Civil and Administrative Tribunal

New South Wales

Case Name:	Chief Executive, Office of Local Government v Cornish
Medium Neutral Citation:	[2018] NSWCATOD 110
Hearing Date(s):	14 February 2018 and 20 April 2018
Date of Orders:	12 July 2018
Decision Date:	12 July 2018
Jurisdiction:	Occupational Division
Before:	R C Titterton, Principal Member
Decision:	(1) The respondent's right to payment is suspended for a period of three months from the date of these reasons.
Catchwords:	TRADES AND OCCUPATIONS – misconduct by Councillor who failed to comply with Council resolutions – relevant considerations – suspension of right to payment
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Local Government Act 1993 (NSW) Local Government (General) Regulation 2005 (NSW) Trade Practices Act 1974 (NSW)
Cases Cited:	Commonwealth v Baume (1905) 2 CLR 405 Cornish v The Chief Executive of the Office of Local Director-General, Department of Premier and Cabinet; Re Councillor Martin Ticehurst, LGPIDT 06/2012, 27 June 2013 Government [2016] NSWCATOD 13 Cornish v The Chief Executive of the Office of Local Government [2016] NSWCATOD 14 Health Care Complaints Commission v Do [2014] NSWCA 307 Health Care Complaints Commission v Litchfield (1997)

	41 NSWLR 630 Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd [2013] NSWCA 6 Mehajer v Chief Executive of the Office of Local Government [2014] NSWSC 1804 NSW Bar Association v Meakes [2006] NSWCA 340 Office of Local Government v Genevieve Campbell of Murray Shire Council [2015] NSWCATOD 129 Office of Local Government v Mehajer [2016] NSWCATOD 10 Office of Local Government v Pauling [2014] NSWCATOD 121 Office of Local Government v Councillor Martin Ticehurst of Lithgow City Council [2016] NSWCATOD 122 Office of Local Government v Shelley [2018] NSWCATOD 103 Ousley v The Queen [1997] HCA 49; (1997) 1992 CLR 69; (1997) 148 ALR 510 Phillips v Director-General, Department of Premier and Cabinet [2014] NSWCATOD 48 Re Trade Practices Tribunal; ex parte Tooheys Ltd (1977) 16 ALR 609 Sidgreaves v Chief Commissioner of State Revenue [2018] NSWCATAP 20
Texts Cited:	Maxwell, On The Interpretation of Statutes, 12th ed Pearce and Geddes, Statutory Interpretation in Australia, (online Edition)
Category:	Principal judgment
Parties:	Chief Executive, Office of Local Government (Applicant) Marcus Cornish (Respondent)
Representation:	Counsel: P King (Applicant) B Tronson (Respondent) Solicitors: Office of Local Government (Applicant) Robert Bazola & Associates (Respondent)
File Number(s):	2017/00212948

REASONS FOR DECISION

Summary

1 These proceedings concern the conduct of Councillor Marcus Cornish of Penrith City Council (Council).

2 The conduct to which the application relates is the respondent's failure to comply with resolutions passed by the Council on 27 July 2015 requiring him to take certain actions. Those actions were:

- to publicly acknowledge his breaches of the Council's Code of Conduct;
- to give an undertaking to the Council that he would avoid similar breaches in future;
- to offer an unqualified apology to the Mayor, Council and the Penrith Community;
- to give an undertaking that he would not make negative or derogatory comments regarding the complaint;
- to give an undertaking to participate in a course of training offered by the Council relating to its Code of Conduct and to attend that training.

3 It is common ground that the respondent did not comply with the resolutions, either within the timeframe required or at all.

4 The applicant seeks an order pursuant to s 482A(2)(c) of the *Local Government Act 1993* (the Act) that the respondent be suspended from civil office, in the alternative that his right to payment be suspended, in the further alternative that he be reprimanded.

5 For the following reasons, I have decided to suspend the respondent's right to payment for a period of three months.

Issues to be determined

6 There are three principal issues for me to determine:

(1) Does the Tribunal have jurisdiction to hear and determine the application, or should the application otherwise be dismissed pursuant to s 55 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act)?

(2) Does the failure of the respondent to comply with resolutions passed by Council on 27 July 2015 constitute misconduct in that it was and is a breach of cl 8.10 of the Council's Code of Conduct?

(3) If yes, what disciplinary action, if any, is appropriate?

Overview of Application

7 On 29 June 2017, the Tribunal received a letter from the applicant dated 22 June 2017. That letter relevantly stated that:

(1) the Office of Local Government had recently finalised a departmental report on alleged misconduct by Clr Cornish; and

(2) in accordance with s 440J(2)(b) of the Act, the applicant had determined to refer "this matter" to the Tribunal.

8 The letter attached a report dated 22 June 2017 which the applicant said was prepared in accordance with s 440J(3) of the Act. That section allows the applicant to refer a matter to the Tribunal by means of a report. The report may contain or be accompanied by such material and observations as the applicant thinks fit.

9 The report is dated 22 June 2017. Attached to it are almost 400 pages of materials, including a report of Conduct Reviewer Thane dated 21 April 2015 and that report's annexures.

10 On 13 July 2017, the applicant filed an Application for Disciplinary Findings and Orders which relevantly stated:

> 3. ORDERS SOUGHT
>
> That the Civil and Administrative Tribunal, after considering the Report under section 440J of the Local Government Act presented to it recently, decides to conduct proceedings into the complaint that forms the subject of that Report, pursuant to section 469 of the Local Government Act 1993.
>
> 4. grounds for application (including particulars)
>
> Ground 1. That Councillor Marcus Cornish breached clauses 8.8 and 8.10 of Penrith City Council's Code of Conduct and in turn committed misconduct by reference to s.440F of the Local Government Act 1993 by failing to comply with Council's resolution of 27 July 2015.

11 Section 440J provides:

> 440J Alternatives to disciplinary action by the Departmental Chief Executive
>
> (1) The Departmental Chief Executive may before, during or after an investigation into an allegation of misconduct by a councillor decide to take no further action against the councillor, if satisfied that no further action is warranted.
>
> (2) The Departmental Chief Executive may, instead of taking disciplinary action against a councillor:

(a) refer the matter to the council concerned with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise, or

(b) refer the matter to the Civil and Administrative Tribunal for consideration.

(3) A matter is referred to the Tribunal under this section by means of a report presented to the Tribunal by the Departmental Chief Executive. A report may contain or be accompanied by such material and observations as the Departmental Chief Executive thinks fit.

(4) The Departmental Chief Executive is to notify the councillor concerned of any decision to refer the matter to the Tribunal.

(5) The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section.

12 Section 469 provides:

469 NCAT to decide whether or not to conduct proceedings into a complaint

(1) After considering a report presented to it in relation to a complaint, the Civil and Administrative Tribunal may decide to conduct proceedings into the complaint.

(2) If the Civil and Administrative Tribunal decides not to conduct proceedings into a complaint, it must provide a written statement of its decision, and the reasons for its decision:

(a) to the person against whom the complaint was made, and

(b) to the person who made the complaint, and

(c) to the Departmental Chief Executive.

13 On 27 July 2017, having considered the terms of that letter and the content of the departmental report, the Tribunal determined to conduct proceedings into the matter pursuant to s 470A(1) of the Act. I note that the Tribunal refers to s 470A(1), rather than s 469 as identified. These sections are in relevantly identical terms, in so far as sub-section (2) is concerned. However, s 470A(1) states:

After considering a report presented to it under section 438HA or 440J in relation to a referred matter, the Civil and Administrative Tribunal may decide to conduct proceedings into the matter.

14 I see no issue in the Tribunal identifying s 470A rather s 469. The fact is that on 29 June 2017 the applicant referred the matter to the Tribunal, and on 27 July 2017 the Tribunal determined to conduct proceedings into the matter.

15 By application dated 3 October 2017 (the amended application), the applicant then sought the following orders:

1. An order pursuant to s 482A(2)(c) of the Local Government Act 1993 that the respondent be suspended from civic office.

2. In the alternative to Order 1, an order pursuant to s 482A(2)(d) of the Local Government Act 1993 that the respondent's right to be paid any fee or remuneration be suspended.

3. Further or in the alternative to Orders 1 and 2, an order pursuant to s 482A(2)(b) of the Local Government Act 1993 that the respondent be reprimanded.

4. Such other order as the Tribunal sees fit.

16 The grounds of the amended application are set out in Annexure A to the amended application and are stated as:

GROUNDS FOR APPLICATION

1. On and from 28 October 2015, the respondent has engaged in conduct amounting to misconduct in that it was and is a breach of cl 8.10 of the Penrith City Code of Conduct.

Particulars

a) On 21 April 2015, a Conduct Reviewer completed a Code of Conduct complaint investigation report (**Report**) relating to the conduct of [the respondent].

b) The Reviewer's Report found that [the respondent] had by his conduct breached the Code of Conduct at an Ordinary Council Meeting on 24 November 2014 and at an Extraordinary Council Meeting on 8 December 2014.

c) On 27 July 2015, at an Ordinary Council Meeting, the Council resolved to formally censure [the respondent] for breach and adopt the recommendations of the Reviewer's Report, inter alia, that [the respondent]:

i) Publicly acknowledge the findings of breach of the Model Code and is also to give an undertaking to the Council that he will avoid similar breaches in future (**Acknowledge Requirement**);

ii) Offer an unqualified apology to the Mayor, Council and the Penrith Community (**Apology Requirement**);

iii) Give an undertaking that he will not make negative or derogatory comments regarding the complaint, the outcome or the Code of Conduct process publicly including to the media (**Comment Undertaking Requirement**);

iv) Be required to attend, and give an undertaking to participate in, a course of training offered by the Council relating the Code of Conduct and the matters dealt with in the Report (**Training Requirement**); and

v) Complete the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement and Training Requirement within three months (**Time Requirement**).

d) Each of the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement, Training Requirement and Time Requirement was

> a Council resolution requiring [the respondent] to take action as a result of his breaches of the Code of conduct.
>
> e) On 28 July 2015, the General Manager of the Council formally advised [the respondent] of the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement, Training Requirement and Time Requirements.
>
> f) On 24 August 2015, at an Ordinary Council Meeting, [the respondent] was given the opportunity to comply with the Acknowledge Requirement, Apology Requirement and Comment Undertaking Requirement, and to give the undertaking required by the Training Requirement, but did not do so.
>
> g) At no time since 24 August 2015 has [the respondent] complied with the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement or Training Requirement. From 28 October 2015, [the respondent] failed to comply with the Time Requirement.
>
> h) From 28 October 2015, [the respondent] failed to comply with the Time Requirement.

17 The definitions and bolding set out above are as appear in the Amended Application. I shall use those definitions in these reasons, save that I will refer to the report of Conduct Reviewer as the "Investigation Report" as that is how she described it, and to distinguish that report to the applicant's report dated 22 June 2017.

18 The respondent filed a Reply to the amended application on 23 October 2017. The substance of the Reply is dealt with below. Suffice it to say, the respondent raised a number of preliminary, procedural and matters in support of his submission that, in effect, the Tribunal did not have jurisdiction to conduct the proceedings and/or that the application should be dismissed pursuant to s 55 of the NCAT Act.

19 The resolutions recommendations suggested by the Conduct Reviewer were passed as resolutions of the Council on 27 July 2015. The respondent did not comply with the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement or Training Requirement, either as required by the Time Requirement or at any time.

20 A hearing was held on 14 February 2018. The evidence of the evidence relied on by the applicants was the affidavit of Mr Adam Beggs affirmed 29 September 2017, and the applicant's report dated 22 June 2017, together with annexures including the Investigation Report. I allowed the tender of the applicant's report over the objection of the respondent. Investigations reports

are routinely tendered in proceedings of this nature: see *Office of Local Government v Mehajer* [2016] NSWCATOD 10, *Office of Local Government v Pauling* [2014] NSWCATOD 121; *Office of Local Government v Councillor Martin Ticehurst of Lithgow City Council* [2016] NSWCATOD 122.

21 Included in the Investigation Report was a memorandum dated 10 December 2014 of the Council Mayor to Council General Manager Mr Alan Stoneham. It was this memorandum which was a catalyst for the investigation. Clr Fowler states that the respondent may have breached the Council Code of Conduct He asks Mr Stoneham to review the conduct of the respondent at the two meetings to determine whether his conduct constituted a beach of the Council's Code of Conduct.

22 The evidence of the respondent included two affidavits of the respondent respectively sworn 15 December 2017 and 19 January 2018, and two bundles of photographs.

23 The applicant submits that:

(1) the Tribunal should find that the respondent's behaviour warrants action under s 482(A) of the Act; and

(2) suspend the respondent from civic office, suspend his right to be paid any fee or remuneration or reprimand him.

24 In summary, the respondent submits that:

(1) the "statutory criteria" for s 482A are not satisfied, in that the "statutory pathway under Div 3 of Part 1 of Ch 14 of the Act has not been followed" and that for this and on a number of other bases the Tribunal lacks jurisdiction to hear the application and/or that the application should be dismissed pursuant to s 55 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). The respondent submits that the failure of the Conduct Reviewer to consider at all the provisions of s 482(3) of the Act is "fatal" to the Tribunal conduct the proceedings because "the complete absence of any reference whatsoever to the lack of any 'prior misconduct', any 'disciplinary action' or and 'previous incidents' amounts to a Wednesbury Unreasonableness";

(2) that are various problems with Report (such as the Conduct Reviewer not properly considering a detailed 14 page Reply dated 23 March 2017, and the bias of the Conduct Reviewer) such that "the questions of fact and law founded within the Conduct Reviewer's Report has never been allowed to be merit reviewed";

(3) the respondent was denied procedural fairness in that he was never aware of the precise allegations being put against him in the application;

(4) there was no evidence to support the relief sought; and

(5) the relief sought by the applicant is "excessive".

25 For any or all of these reasons the respondent submits that that the application should be dismissed, and the applicant ordered to pay the respondent's costs.

Issue 1: Does the Tribunal have jurisdiction to hear and determine the application, or should the application otherwise be dismissed pursuant to s 55 of the NCAT Act?

26 The respondent raised a number of matters in support of his submission that, in effect, the Tribunal did not have jurisdiction to hear the matter, or that the application should otherwise be dismissed pursuant to s 55 of the NCAT Act. He raises seven "grounds as to "procedural and jurisdictional issues in his Reply. Submissions in respect of each ground are developed in his Reply, and amplified in his written submissions. The respondent bases his argument that the application should not be heard or otherwise dismissed by the Tribunal on a number of preliminary, procedural and jurisdictional ways.

27 To address the issues raised by the respondent, it is appropriate to first set out the relevant provisions of the Act, and then to make some factual findings relating to jurisdiction and procedure.

Relevant legislative provisions

28 Chapter 14 of the Act deals with the honesty of and disclosure of interests by councillors. The Introduction to the Chapter states:

> Introduction
>
> This Chapter places obligations on councillors, council delegates, staff of councils and administrators of councils to act honestly and responsibly in carrying out their functions.
>
> The Chapter also provides for the adoption of codes of conduct for councillors, staff and other persons associated with the functions of councils and enables the Departmental Chief Executive to investigate and take action against councillors who engage in misconduct. However, the Chapter does not affect any other duties imposed by other laws or any offences created by other laws.
>
> It also requires that pecuniary interests of councillors, council delegates and other persons involved in making decisions or giving advice on council matters be publicly recorded and requires councillors and staff to refrain from taking part in decisions on council matters in which they have a pecuniary interest.

> The Chapter enables any person to make a complaint concerning a failure to disclose a pecuniary interest and provides for the investigation of complaints.
>
> The Chapter also empowers the Civil and Administrative Tribunal to conduct hearings into complaints and to take disciplinary action against a person if a complaint against the person is found to be proved.

29 Part 1 of Ch 14 deals with conduct of councillors, council staff, delegates and administrators and is divided into three divisions namely:

- Conduct Generally (Div 1);
- Serious Corrupt Conduct (Div 2); and
- Misconduct of councillors (Div 3).

30 Section 440, which appears in Division 1, relevantly provides that:

> (1) The regulations may prescribe a model code of conduct (the ***model code***) applicable to councillors, members of staff of councils and delegates of councils.
>
> (2) Without limiting what may be included in the model code, the model code may:
>
> (a) relate to any conduct (whether by way of act or omission) of a councillor, member of staff or delegate in carrying out his or her functions that is likely to bring the council or holders of civic office into disrepute, and
>
> (b) in particular, contain provisions for or with respect to conduct specified in Schedule 6A.
>
> (3) A council must adopt a code of conduct (the ***adopted code***) that incorporates the provisions of the model code. The adopted code may include provisions that supplement the model code.
>
> (4) A council's adopted code has no effect to the extent that it is inconsistent with the model code as in force for the time being.
>
> (5) Councillors, members of staff and delegates of a council must comply with the applicable provisions of:
>
> (a) the council's adopted code, except to the extent of any inconsistency with the model code as in force for the time being, and
>
> (b) the model code as in force for the time being, to the extent that:
>
> (i) the council has not adopted a code of conduct, or
>
> (ii) the adopted code is inconsistent with the model code, or
>
> (iii) the model code contains provisions or requirements not included in the adopted code.

31 On 11 February 2013 the Council adopted a code of conduct reflecting the Model Code (the Code). The Code relevantly provides:

8.10 Where you are a councillor or the general manager, you must comply with any council resolution requiring the councillor to take action as a result of a breach of the Code.

32 Division 3 deals with misconduct of councillors. Misconduct is relevantly defined in s 440F as:

(1) In this Division:

misconduct of a councillor means any of the following:

(a) a contravention by the councillor of this Act or the regulations,

(b) a failure by the councillor to comply with an applicable requirement of a code of conduct under section 440,

(c) a failure by a councillor to comply with an order issued by the Departmental Chief Executive under this Division,

(d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council,

(e) an act or omission of the councillor intended by the councillor to prevent the proper or effective functioning of the council or a committee of the council.

(2) However, a contravention of the disclosure requirements of Part 2 is not misconduct.

Note.

A contravention of the disclosure requirements of Part 2 is dealt with under other provisions of this Chapter.

(3) A reference in this Division to misconduct includes a reference to misconduct that consists of an omission or failure to do something.

33 Where there is suspected or alleged misconduct (as defined) by a councillor, Division 3 sets out a number of avenues of action open. In summary, these are:

- a council may by resolution at a meeting formally censure a councillor for misconduct (s 440G(1));
- the Departmental Chief Executive may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct (s 440H);
- the Departmental Chief Executive may arrange for a departmental report to be prepared in relation to an investigation conducted under s 440H (s 440H(5));
- the Departmental Chief Executive may arrange for a departmental report to be prepared about whether a councillor has engaged in misconduct without an investigation being carried out (s 440H(5A)).

34 The preparation of a departmental report is a prerequisite to a decision by the Departmental Chief Executive to take disciplinary action against a councillor,

unless the disciplinary action is taken on the basis of a report by the Ombudsman or the Independent Commission Against Corruption (s 440H(6)).

35 Section 440I provides that the Departmental Chief Executive may take disciplinary action against a councillor if the Departmental Chief Executive is satisfied that (a) the councillor has engaged in misconduct (whether on the basis of a departmental report or a report by the Ombudsman or Independent Commission Against Corruption), and (b) disciplinary action is warranted (s 440I(1)).

36 The Departmental Chief Executive may take other actions, such as counselling or reprimanding the councillor, directing the councillor to cease engaging in the misconduct and to apologise for their misconduct in the manner specified in the order, directing the councillor to undertake training or to participate in mediation, or suspend the councillor from civic office for a period not exceeding 3 months or suspend their right to be paid (s 440I(2)).

37 Section 440J allows for alternatives to disciplinary action by the Departmental Chief Executive" and is set out above at [11].

> (1) The Departmental Chief Executive may before, during or after an investigation into an allegation of misconduct by a councillor decide to take no further action against the councillor, if satisfied that no further action is warranted.
>
> (2) The Departmental Chief Executive may, instead of taking disciplinary action against a councillor:
>
> (a) refer the matter to the council concerned with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise, or
>
> (b) refer the matter to the Civil and Administrative Tribunal for consideration.
>
> (3) A matter is referred to the Tribunal under this section by means of a report presented to the Tribunal by the Departmental Chief Executive. A report may contain or be accompanied by such material and observations as the Departmental Chief Executive thinks fit.
>
> (4) The Departmental Chief Executive is to notify the councillor concerned of any decision to refer the matter to the Tribunal.
>
> (5) The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section.

Relevant findings relating to jurisdiction and procedure

38 Before considering the respondent's several grounds, it is appropriate to set out some relevant factual findings. I make these findings on the balance of

probabilities based on the materials before me, including Exhibit 2 (being the applicant's report to the Tribunal, the attached Investigation Report and the attachments to that report, and the respondent's affidavits.

39 On 10 December 2014, the Council received a complaint about the conduct of the respondent which was alleged to have occurred at Council meetings on 24 November 2014 and 8 December 2014. At these two meetings, Council considered a development application for a place of worship for Muslims.

40 The complaint arose from questions asked by the respondent at each of the meetings and in relation to the respondent's conduct at the meeting on 24 November 2014. It was alleged that at the Council meeting held on 24 November 2014, the respondent did not immediately sit down, despite the Mayor Clr Fowler rising and asking him to resume his seat on two occasions. It was alleged that this conduct occurred immediately after the respondent asked Dr Zaida, who was addressing the Council, whether she lived in Penrith, a question which the Mayor, Clr Fowler, said was irrelevant to Council's consideration of the development application.

41 It was further alleged that at a Council meeting held on 8 December 2014 (where a rescission motion in relation to the development application was being debated) the respondent continued to stand and address the meeting despite requests by the Mayor for the respondent to be seated.

42 On 19 December 2014, the Council's Chief Governance Officer and Complaints Co-ordinator referred the matter the Conduct Reviewer, Ms Kathy Thane. Ms Thane is a Code of Conduct Reviewer and Committee Member of the Western Sydney Regional Organisation of Council Conduct Review Committee Panel of which the Council is a Member. The complaint was referred to Ms Thane pursuant to cl 6.12 of the Procedures for the Administration of the Model Code of Conduct (the Procedures).

43 Clause 6.9 of Procedures provides that a reviewer is to undertake a preliminary assessment of a complaint to determine how that complaint is to be managed.

44 On 29 December 2014, after considering the materials provided to her, the Conduct Reviewer determined to investigate the allegations against the

respondent pursuant to cl 6.10(e) of the Procedures. On that date, the Conduct Reviewer forwarded a Notice of Investigation to the respondent pursuant to cl 8.4 of the Procedures, which formally advised him of the allegations made against him and inviting him to make written submissions. Evidence in the form of statutory declarations was provided by the respondent to the Conduct Reviewer by his solicitor, together with various submissions.

45 After consideration of the material gathered as part of her investigation, including the respondent's submissions on the Investigation Report, the Conduct Reviewer was satisfied on the balance of probabilities that the respondent did not immediately sit down, despite the Mayor asking that he do so, and that the respondent failed to show respect for the Mayor as Chair by failing to comply with the Mayor's requests at the Meetings on 24 November 2014 and 8 December 2014.

46 The Conduct Reviewer recommended that:

(1) the respondent be formally censured under s 440G of the Act;

(2) her findings of inappropriate conduct be made public at the next Council meeting;

(3) that at that meeting the respondent:

  (a) publicly acknowledge the findings of breaches of clauses of the Code;

  (b) give an undertaking to avoid similar breaches in the future;

  (c) offer an apology to the Mayor, the Council and the Penrith community;

  (d) give an undertaking that he would not make negative or derogatory comments about the complainant, the outcome or the Code of Conduct process publicly including to the media;

(4) the Council provide Code of Conduct training for the respondent; and

(5) that the respondent be required to attend and to undertake to participate in such training within three months.

47 On 27 July 2015, at an Ordinary Council Meeting, the Council resolved to censure the respondent and adopt the recommendations Conduct Reviewer contained in the Investigation Report.

48 On 28 July 2015, the General Manager of the Council formally advised the respondent of the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement, Training Requirement and Time Requirement.

49 On 24 August 2015, at an Ordinary Council Meeting, the respondent was given the opportunity to comply with the Acknowledge Requirement, Apology Requirement and Comment Undertaking Requirement, and to give the undertaking required by the Training Requirement. The respondent did not do so.

50 At no time since 24 August 2015 has the respondent complied with the Acknowledge Requirement, Apology Requirement, Comment Undertaking Requirement or Training Requirement, either in accordance with the Time Requirement or at all.

51 Following the respondent's failure to comply with the Council resolutions, the matter was referred to the applicant as a possible breach of the misconduct provisions of the Act.

52 In August 2015, the respondent commenced proceedings in the Tribunal seeking a review of decisions of the applicant said to be contained in letters the Council had sent to the respondent's solicitors. This application was dismissed for want of jurisdiction: *Cornish v The Chief Executive of the Office of Local Government* [2016] NSWCATOD 14.

53 In September 2015, the respondent commenced more proceedings in the Tribunal. He said that he was seeking a review of a decision of the applicant said to be contained in a letter dated 5 August 2015 from the Council to the respondent's solicitors for the Applicant. The letter was from a Senior Governance Officer of the Council and refers to several decisions. This application was also dismissed for want of jurisdiction: *Cornish v The Chief Executive of the Office of Local Government* [2016] NSWCATOD 13.

54 On 5 May 2016, the applicant authorised the preparation of a departmental report regarding the allegations of misconduct by the respondent. In doing so, the applicant noted that s 440H(5A) of the Act provided that he could arrange for a departmental report to be prepared about whether a councillor had

engaged in misconduct without an investigation being carried out, it the matter had been referred to him by the Council and he was of the opinion that the report could be based on the findings of an investigation conducted on or on behalf of Council.

55 On 22 June 2017, the applicant referred the departmental report to the Tribunal pursuant to s 440J(2)(b) of the Act.

56 On 27 July 2017, the Tribunal, having considered the terms of the applicant's letter and the content of the departmental report the Tribunal, determined to conduct proceedings into this matter pursuant to s 470A(1) of the Act.

57 Having set out those findings, I now turn to consider the respondent's jurisdictional and other preliminary grounds.

Ground 1

58 Ground 1 is stated as follows:

> The Tribunal has no jurisdiction with respect to the complaint and/or the amended complaint in that the alleged breaches concern and arise under the law of New South Wales relied upon by the Applicant made by Act No 37 of 2015 of the Parliament which commenced 2 November 2015 a date after the alleged misconduct in 2014 which law amended inter alia *Local Government Act 1993* [NSW] sections 440F, 440H and 482A, and in that the complaint relies on such laws having retroactive operation contrary to the terms operation and effect of the laws of New South Wales, and in that the powers provided for under Chapter 14 *Local Government Act 1993* [NSW] invoked by the Applicant with respect to the orders sought in paragraphs 1, 2 and 3 of the *'General Application Form'* dated 27 September 2017 relate to the civic office which he now holds consequent upon his election as councillor for North Ward on Penrith City Council in September 2016 with an increased majority in circumstances where by contrast the civic office in respect of which the complaint of the Applicant is made relates to the civic office held by the Respondent as former councillor consequent upon his election in 2012 under the Act then pertaining which civic office expired in September 2016 under Chapter 9.2.3 of that Act.

59 In oral submissions, Mr King submitted that ss 440F, 440H and 482A of the Act commenced on 2 November 2015, that is, a date after the respondent's alleged misconduct. He submitted that was is a "fundamental problem" is that s 440H(5A)(a) did not exist at the time of the alleged conduct, and to do so is to give the legislation a retrospective effect unintended by Parliament.

60 I disagree. This argument is misconceived. As the above factual chronology identifies, it was on 5 May 2016 that the applicant authorised the preparation of

a departmental report, some six months after the Investigation Report was completed. I see no reason why what occurred was anything other than the process envisaged by s 440H(5A)(a) has occurred, that is that:

- the applicant arranged for a departmental report to be prepared, about whether the respondent had engaged in misconduct;
- without an investigation;
- as the matter had been referred to him by the Council;
- and the applicant was of the opinion that the report may be based on an investigation conduct by or on behalf of the Council. In this latter respect I note that Report was prepared by the Conduct Reviewer following the referral to her by the Council of a complaint about the respondent's conduct.

61 It is convenient at this point to deal with a related submission of the respondent, that is, that any investigation should have been carried out pursuant to s 440N of the Act. That section provides that:

> 440N Investigation of former councillors
>
> (1) The Departmental Chief Executive may conduct an investigation for the purpose of determining whether a former councillor engaged in misconduct during the period in which the former councillor was a councillor.
>
> (2) For that purpose, sections 440H and 440M apply as if a reference in those sections to a councillor includes a reference to a former councillor.
>
> (3) The Departmental Chief Executive may before, during or after an investigation into an allegation of misconduct by a former councillor decide to refer the matter to the Civil and Administrative Tribunal for consideration.
>
> (4) Section 440J applies to the referral of the matter to the Tribunal in the same way as it applies to a referral of a matter relating to a councillor to the Tribunal.

62 The respondent was first elected to Council in September 2012, and re-elected in September 2016. The applicant authorised the preparation of a departmental report on 2 May 2015. A draft of that report was sent to the respondent on 17 December 2016, and submissions provided on 23 March 2017. The respondent's submissions addressed perceived jurisdictional, procedural and other issues, but did not address the content of the draft departmental report of what sanction might be imposed. On 1 June 2017, the applicant determined to refer the departmental report to the Tribunal.

63 The respondent's submission is based on the fact of his re-election to Council in September 2016, and that when his alleged misconduct occurred when he

was serving his previous term as a councillor. In my view, this submission is also misconceived, for three reasons. First, s 440N(2) provides s 440H applies as if the reference to "councillor" in the section includes a reference to a former councillor. In other words, even it be correct that the respondent was a former councillor, the applicant could nevertheless proceed on the basis of s 440H(5A). But secondly, in my view, the natural meaning of "former councillor" is simply a councillor who was formerly a councillor and therefore no longer a councillor. In my view, the respondent only becomes a former councillor when he is no longer elected. Finally, I accept the applicant's submission that, even if I accepted the respondents' submission (which I do not) I would nevertheless be satisfied that the departmental report had been validly placed before the Tribunal.

Ground 2

64 Ground 2 is that the amended application dated 27 September 2017 does not accord with Order 2 of the Tribunal made 6 September 2017 in that it is not an amendment, it purports to relate to more than one division of the Tribunal, and it has not been filed.

65 Order 2 was in the following terms:

> The applicant is to file its amended application and to give all evidence on which it will rely to the respondent on or before 4 October 2017.

66 I do not consider that there is any substance in this submission. At best this is a submission based on a technicality which leads nowhere, as the Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (NCAT Act, s 38(4)).

67 I reject this ground for the following reasons. First, the purpose of Order 2 no doubt was to ensure that the respondent was on notice of the order or orders sought by the applicant and the grounds for seeking that order or orders.

68 Secondly, I do not understand the submission that the amended application purports to relate to more than one Division of the Tribunal; on its face, it does no such thing. But even if it did, that would not be a basis for finding that the application was invalid.

69 Thirdly, Order 2 required the applicant to file its amended application on or before 4 October 2017. The applicant did so on 3 October 2017.

70 In addition, it was suggested repeatedly throughout the hearing that a sealed copy of the amended application had never been served on the respondent. It is not the practise of the Tribunal to affix the seal of the Tribunal to filed documents, although a date received stamp is utilised. Again, I refer to s 38(4).

71 Regardless of this point, the respondent's Reply filed 25 October 2017 specifically refers to an "amended complaint", so I conclude that the respondent knew what order was sought and the grounds relied on.

72 None of these claims, either individually or cumulatively support a submission that the Tribunal lacked jurisdiction.

Ground 3

73 Ground 3 is that the proceedings should be dismissed on the basis of "Further Replies as to Formal and Essential Pleadings". This is the first of five grounds (namely Grounds 3 to 7) in the Reply seeking dismissal of the proceedings pursuant to s 55 of the NCAT Act. That section relevantly provides that :

> (1) The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances:
>
> (a) if the applicant or appellant (or, if there is more than one applicant or appellant, each applicant or appellant) withdraws the application or appeal to which the proceedings relate,
>
> (b) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (c) if the applicant or appellant (or, if there is more than one applicant or appellant, each applicant or appellant) has failed to appear in the proceedings,
>
> (d) if the Tribunal considers that there has been a want of prosecution of the proceedings.

74 No paragraph of sub-section (1) was identified by the respondent in relation to any of Grounds 3 to 7. In my view, the only possible paragraph is (b).

75 Ground (3) is particularized by reference to:

- there being different originating process documents;
- this being the second incident of unsealed copies of documents;
- there being no up-marked version to purported amended application; and

- the orders sought being unclear.

76 None of these matters, either individually or cumulatively amount to a reason why the application should be dismissed pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)). I refer again to s 38(4) of the NCAT Act.

Ground 4

77 Ground 4 is stated as:

> This ground seeks to dismiss this application on grounds that the Tribunal has only part considered its statutory considerations when exercising ss.469 LGA, cf470B, and hence not discharged its duty to consider those statutory factors in S.470B upon receipt of a Report under S.440J LGA, that is no consideration or application of s.470B when making Order 3 on 27 July 2017.

78 I reject this ground as being a basis to dismiss the application pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)). The matter was referred to the Tribunal pursuant to s 440J(2)(b) by a letter from the applicant dated 22 June 2017.

79 On 27 July 2017, the Tribunal (constituted by the Deputy President Acting Judge Boland) directed that :

> 3. Having considered the terms of the Acting Chief Executive's letter and the content of the departmental report the Tribunal, pursuant to the provisions of s470A(1) of the Local Government Act, hereby determines to conduct proceedings into the matter.

80 Section 470A of the Act provides:

> 470A NCAT to decide whether or not to conduct proceedings into a referred matter relating to misconduct
>
> (1) After considering a report presented to it under section 438HA or 440J in relation to a referred matter, the Civil and Administrative Tribunal may decide to conduct proceedings into the matter.
>
> (2) If the Civil and Administrative Tribunal decides not to conduct proceedings into a referred matter, it must provide a written statement of its decision, and the reasons for its decision:
>
> (a) to the councillor to whom the report relates, and
>
> (b) to the council concerned, and
>
> (c) to the Departmental Chief Executive.

81 Section 470B of the Act, in respect of which the respondent submits the Tribunal erred by failing to consider, is in the following terms:

> 470B Circumstances in which NCAT may dispense with hearing
>
> (1) After considering a report presented to it under section 438HA or 440J and any other document or other material lodged with or provided to the Tribunal in relation to the report, the Civil and Administrative Tribunal may determine the proceedings without a hearing if:
>
> (a) the Departmental Chief Executive and the councillor to whom the report relates have agreed that the proceedings may be determined without a hearing, and
>
> (b) there are no material facts in dispute between the Departmental Chief Executive and the councillor, and
>
> (c) in the opinion of the Tribunal, public interest considerations do not require a hearing.

82 It is implicit in the Tribunal's determination that the Tribunal did not consider that it was appropriate to determine the present proceedings without a hearing.

83 I perceive no error and see no reason why the application should be dismissed pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)) on the basis of Ground 4.

Ground 5

84 Ground 5 is based on there being no disciplinary determination by the applicant prior to referral to the Tribunal. The substance of this submission is set out in pars 3.9 to 3.14 of the Reply:

> 3.9 If was open to the Applicant to conduct its own statutory investigation under S.440H.
>
> 3.10 The Reporter / Applicant did not investigate nor make its own disciplinary findings thus denying the Respondent a statutory right of appeal under s.440L.
>
> 3.11 The Reporter / Applicant attempted to 'rebadge' the Conduct Reviewer Report as if it were a s.440H Report, which was demonstrably unsuccessful by recourse to this statutory path to prepare and lodge a S.440J Report, there being no S.440H Report in this matter.
>
> 3.12 Unlike *Phillips,* this matter comes to the Tribunal with no S.440H
>
> investigation in place and no prior application of statutory rights of appeal.
>
> 3.13 As a result of this election to not investigate the alleged disciplinary findings of the Council Below, this matter ceases to be an Appeal under S.440L, but becomes a Proceeding based upon application of the Department to this Tribunal.
>
> 3.14 The consequence is that there is no DLG Investigation into this matter,

85 This ground too is rejected. Section 440J(2)(b), set out above, clearly provides that the Department Chief Executive may, instead of taking disciplinary action against a councillor, may refer the matter to the Tribunal. That is precisely what

happened in this application. By letter dated 22 June 2017, as stated, the applicant referred the matter to the Tribunal.

86 In these circumstances I see no reason why the application should be dismissed pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)) on the basis of Ground 5.

Ground 6

87 Ground 6 is that there is “no trigger” for the application of s 440J. The respondent submits that this Ground seeks to dismiss this application on grounds that s 440J is wrongly applied and has no statutory authority on grounds that there is no Departmental investigation upon which to exercise its statutory discretion under ss 440J(1) and (2). The core of the respondent’s Reply submissions on this issue appear at pars 4.14 to 4.16:

> 4.14 The trigger of S.440J relies on the application of 440H(5A). In the absence of any Departmental investigation, and reliance solely upon the Conduct Reviewer report, the only construction that can be placed on this election as to conduct by the Applicant is that the matter was of such a minor nature, being no higher than a sequence of reprimand, undertaking, apology and counselling provisions, that the DLG has wrongly invoked S.440J and thereby invoked s.482 invoking statutory penalties grossly excessive against the resolution of the decision below and grossly excessive against the Legislator's intent. It is highly doubtful the New South Wales Parliament intended or meant for ss.440H(5A), 440J, 469 and 482 LGA to be used in this way against the clear Explanatory Note and 2nd Reading Speech of the Minister for Local Government as to the purpose of statutory referral by report without investigation.
>
> 4.15 S.440J is to be read as a whole. The Legislator's intent is clearly headed 'Alternatives to disciplinary action by the Departmental Chief Executive", S.440J is not intended to be a disciplinary procedure. 440J(1) is read conjunctively with 440(2) and are not mutually exclusive, 440(1) refers to the proviso '...if no further action is warranted'. Subsection (2) provides relevantly the alternative '..instead of taking disciplinary action...' of which (2)(a) and (b) are the two statutory alternatives.
>
> 4.16 If 440J(2)(b) is elected, it is exercised in the context of the application of s.440H(5A), which, as noted above, is the Legislator's intent to be exercised only for minor matters that are of a 'non-public nature' in the order of a 'counselling or reprimand' within which this matter clearly falls within as found within the Conduct Reviewer / Council's own recommendations, none of which recommend suspension from civic office and termination of all payments.

88 This ground is also rejected as misconceived. This is for the simple reason that there does not have to be a departmental investigation. Section 440H(5A) provides, in terms, that the applicant may arrange for a department report to be carried out about whether a councillor has engaged in misconduct if:

- the matter has been referred to the Departmental Chief Executive (that is, the applicant) by the Council and the Departmental Chief Executive is of the opinion that the report may be based on the findings of an investigation conducted by or on behalf of the Council (s 440H(5A(a)); or
- the Departmental Chief Executive is of the opinion that the alleged misconduct, if proven, would be minor in nature and, were it to warrant disciplinary action, the disciplinary action would be comprised only of counselling or reprimanding the councillor (s 440H(5A(b)); or
- the Departmental Chief Executive otherwise considers it appropriate to do so (s 440H(5A(c)).

89 The respondent submits that by not undertaking an investigation himself, and preparing a report, the applicant intentionally sought to prejudice the respondent by denying him the right of merits review. He submits that:

> [147] . . . the applicant seeks to turn this application into a de facto 440I disciplinary proceeding. Again, the Applicant has not applied any disciplinary power under s.4401 for reasons best known to itself. What the Applicant cannot do, is refuse to exercise its disciplinary power then "flick" this matter onto the NCAT with the intentional desire that this matter not permit the respondent his merit review as an applicant against the decision below.

90 I reject this submission. Based on the materials before me I find that the matter was referred to the applicant by the Council and that the applicant was of the opinion that the report may be based on the findings of an investigation conducted by or on behalf of the Council (that is, the investigation carried out by the Conduct Reviewer).

91 I see no reason why the application should be dismissed pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)) on the basis of Ground 6.

Ground 7

92 Ground 7 is that the “or” in s 440H(5A) should be read as “and”.

93 Section 440H(5A) provides:

> (5A) The Departmental Chief Executive may arrange for a departmental report to be prepared about whether a councillor has engaged in misconduct without an investigation being carried out under this section if:
>
> (a) the matter has been referred to the Departmental Chief Executive by the council and the Departmental Chief Executive is of the opinion that the report may be based on the findings of an investigation conducted by or on behalf of the council, or

> (b) the Departmental Chief Executive is of the opinion that the alleged misconduct, if proven, would be minor in nature and, were it to warrant disciplinary action, the disciplinary action would be comprised only of counselling or reprimanding the councillor, or
>
> (c) the Departmental Chief Executive otherwise considers it appropriate to do so.

94 The respondent submits, in summary:

- s 440H(5A) was "clearly meant" to be read and applied conjunctively, between subsections (a), (b) and (c) as to give legislative intent that this provision was only meant to be applied for cases which 'if proved, would be minor in nature and, were it to warrant disciplinary action, the disciplinary action would be comprised only of counselling or reprimanding the councillor;
- s 440H(5A) was "clearly meant" to apply across any alternative to disciplinary processes where matters of a minor nature are contemplated;
- it was never the intention of the legislation to enable the highest order of discipline being full suspension and full withdrawal of salary where no investigation has been conducted and the action commences on a report alone; and
- the enactment in 440H(5A) is a legislative mistake against the Legislative intent that this provision was meant to be conjunctively read and not disjunctively read.

95 I reject each of these submissions. No other materials, such as Second Reading Speeches, have been placed before me to persuade me that the "or" in s 440H(5A) should be read as anything other than "or". Nor is any authority cited by the respondent as to why I should do so.

96 Pearce and Geddes, *Statutory Interpretation in Australia,* (online Edition) states:

> [2.29] A common example of the interpretive problem referred to in 2.28 occurs in relation to the use of the words 'and' and 'or'. In ordinary speech the word 'and' is used conjunctively and the word 'or' disjunctively. But one quite often finds arguments being put to the courts that items connected by the word 'and' should be treated as alternatives and that items connected with 'or' should be treated as being cumulative. In some instances these arguments have been successful.
>
> Most of the cases fall into two groups. In one group the court has decided that there are compelling reasons for concluding that there is a printing or drafting error and that, in line with the golden rule, the provision should be interpreted as if the word that had been intended had been used. As mentioned in 2.28, it may be possible to correct some errors of this kind by relying on the purposive approach and taking account of the context in which the provision appears. That could include reading 'and' for 'or' and vice versa if the underlying purpose or object and the context of the provision suggests such an interpretation. As to this see Smith v Papamihail (1998) 88 FCR 80 at 88–

> 9; 158 ALR 451 at 458–9. In the second group of cases the court has not decided that 'and' or 'or' was used in error. Instead, it has concluded, usually by reference to the context in which the word appears, that the cumulative effect of the provision should not be dictated by the presence of the word in question. . . .
>
> [2.30] As indicated in 2.29, there is also a group of cases in which the court did not conclude that there had been a printing or drafting error, but in which the court's reasoning produced a disjunctive effect despite the presence of the word 'and', or a conjunctive effect in spite of the presence of 'or'. In Re Licensing Ordinance (1968) 13 FLR 143 at 14 7 Blackburn J spoke of cases:
>
> > … in which there was a list of items, the items being joined by 'and' and the list being governed or affected by words which showed that the list was a list of alternatives. In such a case, the word 'and', which is used to join the items in the list, is truly cumulative; it links the members of a class and its function is to indicate that the whole class is to be considered together. Governing the words which enumerate the members of the class are other words which categorize the class, as a whole, as a class of alternatives … the word 'and' inside the class does not have dispersive or alternative force; its force is wholly cumulative; it is the words outside the class which give the dispersive effect.

97 I note that in *Re Trade Practices Tribunal; ex parte Tooheys Ltd* (1977) 16 ALR 609, Franki J was satisfied, in the circumstances of that case, that it was necessary to read the word "or" appearing between s 106(2)(a) and (b) of the *Trade Practices Act 1974* as "and" so as to "to make the section intelligible", and referred to Maxwell, *On The Interpretation of Statutes*, 12th Ed, at 233–4.

98 I am not satisfied that there are any compelling reasons for concluding that there is a printing or drafting error and that the section should be interpreted as submitted by the respondent. Nor am I persuaded that it is necessary to read "or" as "and" to make s 440H(5A) intelligible. In my view, the meaning of the section as drafted is logical and compelling. Nor am I satisfied that, by reference to the context in which the word appears, that the cumulative effect of the provision should not be dictated by the presence of the word "or", but rather by "and". In my view, each of paragraphs (a), (b) and (c) are alternatives. In any event, in giving effect to the respondent's submission, the word "otherwise" in paragraph would be otiose. As Pearce and Geddes note at [2.26], as a general principle, the courts have pointed out that they are not at liberty to consider any word or sentence as superfluous or insignificant. All words must prima facie be given some meaning and effect: *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

99 The meaning of the section when “or” is read as “or” is logical and compelling, and I see no reason why the application should be dismissed pursuant to s 55(1)(b) (or for the avoidance of doubt any other paragraph of s 55(1)) on the basis of Ground 7.

Other grounds

100 Thus far I have dealt with the grounds and submissions set out in the Reply. At the hearing, the respondent made additional submissions as to jurisdiction or why the matter should be dismissed.

101 First, the respondent submitted that he had been denied procedural fairness in that he was never aware of the precise allegations being put against him in the amended application. I reject this submission for two reasons, namely:

(1) the respondent was provided with a draft departmental report, in respect of which his solicitors provided 12 pages of comments;

(2) the respondent’s Reply sets out an extensive response to the amended application.

102 Secondly, the respondent submitted that there is no resolution of the Council referring the Council requirements and complaints of misconduct to the Department Chief Executive under s 440H(1). I reject this submission. There is no requirement in the Act that there must be such a resolution of Council before a complaint of misconduct is referred to the Department Chief Executive. Section 440H(2) of the Act provides that for that the Departmental Chief Executive may conduct such an investigation:

- (on his or her own initiative (s 440H(1)(a)); or
- if the general manager of a council refers an allegation of misconduct by a councillor to the Departmental Chief Executive (s 440H(1)(b)); or, or
- if a council, by resolution, refers an allegation of misconduct by a councillor to the Departmental Chief Executive (s 440H(1)(c)); or,
- if the Ombudsman states in a report that the Ombudsman is satisfied that a councillor has or may have engaged in misconduct (s 440H(1)(d)); or, or
- if the Independent Commission Against Corruption states in a report that the Commission is satisfied that a councillor has or may have engaged in misconduct (s 440H(1)(e)).

103 Finally, I note that the respondent submitted:

> In short the statutory pathway under Ch 14.1.3 has not been followed. There is no resolution of the Council referring the Council requirements and complaints of misconduct to the Department Chief Executive under s 440H(1) [cf the OLG resolution of Council of 30 10 2016 Annex 3 to Rowe report]; there is no investigation into an allegation of misconduct under s440J(1); there is no investigation to authorise referral to NCAT with respect to an existing or former councillor under s 440N(4); s 482A does not apply to s 440N investigations which in any event has not been invoked.

104 It should be clear from what I have written that I do not accept these submissions, either individually or collectively, establish that the Tribunal lacked jurisdiction to hear this application, or that the matter should otherwise be dismissed pursuant to s 55 of the NCAT Act.

Issue (2): Is the failure of the respondent to comply with resolutions passed by Council on 27 July 2015 misconduct in that it was and is a breach of cl 8.10 of the Council's Code of Conduct?

105 As I stated earlier in these reasons, it is common ground that the respondent did not comply with the Council resolutions of 27 July 2015. The applicant submits that this was a breach of cl 8.10 of the Council's Code of Conduct.

106 I agree. As the applicant correctly, and pithily, submits, the relevant essence of its case is that:

- the Council resolved to censure the respondent;
- the validity of its resolutions has never been challenged;
- in breach of cl 8.10 of the Code, the respondent has not complied with the Council's various Requirements, in accordance with the Time Requirement, or at all;
- the respondent has thereby engaged in misconduct as defined in s 440FG(1)(b) of the Act.

107 In March 2013, the NSW Government published the *Model Code of Conduct for Local Councils in NSW* (the Model Code). The purpose of the Model Code was to set minimum requirements of conduct for council officials in carrying out their functions. The Model Code is prescribed by cl 193(1) of the Local Government (General) Regulation 2005. The Model Code was developed to assist council officials to:

- understand the standards of conduct that are expected of them;
- enable them to fulfil their statutory to act honestly and exercise a reasonable degree of care and diligence;

- act in a way that encourages public confidence in the integrity of local

108 Part 1 of Chapter 14 of the Act requires councils to adopt a code of conduct reflecting the terms of the Model Code. On 11 February 2013, the Council adopted a code of conduct reflecting the then Model Code (the Code). The Code relevantly provided that a councillor:

- must comply with a reasonable and lawful request made by a person exercising a function under the Code (cl 8.8);
- must comply with any Council resolution requiring the councillor to take action as a result of a breach of the Code (cl 8.10).

109 The proceedings concern the respondent's compliance with cl 8.10 of the Code. That clause relevantly provides:

> Compliance with requirements under this code
>
> . . .
>
> Where you are a councillor or the general manager, you must comply with any council resolution requiring you to take action as a result of a breach of this code.

110 I accept that:

(1) the Council has adopted a code of conduct consistent with the Model Code, in accordance with s 440(3) of the Act (the Code); and

(2) the Code is, accordingly, "a code of conduct under section 440" and a breach of "an applicable requirement" constitutes misconduct: s 440F(1) of the Act.

111 As the respondent does not dispute any of the particulars to the sole ground of the application, I reject any submission that he has not engaged in misconduct that was and is in breach of cl 8.10 of the Code of Conduct. I find that the sole ground of the application is established and each particular thereto. I find that the respondent has breached cl 8.10 of the Code of Conduct. I find that this is misconduct as defined in s 440FG(1)(b) of the Act.

Errors in the Investigation Report and the investigation process

112 The Council resolutions arose as a result of recommendations made to it by the Conduct Reviewer in the Investigation Report. The respondent submits that there are many problems with the Report, that the Conduct Reviewer should not have made the recommendations she did, as the findings she made were

not available to her for a variety of reasons. In summary, those submissions included the following arguments.

113 First, the Conduct Reviewer did not properly consider a detailed 14 page Reply dated 23 March 2017.

114 Secondly, the “gratuitous” comments appearing in the Report “only amplify the patent and latent bias” within the Report.

115 Thirdly, the applicant “takes the Recommendations of the Conduct Reviewer to a status of a judicial ‘finding’”, which is “false against the facts” and seeks to amplify and project the Investigation Report by “wrongly elevating that Report to something akin to a prosecutorial finding”.

116 Fourthly, the memorandum of Clr Fowler was “wrong in recollection and fact” and “inherently implausible”.

117 Fifthly, the findings made by the Conduct Reviewer in relation to the respondent’s conduct were not available to her. These include the finding that the 24 November meeting was boisterous” (par 130); or that the respondent rose first (par 133); and the findings that at the 8 December meeting the respondent rose before Clr Fowler (par 139) or that Clr Cornish conduct of the meeting could be characterised as an attempt to bring the meeting under control (par 141).

118 In particular, the respondent disputes Clr Fowler’s account of events at this meeting, which account the respondent says is at best to be “deliberately unreliable”, or at worse “false”, and that the Mayor “lied on oath”. This of course is a submission. However, in his affidavit, the respondent sets out, in great detail, his version of events. He disputes that characterization of the Conduct Reviewer’s conclusion that he stood for “several minutes”. He says, and the surveillance appears to show, that he stood for a period of 36 seconds. The respondent submits that the Conduct Reviewer’s conclusion otherwise is “false, misleading and deliberated exaggerate [sic]”.

119 However, all these matters, while relevant to the Conduct Reviewer’s recommendations, are not relevant to my decision. What I have to decide is whether the complaint the subject of the amended application is made out. The

Conduct Reviewer made recommendations to the Council. These included that the respondent be censured; that the findings of the Investigation Report be made public at the next Council meeting; that at that meeting the respondent acknowledge the findings, apologise and give undertakings that apologize; that the respondent attend Code of conduct training, within three months. The respondent did not do so.

120 Effectively, what the respondent is inviting me to do is to go behind and review the Conduct Reviewer's findings and recommendations. I do not think I should do so. The fundamental reason for this view is that I do not consider it is necessary in this particular application. This is because the conduct of the respondent complained of was his:

(1) making irrelevant or provocative statements at both Council Meetings;

(2) refusing to comply with the Mayor's rulings to sit down on both occasions.

121 The respondent does not dispute that he made the statements as alleged. He says that they were justifiable and understandable in the context of community concern and debate about the development application. However, he strongly disputes the other matters, and provided two affidavits to the Tribunal setting out his version of events, including video surveillance of the meeting on 8 December 2014. In summary, the respondent says, in relation to the meeting on 24 November 2014, he stood to raise appoint of order, that without adjudicating on the point of order the Mayor told him to sit down, which he did. After this he was silent. His evidence was set out in great detail in his affidavits, and was not particularly the subject of cross-examination by the applicant. By and large, the applicant appeared to accept, or substantially accepted the respondent's evidence on these matters.

122 Even accepting, for the sake of the argument, that it was not open to the Conduct Reviewer to make findings about the matters in par 121(2) (being the respondent's response to rulings from the Mayor), it was open to the Conduct Reviewer to make findings as to par 121 (1) (being the respondent's irrelevant and provocative statements at both Council Meetings), which are not denied. In those circumstances, it still would have been open to the Conduct Reviewer to make recommendations to Council. As I have stated, it was a matter for

Council to make a decision about whether those recommendations or not. It would have been at that point, and on this matter I express no view, that the respondent may have sought administrative or judicial review of that decision. It is not to the point, and it is incorrect for the respondent to submit, that there is no merit review process in place for administrative decisions of a Council based the two earlier proceedings in which he was the applicant. Those matters were dismissed for lack of jurisdiction as the respondent said he was seeking a review of decisions of the applicant, whereas in fact he was seeking a review of decisions of the Council.

123 My view is that the Conduct Reviewer's recommendations (based on her findings) should not be re-agitated in the Tribunal. To properly do so would require the calling and cross-examination of the many witnesses from whom Ms Thane received evidence. The Tribunal, and therefore the public, would be entitled to consider the futility and cost of re-litigating an issue determined by the referee where the parties have had ample opportunity to place before the her such evidence and submissions as they did.

124 In my view, it is not the role of this Tribunal, in this application, to conduct a type of merits review of the findings of the Conduct Reviewer, her conclusions in the Investigation Report or her recommendations to Council. As the Local Government Pecuniary Interest Disciplinary Tribunal stated in *Director-General, Department of Premier and Cabinet; Re Councillor Martin Ticehurst*, LGPIDT 06/2012, 27 June 2013 at [50], where the relevant council had passed a resolution making a finding about a breach of the Code of Conduct:

> . . . This hearing is not concerned with an appeal or a redetermination of that finding. Nor is it concerned with an appeal or a reconsideration of the resolution seeking an apology . . ."

125 This might be thought to be consistent with what the Tribunal held in relation to "underlying conduct" in *Phillips v Director-General, Department of Premier and Cabinet* [2014] NSWCATOD 48. Based on those reasons at [39]-[40], the applicant submits, and I accept, that the Tribunal needs only to be satisfied that there was a sufficiency of evidence before the conduct reviewer as apparent from the reviewer's report to make a finding of misconduct. As the Tribunal stated in *Phillips* at [39]:

> This brief survey of the Act demonstrates the important investigative role of the Director-General in matters where misconduct is alleged or a breach of pecuniary interest disclosure provisions. When the Director-General decides to take one of the disciplinary measures available under s.440I a counsellor against whom that action is taken may appeal to the Tribunal. Absent clear words in the Act, such an appeal may encompass the underlying conduct that has brought the councillor to disciplinary attention. The legislature would be reasonably expected to specify in clear terms that a counsellor under such circumstances would be required to challenge the underlying finding of misconduct by way of judicial review and could only appeal the consequential finding of misconduct in the Tribunal. The facts of the present case show how unlikely is that course: here, there is no issue that the required apology has not been given and thus it follows that there has been a breach of the Code of Conduct. The Tribunal would not be permitted to consider the underlying conduct but would be restricted to perhaps dealing only with the appropriate penalty to be imposed for the consequential breach.
>
> (Emphasis added)

126 Further, to do so may amount to a type of collateral challenge to the Conduct Reviewer's report which should not be undertaken: see for instance *Sidgreaves v Chief Commissioner of State Revenue* [2018] NSWCATAP 20 at [63] to [70]; *Ousley v The Queen* [1997] HCA 49; (1997) 1992 CLR 69; (1997) 148 ALR 510 where McHugh J said at 98-99 (footnotes omitted):

> A collateral attack on an act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. In *In re Preston*, however, Lord Scarman used the term "collateral challenge" to include any process challenging a decision - including an application for judicial review - other than a proceeding by way of appeal. This use of the term is readily intelligible. However, with the widespread availability of judicial review procedures, it conduces to clarity of thought, in my opinion, if the term "collateral challenge" is confined to challenges that occur in proceedings where the validity of the administrative act is merely an incident in determining other issues.

127 My view that there is no need to review the findings and recommendations of the Conduct Reviewer means that there is no need to make formal findings about the evidence of the respondent or Clr Fowler. The acceptance or rejection of the Conduct Reviewer's findings and recommendations was a matter for Council itself. The Council did accept the recommendations and passed motions accordingly. I find that the respondent did not comply with those resolutions.

Issue 4: What disciplinary action, if any, is appropriate?

Relevant principles

128 The applicant asks the Tribunal to grant relief pursuant to s 482A(1) of the Act. That section provides:

> 482A Decision of NCAT— misconduct matters
>
> (1) This section applies where a matter has been referred to the Civil and Administrative Tribunal under section 438HA or 440J.
>
> (2) The Tribunal may, if it finds that the behaviour concerned warrants action under this section:
>
> (a) counsel the councillor, or
>
> (b) reprimand the councillor, or
>
> (c) suspend the councillor from civic office for a period not exceeding 6 months, or
>
> (c1) disqualify the councillor from holding civic office for a period not exceeding 5 years, or
>
> (d) suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period).
>
> (3) In determining which action, if any, to take against a councillor, the Tribunal may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.
>
> (4) In this section, *councillor* includes a former councillor.

129 The principles relevant to the Tribunal's determination were recently stated in *Office of Local Government v Neville* [2018] NSWCATOD 31 at [36] to [45] and there authorities there cited. I paraphrase those principles as:

(1) first, the Tribunal's jurisdiction is at least in part protective, both of the public and of the maintenance of high standards in the ranks of the particular occupation, here local councillors;

(2) secondly, there are important but indirect effects of a disciplinary order including:

  (a) the order reminds other councillors of the public interest in the maintenance of high standards;

  (b) the order may give emphasis to the unacceptability of the conduct involved; and

  (c) by speaking to the public at large, the order seeks to maintain confidence in the standard of conduct of local councillors.

(3) thirdly, there is a “public interest in having the respondent’s conduct denounced as unacceptable”, and that orders made by the Tribunal would “make plain that conduct of the kind engaged in is unacceptable”;

(4) fourthly, the availability of a range of statutory disciplinary options implies the necessity to consider whether those short of depriving the constituents of their representative can adequately punish the councillor's failure to comply with the statutory obligations and vindicate the public interest in maintaining the honesty of municipal administration;

(5) fifthly, whether the proposed orders will prevent the respondent from exercising any functions as a councillor, and the impact of this on constituents;

(6) sixthly, whether there have been any previous offences or complaints;

(7) seventhly, the acknowledgement if any, or, or apology or remorse for, the conduct by a respondent, and the lack of any insight into the conduct on their part;

(8) eighthly, the longer the experience as councillor the greater should be the councillor’s understanding and knowledge of their duties and obligations. That is not to say that misconduct of an inexperienced councillor should be excused. All councillors must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under the Act (s 439(1)) and comply with the Council’s Code of Conduct (s 440(5)).

Consideration

Applicant’s submissions

130 The applicant seeks an order of suspension. He submits that this order would:

(1) demonstrate that the Tribunal, on behalf of the community and acting in protection of the public interest, takes a consistent and serious view of the conduct in issue; and

(2) provide a significant deterrent message to any other councillors, particularly in demonstrating that a deliberate failure by a Councillor to abide with lawful sanction passed by Council resolution is completely unacceptable in local government.

131 He relies on the following matters in support of this outcome:

- the seriousness of the matter, and the “appalling” nature of the conduct complained of, being conduct that was inflammatory and defiant of authority;
- the respondent’s disregard and contempt for his fellow councillors;
- the respondent’s ongoing refusal to apologise;
- the fact that the respondent was an experienced councillor.

The respondent's submissions

132 Given the stance the respondent took in the proceedings, he did not make submissions on the issue, save for submitting that the order sought was excessive.

Consideration

133 The Tribunal's jurisdiction is both disciplinary and protective of the public, and by maintaining appropriately high standards of conduct by local councillors, ensures public confidence in the important civic institution of Local Government: *Office of Local Government v Genevieve Campbell of Murray Shire Council* [2015] NSWCATOD 129 at [4].

134 Fundamental to Council's work is the passing of resolutions and the orderly conduct of meetings in doing so. Fundamental to the work of councillors is their compliance with the respective Code of Conduct. Section 440(3) of the Act requires Councils to adopt Codes of Conduct. Section 440(5) requires councillors to comply with provisions of Code of Conduct. I accept, as submitted by the applicant, that the misconduct of the respondent concerns matters central to the operation of local government, namely the ability of Council to convene public meetings in an orderly fashion and in compliance with the Meeting Code: *Director-General, Department of Premier and Cabinet; Re Councillor Martin Ticehurst*, LGPIDT 06/2012, 27 June 2013 at [65].

135 I note that in *Office of Local Government v Councillor Martin Ticehurst of Lithgow City Council* [2016] NSWCATOD 122 the Tribunal suspended a councillor (who was the Deputy Mayor) for a period of five months, but there were six grounds of complaint over a two year period. That said, in decision of the Local Government Pecuniary Interest Disciplinary Tribunal of June 2013 referred to above, suspended Clr Ticehurst for a period of two months, based on one instance of misconduct. The councillor had refused to comply with a Council resolution that he apologise to Council's General Manager. That decision states:

> 51. . . . this Tribunal is concerned with the fact of a resolution by the Council requiring an apology, and the fact of the resistance by Councillor Ticehurst, as far as the Tribunal is aware including up and to today, to comply with that resolution. Although it constitutes an omission over a significant period of time the Tribunal is satisfied that that conduct constitutes an incident of

misbehaviour (being a continuous one) that is of sufficient serious nature as to warrant the Councillor's suspension. That is because it is not for Councillor Ticehurst to decide whether he should or should not comply with the resolution requiring an apology, rather, as the Code of Conduct requires, he was required to comply with the resolution.

. . .

62. . . . the Code . . . sets out a process for arriving at a point where a Council can vote on the matter of an alleged breach of the breach of the Code of Conduct and decide on that matter. The resolution of the Council is the culmination of that process.

63. The system sought to be prescribed by the Local Government Act relies upon Councillors complying with the decision of the collegiate body. If processes are objectionable a mere failure to comply with a resolution is not the appropriate way to deal with a concern by a Councillor about such processes.

64. Abject refusal to comply with a resolution of council irrespective of whether a Councillor feels that he or she is right or wrong is a serious breach of the Code of Conduct. This is because that breach is a breach following a process that is contemplated by a Code of Conduct, not necessarily resulting in a sanction of an apology but leading to the possible resolution of a Council, as a whole, giving rise to an apology.

(emphasis added)

136 The respondent is an experienced councillor. He was first elected to Council in 2012, and re-elected in 2016. He has expressed no remorse for his behaviour. He has provided no references in support either personal or professional. He has maintained a rigid belief in the correctness of his own conduct and the wrongfulness of Council's conduct in passing the various resolutions. He has not taken a single step to comply with any of the resolutions.

137 He does not accept that he should be reprimanded in any way. On the contrary, he says that he has not committed the misconduct, that is, that he did not breach cl 8.10 of the Code of Conduct.

138 In my view, something more than a reprimand is called for, although I do not consider that his conduct is so serious, on this occasion, as to require his suspension from his office. Even in the earlier *Ticehurst* decision, where the Tribunal suspended Clr Ticehurst because of a failure to apologise, it appears there were earlier instances of misconduct which the Tribunal would not consider as s 482A(3) of the Act had not commenced operation. That section is set out above. At the time of the earlier *Ticehurst* decision, the Tribunal could not take into account any previous incidents of misconduct by the councillor,

any disciplinary action previously taken against the councillor or any other relevant matters.

139 I can. But there is no evidence before me of any such matters. Hopefully the conduct is a "one off" and will not reoccur. This can be contrasted with the conduct of the respondent in *Office of Local Government v Neville* [2018] NSWCATOD 31, where the Tribunal suspended the councillor for a period of two months. There the councillor had, amongst other matters, failed to complete returns in the form prescribed by the regulations in accordance with the provisions of s 449(3) of the Act for a period of 15 years.

140 As I stated in *Office of Local Government v Shelley* [2018] NSWCATOD 103 at [96]:

> However, at the end of the day, there is a Code of Conduct, by which all councillors must abide. [The councillor] is an experienced councillor who admits that he is aware of the Code. He must abide by its spirit and letter. In the event that further complaints are established, a future Tribunal may well consider harsher disciplinary outcomes.

141 In these circumstances, the appropriate order is that the respondent's right to payment be suspended for a period of three months from the date of these reasons.

Costs

142 I reserve the question of costs.

143 If either party seeks costs, they should file and serve written submissions within two weeks of receiving these reasons, with the other party responding if it wishes to within a further two weeks. Any submissions should address s 60 of the NCAT Act.

144 My preliminary view is that the question of costs should be determined "on the papers", and without a further hearing. However, if either party considers it appropriate for a hearing to be held on the issue of costs, their submissions should address that issue.

Order

(1) The respondent's right to payment is suspended for a period of three months from the date of these reasons.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar