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COUNSELLOR MISCONDUCT – THE FINAL CHAPTER?

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COUNCILLOR MISCONDUCT - THE FINAL CHAPTER??

VCAT has ordered that the Council of the City of Greater Shepparton is to bear the costs of Councillors who made an application to the Tribunal for a finding of serious misconduct by a municipal councillor. (Dobson v Muto (Review and Regulation) [2015] VCAT 1413). The application was made under s.81B(1) of the Local Government Act 1989. The application to the Tribunal had been authorised by a Councillor Conduct Panel. The principal proceeding (B82/2012) and an application by the Secretary to the Department of Planning and Community Development (B87/2012) were determined in [2013] VCAT 1180 as reported in the VPELA Newsletter of October 2013.

The Councillors had made an application as a group of Councillors pursuant to s. 81B(1)(c) of the Act, rather than passing a resolution of the Council to bring the proceeding pursuant to s.81B(1)(a) of the Act. That being the so, the Council was not required to bear the costs of the proceeding as would otherwise have been the case under 46F of Schedule 1 to the VCAT Act as it then was (when the application was made in March 2012):

> **46F Costs**
> Despite section 109, the Council is to bear the costs of the proceedings unless –
> (a) The Secretary is the applicant; or
> (b) VCAT otherwise orders

Clause 46F was amended in October 2012 to provide (relevantly) that Council must bear the costs of the proceedings if the Council is a party to a proceeding referred to VCAT under section 81J(1)(b) of the Local Government Act 1989. That section provides that after a Councillor Conduct Panel has conducted a hearing, the Panel may authorise an applicant to make an application to VCAT if the Panel considers that there are reasonable grounds on which VCAT may make a finding of serious misconduct against a Councillor.

The Tribunal noted at par 6 that the Councillor Conduct provisions of the Act are surprisingly complex and deal with a number of alternative, confusing, situations. Nevertheless, it was entirely reasonable for the Councillors as a group to retain legal assistance to act on their behalf, notwithstanding they could have passed a resolution as the Council and relied on the then Clause 46F for costs.

The Council was not a party to the principal proceeding. However, it was common ground ([42 and 43]) that clause 46F, in its original form, would oblige the council to bear the cost of the proceeding, including the costs of the group of Councillors. The Council sought to avoid that obligation on the basis of the new version of clause 46F. In unwinding the legislation to achieve a just result, the Tribunal noted that Parliament would not have consciously intended that the Councillor group commence the proceeding under the original 46F only to have the benefit of the Council paying the costs retrospectively removed so that they were then exposed as to costs by a later legislative change. ([63])

The Council argued that the effect of the new clause 46F was that it operated from the beginning of the proceeding. The benefit of the provision was therefore not available to the Councillor group. The Tribunal determined that if the amendment to the clause was intended to act retrospectively to take away the benefit and contingent right of the Councillor group to have the council bear the costs, the legislation should have made that clear. The Tribunal did not accept that was the intention of the new clause and did not interpret it as having that effect.

For the avoidance of doubt, the Tribunal relied on s 60 of the VCAT Act to join the Council as a party to the proceeding because the Tribunal considered that the Council ought to be bound by its order.

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