

**LOCAL GOVERNMENT  
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL**

**LOCAL GOVERNMENT ACT 1993**

**LGPIDT 02/2011**

**DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET  
RE: COUNCILLOR TINA LOUISE REYNOLDS, DUBBO CITY  
COUNCIL**

**DETERMINATION**

1. This proceeding related to a complaint made by the Director General of Department of Local Government, through his delegate, on 1 February 2011 against Cllr Tina Louise Reynolds, a Councillor of the Dubbo City Council. Pursuant to s.462 of the *Local Government Act* the Director General undertook an investigation of that complaint and on 16 November 2011 submitted to the Tribunal, pursuant to s.468(1), a report of the investigation into the complaint. On 30 January 2012 the Tribunal determined to conduct proceedings in relation to the complaint and, following a Preliminary Conference held on 10 April 2012, conducted a hearing in relation to the complaint on 8 and 9 August 2012. The Director General was represented by Ms Richardson of Counsel and Ms Reynolds was represented by Mr Maher, Solicitor.

**OUTLINE FACTS**

2. The complaint relates to a series of meetings held by the Dubbo City Council between March 2007 and March 2010. During that period four forms of Council Committee, comprising variously the Parks and Landcare Committee, the Works and Services Committee, the Council

as constituted in Ordinary Meeting, and two Extraordinary General Meetings of the Council had met to consider draft prospective budgets for the Council for the ensuing year. The meetings were held on 19 March 2007, 26 March 2007, 26 April 2007, 25 June 2007, 18 July 2007, 17 March 2008, 25 March 2008, 28 April 2008, 16 June 2008, 23 June 2008, 16 March 2009, 23 March 2009, 4 May 2009, 15 June 2009, 22 June 2009, 15 March 2010, and 22 March 2010.

3. At each of the meetings the Annual Operating Budget of the Council was the subject of consideration by the committee or the Council, as the case was. The budget involved the whole budget for the Council for the ensuing year, and included as an item within what was, on any view, a significant document of budgeting, was an item described as relating to "street trees maintenance", "trees-special projects", or "trees-private works", all within the Parks and Landcare Division of the Council, relating to horticultural services. The amounts allocated in each budget for each year were not insignificant and, in the main, related to anticipated costs for the undertaking of tree maintenance for the ensuing year.
4. Councillor Reynolds had been elected to the Dubbo City Council in August 2006.
5. Prior to her election and at all material times until now she has been a Director and fifty percent (50%) Shareholder in a company trading by the name "A1 Tree Services Pty Ltd", being a company which in essence undertakes tree lopping and tree maintenance. The other Director and Shareholder was, and is, her husband.
6. Before her election as a Councillor, in about June of 2005 the Council had advertised for quotations for specialised trade works for the Parks and Landcare Services Division. That advertisement called for quotes for a number of services including arboriculture work. On 28 June 2005 A1 Tree Services responded to that call for quotations and provided a quotation for arboriculture services.

7. Following assessment of that quotation on 15 July 2005 A1 Tree Service, together with another tenderer (and other tenderers for other services) were advised that they were included on a shortlist of approved contractors for the undertaking of what was described as "tree works".
8. By the time that Clr Reynolds had been elected as a Councillor of the Dubbo City Council A1 Tree Services in fact had undertaken tree services for the Council and the work that had been undertaken was to a value in excess of \$100,000. Throughout the period in which the subject meetings were held A1 Tree Services continued to undertake tree services for the Council for similar, not insignificant, amounts, all as referable to the amount of work involved, and in the more particular circumstances described later in this Determination. The amount of work undertaken by A1 Tree Services declined significantly towards the end of the period of the meetings referred to above.

### **THE ALLEGED BREACH**

9. The complaint made by the Director General alleges that in participating in the various meetings broadly described and throughout the period identified above, in circumstances where a company of which Clr Reynolds was a Director and Shareholder stood to gain from work related to tree services, and where the budget being considered in the meeting allocated amounts of money for the undertaking of tree services in prospective years, that Clr Reynolds had a pecuniary interest in the matter(s) before the meeting and was required to declare such an interest; and furthermore that she was required to not be present at or in sight of the meeting of the Council or committee during any time which the matter was being considered or discussed or at any time in which the Councillor or committee was voted on any question in relation to the matter.
10. For the reasons set out below the Tribunal finds that Clr Reynolds has not breached the Act.

## **RELEVANT LEGISLATIVE PROVISIONS**

**11.** The principle legislative provision relating to disclosure of pecuniary interest at meetings is contained in s.451. Section 451 provides as follows:

- 1)** A councillor or member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.
- 2)** The councillor or member must not be present at, or in sight of, the meeting of the council or committee:
  - a)** At any time during which the matter is being considered or discussed by the council or committee, or
  - b)** At any time during which the council or committee is voting on any question in relation to the matter.
- 3)** For the removal of doubt, a councillor or a member of a council committee is not prevented by this section from being present at and taking part in a meeting at which a matter is being considered, or from voting on the matter, merely because the councillor or member has an interest in the matter of a kind referred to in section 448.

**12.** The disclosure obligation contained in s.451 is primarily concerned with a pecuniary interest which itself is defined in s.442 as follows:

- 1)** For the purposes of this Chapter, a “pecuniary interest” is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person.
- 2)** A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448.

13. Section 442 is not limited to pecuniary interests personal to a Councillor. By operation of s.443 a person is deemed to have a pecuniary interest by reference to other persons' interests, and in the circumstances of the present case (as relevant) the interest will extend to a company or other body of which the person is a member: s.443(1)(c).
  
14. In the circumstances of the present case at all material times Clr Reynolds was both a Director and Shareholder of A1 Tree Services. Although in her evidence before the Tribunal she sought to establish that she had little involvement in the day to day actual operation of the company, the operation of s.443 overrides any such position and deems, or would have deemed, as her interest the interest of A1 Tree Services merely by the fact of her Directorship and Shareholding. There are exceptions to this deeming operation (see for example s.448(h)), but none of those sections apply in the circumstances of the present case.

#### **FURTHER FACTUAL MATTERS**

15. In addition to the broad factual circumstances as set out above, the following matters are relevant to the determination of the question of whether Clr Reynolds breached s.451 of the Act.
  
16. Firstly, there was no issue that Clr Reynolds attended each of the meetings particularised by the Director General.
  
17. Next, in so far as those meetings were concerned, the normal order for the consideration of budget items was that a preliminary budget prepared by managers of the various divisions of the Council would be considered by various committees, including as relevant to this particular case the Parks and Landcare Committee. The draft budget was then considered by a Works and Services Committee, which committee comprised all Councillors. Following the consideration of the draft budget in that form, the Council in Ordinary Meeting then considered the budget with a view to notionally approving it so that it could then be exhibited in

accordance with the Act for the purposes of public consultation, and ultimate ratification, again in Ordinary Council Meeting (or in some instances in an Extraordinary Council Meeting).

18. As referred above the budget was prepared by the various managers of the various divisions and was, according to Mr Riley the General Manager (who gave evidence before the Tribunal), based upon the previous year's expenditure with an assessment by each manager as to whether the anticipated expenditure for the particular item would decrease or increase in the next year. The budget was also set as a function of a five year plan, all as determined by the individual managers in consultation with the General Manager.

### ***THE A1 TREE SERVICES RELATIONSHIP***

19. As referred above, A1 Tree Services commenced a working relationship with the Council in response to a call for quotations by the Council. Although that invitation was in that form (i.e. a call for quotations), in essence the call for invitation was more in the nature of assessing a short list of contractors to whom the Council would have recourse as and when they required the particular services the subject of the quotation.
20. The job description/specification document contained a series of requirements for each of the tendering companies including performance guarantees and details of Occupational Health and Safety aspects, and insurances. The tenderers were also to provide schedule of prices for the provision of services. The tender document itself provided:

*"From the quotations selected a shortlist of approved contractors will be created from which the Council's Parks & Landcare Division will obtain quotes for works to be carried out."* (emphasis added)

21. Thus, at least on the face of the tender document, a person who was included on the shortlist had passed the preliminary assessment process sufficient to qualify for an invitation to give a quotation to the Council for works as and when they fell to be undertaken.
22. In the notification to A1 Tree Services in 2005 of its success as a shortlisted tenderer A1 Tree Services, together with each of the other successful tenderers (including one other tree services provider), was advised, consistent with the tender document, that:

*“From quotations selected a shortlist of approved contractors will be created from which the Council’s Parks & Landcare Division will obtain quotes for works to be carried out.”*

23. In 2007 there was another call or tenders in essentially the same terms as the 2005 call for tenders. The specification document contained the same proviso regarding the obtaining for quotes for works to be carried out. As with the 2005 tender submission, A1 Tree Services was advised that it was successful, however, unlike the 2005 situation only it was identified as a successful tenderer. There was an issue before the Tribunal as to whether A1 Tree Services ever received notification of that fact, however for the reason set out below the resolution of that issue is not critical to the Tribunal’s finding in relation to breach.
24. Throughout the period in which A1 Tree Services provided tree lopping services to the Council there also appears to have been, at various times, an in-house tree lopper/arborist with the Council. It was unclear to the Tribunal when exactly such a person commenced working for the Council, however it appears that such a person worked on a casual basis throughout the intervening years, with an arborist being employed fulltime towards the end of the relevant period, that is towards the time when the last of the meetings the subject of the complaint occurred. So much is so because Clr Reynolds gave evidence that the person

employed by the Council had in fact previously worked for A1 Tree Services.

- 25.** In the administration of the carrying out of works by contractors and in the obtaining of quotes for those works there was some issue at the hearing before the Tribunal as to whether the Council had, effectively, a policy by which works which were anticipated to cost less than \$5000 were able to be directly referred to the firstly listed successful tenderer. In the notification to tenderers, as relevant to this proceeding, A1 Tree Services was nominated as being ranked number one for the provision of tree services. The issue arose because it was suggested that by reason of the “policy”, where works were anticipated to be valued at less than \$5000, there was no need for a quotation to be obtained, and A1 Tree Services were automatically given such works.
- 26.** Notwithstanding that suggestion Cllr Reynolds gave evidence before the Tribunal that to the best of her understanding at all times that A1 Tree Services undertook work for the Council quotations were provided by it to the Council upon request. In addition Mr Riley, the General Manager, qualified such a “policy” somewhat by indicating that his understanding was that where works were anticipated to cost less than \$5000 the job was simply sent to either the preferred or second preferred tenderer from the list. The evidence before the Tribunal did not suggest there was any determined policy for works under \$5000, or for that matter that there was any determined policy that a tenderer listed as number one on the notification list would be offered any job in preference or indifference to another tenderer.
- 27.** Furthermore there was no evidence before the Tribunal that anyone, let alone any Councillor, nor especially Cllr Reynolds, was aware of any such policy, in whatever form. To this effect the tender specification made no mention of any such policy and, as referred above, both in the tender specification and in the notification letter to successful tenderers,



specifically advised each of those on the list that quotations would be obtained for any given job.

28. Notwithstanding any issue about the existence of a policy, the Director General, both in the Investigation Report and before the Tribunal, alleged that in such circumstances Cllr Reynolds knew that there would only be two suppliers for the provision of tree services, that A1 Tree Services ranked ahead of the other tree service provider, and that by voting on a budget which allocated an amount of money to tree services there was a reasonable likelihood or expectation of appreciable financial gain to Cllr Reynolds, via A1 Tree Services.
29. Cllr Reynolds, through her solicitor, submitted that there was a significant issue of causation primarily because the outcome of the "matter" before the relevant meeting or Council meeting was not one which affected A1 Tree Services and that furthermore the budget line for tree services in the overall budget made the interest so remote as so not to constitute a pecuniary interest.

## **FINDING**

30. On the basis of the matters set out above it is clear that there can be no doubt that Cllr Reynolds should be imputed with a pecuniary interest in so far as A1 Tree Services is concerned by reason of her relationship to that company. In any case, the company was a family based company which operated from premises located on the same property as Cllr Reynolds' home and it is unlikely in circumstances of her experience as a businesswoman and her involvement with the company that she did not have at least a conscious knowledge of the fact that A1 Tree Services was undertaking tree services for the Council. However that is not critical to the determination of the question of breach s.451.

31. In terms of whether a pecuniary interest may be said to have existed it is appropriate to consider the elements of s.442(1) in establishing a pecuniary interest for the purposes of the Act.
32. The first element is the requirement for an interest in a matter. Here, “the matter” is the overall budget of which tree maintenance was, on any view, a very minor part. It is difficult to conclude that anything related to the budget, which was in many respects an anticipated or prospective estimate, would comprise a matter which connects to a financial gain in the hands of A1 Tree Services.
33. Within s.442(1) there is, most importantly, the concept of a reasonable likelihood or expectation of appreciable financial gain or loss to the person. In so far as the mere concept of gain, it is easily open to conclude in the circumstances of the present case that the gain was potentially “appreciable” – the amounts involved in undertaking tree maintenance works were large amounts of money, and hence were appreciable when aligned to the concept of gain.
34. Similarly, to the extent that this element is related to a gain “to the person”, as discussed above although the contracts were undertaken by the corporate entity, s.443(1)(c) imputes to Clr Reynolds that interest.
35. However it is with respect to the concept of “reasonable likelihood” or “expectation” that is the fundamental aspect missing in the circumstances of this case.
36. It is clear that the concept is not concerned, at either extreme, with a definite result, nor with fanciful ones. In the Tribunal’s decision in *Roberts (PIT 1/1995, 3 August 1995, Clr Graeme Frank Roberts, Hasting Council)*, Mr Holland QC at pages 17 – 30 summarises the history and position with respect to how that requirement is to be construed.

- 37.** In *Roberts* the Tribunal found that in circumstances in which a Councillor was voting upon the determination of a development application where that Councillor had undertaken communications with the developer for the provision of engineering services for the development if approved that there in fact was such reasonable likelihood or expectation of appreciable financial gain. In that case the matter before the Council was the actual development application for which the Councillor had tendered.
- 38.** It is relevant to note that Mr Holland QC recognised in *Roberts* that the chain of causation to the pecuniary interest was not engaged at an earlier point in that negotiation with the developer, namely at the point of the provision, merely, of the Councillor's company's profile: *Roberts* at page 18. 5.
- 39.** Leaving aside any direct factual parallel to the present case, as there is little, it is important to recognise from *Roberts* that proximity is relevant to the threshold question in s.442.
- 40.** The relevant phrase, or element, in s.442 is a "reasonable likelihood" or "expectation" deriving from the "matter". In this case the matter was the budget; but as identified above there was no gain deriving from the budget itself. Rather, the budget identified the allocation of funds to be spent on tree services, essentially regardless of who it is was that was to carry out the work.
- 41.** After the ratification of the budget what was required in order for there to be, ultimately, an appreciable financial gain to A1 Tree Services was:
- A demand for the work. That demand was a function of the exigencies outside the control of the Councillor and was then a function of a decision by the various managers to decide to undertake the work.

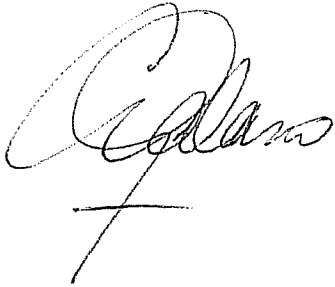
- A call for a quotation to undertake the work. As set out above according to the formal tender documents there was no distinction between successful tenderers. Even though someone was ranked first the tender document did not represent that only they would be the person called to give a tender. In any case, as the General Manager told the Tribunal, it was open to call for a quotation from either of the tenderers, or both of them, in any order.
  - The provision of the quotation by the contractor.
  - The awarding of the specific work contract to the contractor after provision of the quotation and acceptance of it by someone within the Council.
  - The carrying out of the work.
- 42.** In the circumstances of each of these intervening steps, either individually or cumulatively, it cannot be said that there was a reasonable likelihood from the matter (being the budget voting) of an appreciable financial gain to A1 Tree Services. Accordingly, in terms of s.442(1) the Tribunal is not satisfied that there was a pecuniary interest in the matter before the Council.
- 43.** Section 442(1) does not operate in isolation and whatever is engaged by it is subject to the exclusion contained in s.442(2), set out in full above.
- 44.** Section 442(2) provides that a person does not have interest if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision a person might make in relation to the matter. (s.442(2) also provides for certain exceptions as referred in s.448 none of which are relevant to this proceeding).
- 45.** This subsection, although not necessary due to the analysis and findings set out above, is relevant to consider in support of the conclusion set out

above in relation to whether a pecuniary interest existed pursuant to s.442(1). This is because, in the circumstances of the budget voting, it is difficult to see how it could persuasively be said that the interest (namely the anticipated pecuniary interest in A1 Tree Services) could reasonably be regarded as likely to influence any decision that Cllr Reynolds might have made in relation to voting on the budget either *per se*, or as a matter of remoteness having regard to what needed to have occurred before A1 Tree Services was able effectively to take the benefit of the budget allocation for the tree services (through the steps that have been outlined at [41] above).

46. For this additional reason the Tribunal is satisfied that at the time of each of the meetings Cllr Reynolds did not have a pecuniary interest in the matter that was before the Council for the purposes s.442 and s.451.
47. The Tribunal though wishes to note that this finding is not to be construed as the adoption of a narrow approach to what is a pecuniary interest: see for example *Roberts* at page 17.4. It is clear that the Act is focusing on potential conflicts and potential outcomes of the matter and potential financial interests: *Id* at page 17.9. As discussed in *Roberts*, s.442(1) is not concerned with probabilities: page 19.5. The concept is intended to extend to chances or possibilities. But as discussed in *Roberts* at page 19, the question of remoteness is relevant to the determination of whether a person has a pecuniary interest in a matter before the Council.
48. Finally, at a time when there was the communication of the complaint being made Cllr Reynolds commenced to declare a pecuniary interest in the budget line item and otherwise comply with the provisions of s.451. The Tribunal does not consider such action as an admission with respect to the prior meetings.

49. For the reasons set out above the Tribunal finds that with the respect to the meetings identified in the complaint Clr Reynolds has not breached s.451 of the Act.

**Date: 21 September 2012**



**ADRIAN GALASSO SC**

**Local Government Pecuniary Interest and Disciplinary Tribunal**