within 28 days." (reference removed)

115. Two questions arise in relation to that resolution. Firstly whether the resolution was complied with, and secondly if it was not complied with whether the failure to comply with it constitutes an Act of Misbehaviour as defined in the Act.

116. In so far as an apology is concerned the Tribunal was not assisted by the absence of Mr Ticehurst from the hearing who may have been able to have provided some clarity in relation to the topic. Doing the best the Tribunal can from the evidence before it the following appears to be the case:

- a) A form of an apology appears to have been given by Mr Ticehurst. This is as submitted by him in Exhibit 3, his written submission of 27 April 2010, where he refers to the article in the Lithgow Mercury on 20 March 2008 in which it is reported that "the meeting was told that Channel 7 and Councillor Ticehurst had complied with the section of the order relating to the issue of an apology to the General Manager for their actions". The "order"

referred to appears to be a provision of the Deed of Settlement in the Defamation Proceedings.

- b) The Record of Interview with the General Manager refers (Investigation Report pg 267) to a form of an apology. The series of questions and answers are as follows (from line 23):

“Q. I understand that the terms of the resolution required that the apology to you be published?

A. That’s my understanding.

Q. To your knowledge was that apology ever published?

A. I’ve never received any apologies from Councillor Ticehurst for this or any other matter.

Q. In that respect did you ever see an apology published in I think it is the Lithgow Mercury newspaper?

A. There was a form of words that was provided by solicitors acting on and for and on behalf of Channel 7 following a successful defamation matter that I took personally.

Q. If I can come back to my question. To your knowledge has Councillor Ticehurst published an apology in the Lithgow mercury as required by the resolution?

A. Not that I’m aware of.

Q. Did you ever receive a personal apology from Councillor Ticehurst in respect of that matter?

A. No”

117. The Tribunal observed that a form of apology appears to have been published in respect to the matter. The form of apology published was not in evidence before the Tribunal, and as referred above the Tribunal was not assisted by Mr Ticehurst’s absence so is to assist the Tribunal in terms of the nature of the apology that was published.

118. The Director-General submits that there is no evidence of a publication, and that in any case it was not in a form required by the resolution. In this respect it referred to the evidence from the General Manager in the Record of Interview, as referred to above.

119. The resolution is set out above and it required that Mr Ticehurst publicly apologise to the General Manager and senior staff for the breaches of the Code of Conduct, and that such apology be published without qualification in the Lithgow Mercury within 28 days. In terms of time, that would have required the publication to be made before the end of September 2007. Mr Ticehurst advised the Tribunal that the Defamation proceedings were mediated on 15 February 2008, and “formally finalised” on 22 February 2008. Also as referred above, it appears to be the case that an apology referable to the defamation proceeding was published in the Lithgow Mercury, and probably within a short period of the finalisation of the court proceedings, hence, by the end of March 2008. This is not a material time after the council resolution, although it is strictly not in compliance with it.
120. In terms of the submission that the apology was not in the same terms as required in the council resolution, it is difficult to see what is significant about the resolution in terms of an apology. In its terms it required that Mr Ticehurst publicly apologise to certain persons for the breaches of the Code of Conduct as particularised in the Code of Conduct Committee Report. As referred above, there appears to have been a publication of an apology sufficient for the purposes of resolution of the defamation proceedings. It is unclear if that extended also to “senior staff” of the Council.
121. There were multiple plaintiffs to the defamation proceedings and presumably the apology was directed at all plaintiffs, as parties to the mediation and the resolution of defamation proceedings.
122. The Director-General submitted that the three plaintiffs to the proceeding constituted the General Manager and that the other two plaintiffs, identified by Mr Ticehurst in his submission to a Tribunal, were persons who were implicated in receipt of the fill, but not other council officers.

123. It is clear that the defamation proceedings were on foot at the time of the resolution. So much is so from the actual page of the minutes of that meeting in which the General Manager had declared a non pecuniary conflict of interest "due to a private civil defamation matter between Channel 7 and Mr Ticehurst" and he vacated the Chamber. The failure of Mr Ticehurst to issue an apology could well be explained by his reservation in compromising his position in the still existing defamation proceedings if he published an apology before those proceedings had been determined. It may well have acted as an admission of the defamation, against his interests.
124. That notwithstanding, as referred above, an apology appears to have been made which was satisfactory for the purposes of the defamation proceeding. It is difficult in these circumstances to conclude that there has been a breach of the resolution, other than as to its timing (which may be explainable by the existence of the defamation proceedings).
125. This leaves the second matter concerning this issue, namely whether the failure to comply with the resolution itself constitutes a breach of the Code of Conduct. To this effect the Director-General took the Tribunal to the provisions of Clause 5.1 of the Code (set out above) in so far as it requires a councillor to "avoid an Act of Misbehaviour". In a sense Clause 5.1 is not required, because s440(5) contains the prescription that councillors comply with applicable provisions of the councils adopted code. An act of "misbehaviour" as defined by s.440F is a failure by the councillor to comply with an applicable requirement of a Code of Conduct as required by s.440(5): s.440F(1)(b). Clause 5.1 of the Code does not create, in the manner adverted to the Director-General, an independent basis for breach of the Code constituting an Act for Misbehaviour. But what is required for there to be an Act of Misbehaviour is a provision in the code with which the councillor fails to comply. In this instance, what is required is a provision in the code that would require a councillor to comply with a

resolution from the council, and hence if he does not comply, that Act constitutes an Act of Misbehaviour.

126. The Director-General in this respect referred to two provisions in the Code of Conduct. The first is Clause 10.15 which provides as follows:

“Where the council finds that a councillor has breached the Code, it may decide by a resolution to:

.....

- Require the councillor to apologise to any person adversely affected by the breach”

127. Clause 10.15 strictly speaking provides for avenues which the council may undertake where it determines that a councillor has breached the Code. The question relevant here though is whether the failure to comply with the resolution itself constitutes a breach of the Code. In terms Clause 10.15 does not so provide.

128. Next, the Director-General adverted to Clause 11.1 which provides as follows:

“For the purposes of Chapter 14, Part 1, Division 3 of the Act, failure by a councillor to comply with an applicable requirement of this Code of Conduct constitutes misbehaviour (s.440F).”

129. As with Clause 5.1 discussed above, Clause 11.1 is simply a restatement of the legislative provisions. Also, as with Clause 10.15, Clause 11.1 does not create an obligation within the Code for a councillor to comply with a requirement imposed upon him by the council by resolution.

130. For the reasons set out above, although a strict construction of the Code of Conduct, the failure by Mr Ticehurst to have complied with the resolution requiring an apology, if he did so fail, would not constitute a breach of the Code of Conduct, sufficient itself to have constituted an act of misbehaviour.

131. In the alternative the Director-General submitted that the failure of Mr Ticehurst to comply with the censure constituted a breach of s.440G.
132. The first matter relevant to this submission is the terms of the resolution, which as relevant, provided that:
- “(a) Councillor Ticehurst be censured for the incidence of
misbehaviour”
133. Section 440G provides:
- “(1) A council may by resolution at a meeting formally censure a
councillor for misbehaviour.”
- (There are other conditions to that censure motion).
134. The matter of a “censure” is not defined in the dictionary to the Local Government Act. The word “censure” is defined in the Macquarie Dictionary (3rd) as “(noun) an expression of disapproval ...(verb) to criticise adversely; disapprove ... condemn ...”
135. Assuming that the conditions to censuring Mr Ticehurst were satisfied in the present case, the resolution to censure him constituted a statement of disapproval of his action. But that fact, neither alone nor in combination with any other, does not constitute a further breach of the Code, or s.440G.
136. The Director-General submitted that if, pursuant to the adopted code, the council says that you must do something, then failure to comply with that order is a failure to comply with the Code. However, where the Act provides that an act of misbehaviour occurs where a person breaches the provisions of a code, the preferable approach is that such obligations be express rather than implied.

137. For the reasons set out above the Tribunal does not find that by failing to comply with the requirement to publish an apology Councillor Ticehurst has breached the Code of Conduct.

Written submissions of Mr Ticehurst

138. As referred above, Mr Ticehurst made a series of written submissions to the Tribunal which he considered relevant to the issue before the Tribunal. Before addressing the final issue (consequence) it is relevant to address those submissions which were of relevance to this proceeding.

139. Mr Ticehurst had referred to the fact in the earlier proceedings he had referred to the defamation proceedings: *Councillor Ticehurst* (PIDT 1/2008, 7 May 2009) at [85]. As referred to in those proceedings the defamation proceedings were not relevant to the matters that were then before the Tribunal.

140. Mr Ticehurst submitted that the Code of Conduct Committee process was unlawful and in contempt that the Supreme Court proceedings. As previously stated the Tribunal's role is not to investigate in these proceedings the conduct of the Code of Conduct Committee.

141. He submitted that there was no due process in the investigation. In this respect the Tribunal notes that ample opportunity was given to Mr Ticehurst to address all or any aspect of the investigation report, but that he elected not to participate in the hearing before Tribunal. This extends to the seven matters that he addressed in his letter dated 30 October 2008 to the Director-General, and also to the matter of the alleged biased questions by investigators to the General Manager, especially with respect to an "apology".

142. He submitted that there was “arguable ambiguity” of the Code of Conduct Committee. Unfortunately Mr Ticehurst used this phrase as drawn from the earlier proceedings which related to the question of whether the document that he disclosed on his website was confidential. The concept of arguable ambiguity, if such a “concept” exists, is not relevant to the proceedings before the Tribunal.
143. There is no aspect of double jeopardy in the present proceedings. Firstly in so far as the defamation proceedings are concerned, they related to private rights as between parties to those proceedings. These proceedings concerned whether there was a breach of the Act quite aside from those private rights. Secondly in so far as the Code of Conduct Committee is concerned, there is no relevant double jeopardy principle concerning the investigation or recommendation of the Code of Conduct Committee. That committee was constituted under the Code of Conduct and undertook its task in accordance with those terms, or purportedly so. Independently of that role this Tribunal has determined the question of breach of the code and has not relied upon any findings or investigation of the Code of Conduct Committee.
144. The matter of political interference was also raised by Mr Ticehurst in so far as a newspaper article by the State Member for Bathurst. There is no evidence before the Tribunal that such a matter was relevant to the question before the Tribunal.
145. Mr Ticehurst submitted that there was an absence of natural justice afforded to him because he had no legal representation. It was similar to a submission that he had made in the earlier proceedings referred to in *Councillor Ticehurst* (PIDT 1/2008, 28 August 2009) at [78]. This is also similar to the submission made in the matter of *Councillor Finkernagel* (PIDT 1/2007, 5 June 2009) at [41]. Although unfortunate it is to be observed that the Tribunal does not have mechanisms for the provision of legal representation to persons before it; but this notwithstanding it attempts as far as possible to assist those parties.

146. In terms of the natural justice matter, Mr Ticehurst also pointed to the fact that he was not able to call the General Manager and that there may have been an issue of the payment of witness expenses. This matter was addressed in the previous matter for Mr Ticehurst. If he participated in the proceeding and requested so, the Tribunal has powers to require the attendance of persons; and it is customary for the Director-General to make available to give evidence persons who are the subject of record of interview in the investigation report.
147. Mr Ticehurst complained about the delay between the events and the hearing. The matter of delay is taken into account by the Tribunal in relation to consequence. It is a regrettable and common matter, and to the extent that it can be taken into account, is taken into account by the Tribunal.
148. Mr Ticehurst also submitted in relation to the matter of public interest that he was the only councillor who has been brought before the Tribunal, now twice, and that there is a disproportionate expenditure of this matter in regard to other matters in Local Government occurring throughout the State. This may be so however the Tribunal is only able to determine matters that are referred to it.
149. In terms of the issues raised, accordingly, to summarise, the Tribunal has found that Mr Ticehurst has breached Clauses 10.1, 10.4 (being the primary breach), 5.1, and 9.17 of the Code of Conduct.

Consequence of Breach

150. In the Notice of Decision to Conduct Proceedings issue (xii) raised the issue of whether any of the behaviour of Councillor Ticehurst warrants action under s.482A and if so what action. At the Preliminary Conference, and in correspondence with Mr Ticehurst, the Tribunal made it clear that it proposed to deal with all issues at the hearing, including the matter of any consequence.

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

"The Tribunal may, if 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 any 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)".

152. As referred above, the Tribunal was not able to be assisted by submissions made by Mr Ticehurst in relation to the question of consequence.

153. The breaches of the Code identified above are, in the opinion of the Tribunal, sufficient to warrant action pursuant to s.482A. They are not trivial breaches of the code, but rather constitute action on behalf of Mr Ticehurst which fall outside the proper complaint reporting procedure with the consequence of seriously impugning the conduct of certain council officers. As referred above, the Tribunal's role in this proceeding was not to investigate the truth of the allegations made by Mr Ticehurst on the television program, but rather to consider whether the way the allegations were made constitute acts of misbehaviour for the purposes of the Act. For the reasons set out above the Tribunal has made those findings.

154. In relation to the matter of penalty the Tribunal, so as to attempt to address possible submissions which may have been made by Mr Ticehurst, raised with the Director-General the fact that Mr Ticehurst

had in fact been named as a defendant in defamation proceedings. He was so named because he had breached the *Protected Disclosures Act* and had suffered the consequence of failures in that respect by being a defendant in private defamation proceedings. It might be said therefore that Mr Ticehurst has suffered sufficiently and that any consequence order that the Tribunal may make is unnecessary.

155. The Director-General submitted that the Tribunal should not take the defamation proceedings and their resolution into account in the determination of consequence.
156. The Director-General referred to the fact that Mr Ticehurst had been the subject of an earlier determination by the Tribunal in relation to a misbehaviour matter (PIDT 1/2008, 7 May 2009), and that the Tribunal had as part of that determination ordered that Mr Ticehurst be suspended from holding civic office for a period of one month (PIDT 1/2008, 28 August 2009). Those proceedings concerned the disclosure by Mr Ticehurst via a website controlled by him of a report that said to have been a confidential investigation report.
157. The Director-General submitted that in the circumstances of the present case the action of Mr Ticehurst was more serious. The Director-General submitted that in the previous case the Tribunal had found that it was arguable that the document the subject of the disclosure was not confidential and that there was an aspect of arguable ambiguity: *Id.* at [82]. Instead, here, the video makes it clear that Mr Ticehurst undertook his task with brazen responsibility and that he was proud to be the bearer of this news in the television program. The Director-General submitted that in his participation in the television program he was not reluctantly forced to comment, but openly volunteered the allegations contained in it.

158. The Director-General submitted that Mr Ticehurst was aware of the Code of Conduct and knew what risks he faced in breaching its terms and what the exposure was in so far as his participation in the television program.
159. In so far as the matter of knowledge of the Code of Conduct was concerned, the Director-General submitted that Mr Ticehurst had not attended training sessions in relation to the Code of Conduct. By reference to the evidence of the General Manager, the Director-General submitted that a draft code had been adopted and was then amended through a workshop process and that as and when those amendments were adopted they were reported to council, exhibited, and then readopted, and that on each occasion a copy of the draft and then the copy of the final Code of Conduct was submitted to each individual councillors, with the final copy of the code being provided to Mr Ticehurst before the television program was published.
160. In evidence before the Tribunal was an acknowledgement dated 7 February 2005 by Mr Ticehurst to the effect:
- "I acknowledge I have read and understood my obligations contained in the above document 'City of Lithgow Council Model Code of Conduct'" adopted by the Council of the meeting of 24 January 2005.
161. That acknowledgement is in relation to the Model Code of Conduct published by the Department of Local Government, and as referred to in the Act. There was no similar written acknowledgment by Mr Ticehurst with respect to the adopted Code of Conduct of the Lithgow Council. The Model Code of Conduct contains identical provisions to the provisions contained in the Lithgow Council adopted Code of Conduct; and hence the obligations in Clauses 5.1, 5.3, 1.17, 10.1, and 10.4 were known by Mr Ticehurst.

162. The Director-General submitted that the Code of Conduct Committee had identified inappropriateness of his action and that the council had sanctioned him and that he did nothing.
163. Finally the Director-General submitted that Mr Ticehurst has shown no remorse in his written submissions, and if he does have remorse has not attended to express that position. The Director-General submitted that his open defiance on the video tape was sufficient to conclude that a significant period of suspension should be undertaken.
164. In terms of submissions that might be available to Mr Ticehurst if it did appear, as referred above, the absence of an apology upon resolution by the council may well be explainable by the existence of defamation proceedings against him. Any such apology would probably be regarded by the plaintiffs to those proceedings as an admission of the defamation or imputation relevant to it.
165. It is undoubted that Mr Ticehurst was seriously concerned about the possibility that council resources may be being misused. There is no doubt that his actions were motivated by that concern, leaving aside whether he thought there may be some personal mileage to be gained by being the person that raised them. The point about these proceedings however is more about the departure by Mr Ticehurst from the adopted process regarding such matters. If such matters were able to be dealt with by individual councillors how and when they felt fit, regardless of the provisions of the Code of Conduct, then the process of administering local councils would be at the very least difficult, and probably amount to administrative anarchy. It is for that reason that the legislature and the Minister administering the *Local Government Act* has sought fit to introduce a process of a Model Code of Conduct, and the adoption of the Code of Conduct by individual councils which must be consistent with the Model Code. The Model Code lays down the procedure for making of complaints,

and the investigation of them, in instances of alleged maladministration.

166. The fact that the Code of Conduct Committee undertook an investigation into the matter and made its own recommendations is not, strictly speaking, relevant to the Tribunal's determination of appropriate consequence. Matters of serious impact are independently determined by the Tribunal, and the Tribunal is not (in this case) a mechanism to review the Code of Conduct Committee or its actions where the focus of proceedings before it concern the actions of a councillor.
167. Although Mr Ticehurst has undoubtedly been, in a broad sense, punished by his actions in having been named the defendant in defamation proceedings it remains the fact that in his actions, independently of any private law consequences, he has breached the Act.
168. In terms of consequences the Tribunal is satisfied that it is not appropriate to impose the consequences identified in s.482A(2)(a), (b), or (d). This is a long drawn out process and it is presumed that Mr Ticehurst is well aware of obligations contained in the Code of Conduct sufficient that counselling would neither assist nor be appropriate, and these matters are sufficiently serious that a reprimand is equally not appropriate.
169. As with other matters determined by this Tribunal it is to be noted that a significant period of time has passed since the events in question. This is regrettable.
170. Having regard to all of the factors that the Tribunal considers relevant to the matter of consequence, the Tribunal is of the view that Mr Ticehurst's behaviour is serious and warrants action pursuant to s.482A(2)(c). In the circumstances the Tribunal considers it

appropriate to order that Councillor Ticehurst be suspended from civic office for a period of two months from the date of this order.

Date: 12 August 2010



ADRIAN GALASSO SC

Local Government Pecuniary Interest and Disciplinary Tribunal