

# FOLEY'S | LIST

## Local Government Matters **Councillor Conduct/Misconduct**

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## **LOCAL GOVERNMENT MATTERS**

**Julie Davis – Barrister**

### **Councillor Conduct/Misconduct – the role of VCAT**

#### **Background**

In November 2008, Milvan Muto (the Councillor) was elected as a Councillor of the Greater Shepparton City Council. From January 2009, the Councillor's behaviour and activities were of such concern that there followed a complex series of seven cases referred to here by number (e.g. #1 – see references at the end).

The Tribunal described the legislation as “a complicated set of statutory provisions containing complicated procedural and other provisions”. (The Local Government Act Part 4, Division 1B – Council Administration, specifically Division 1B – Councillor Conduct Panels, sections 81A – 81S)

#### **Applications**

In 2010, the Secretary to the Department of Planning and Community Development made an application to VCAT with respect to allegations of gross misconduct by the Councillor (s81E LGA). The Secretary then sought an injunction from the Tribunal in relation to the gross misconduct application, seeking to restrain the Councillor from carrying out any of his duties or exercising any of his powers as a Councillor until the hearing and determination of the gross misconduct allegations. (#1) The application for an injunction was not granted. But that was not the end of the story.

The matters arising from the 2010 application by the Secretary were dealt with on 4 March 2011 (#2). The Tribunal constituted by a Presidential member (a Judge) sitting alone, found that the Councillor had admitted to engaging in 13 instances of conduct constituting misconduct (s81K LGA). The conduct included assaulting a parking inspector, accusing the CEO of lying, using inappropriate language, and using the electronic billboard at his business premises for inappropriate purposes (see para 41 of #7).

The Tribunal in #2 made orders by consent that the Councillor be reprimanded; that he make a public apology; and that he take leave of absence for one month. Those orders were subsequently appealed to the Victorian Supreme Court, Court of Appeal on the basis that the Tribunal was incorrectly constituted by a Judge sitting alone (see #6 below).

In August 2012, the Secretary and the Councillor were again before the Tribunal (#3) on an application by the Secretary (s29(4) LGA) that the Councillor take leave of absence. The basis for the application was that the Councillor had been charged with the offence of blackmail (s87 Crimes Act 1958). The Tribunal weighed up the need for public confidence in the operation of local government against the presumption of innocence in the absence of the blackmail charge having been heard and determined. Ultimately,

the Tribunal found that the balance lay in favour of the Secretary, supported by the prior admissions of the Councillor which lead to his “prior convictions”. The Councillor was ordered to take leave of absence until proceedings in respect of the charge of blackmail against him were finally determined. He was unable to attend council meetings as a councillor or to participate in them in that capacity. The Council were left one Councillor short. Interestingly, notwithstanding the Councillor’s earlier appearances before VCAT, he was elected for a further term in November 2012.

In April 2013, the Victorian Supreme Court, Court of Appeal (#6) heard and determined an appeal by the Councillor against the 2011 decision. The appeal was made out of time. The Councillor argued that Cl. 46E(1) of Schedule 1 of the VCAT Act requires a presidential member, together with a person with at least five years experience in local government governance matters, to hear the relevant application. Therefore, said the Councillor, there was no provision for a presidential member to sit alone, as was the case in 2011. The Court of Appeal found that in the context of the case, Orders made by the Judge were 'necessary to give effect to' a settlement to which the parties had agreed. Leave to appeal out of time was granted. The appeal was however dismissed in relation to the Orders requiring a reprimand and a public apology.

### **The end game**

Most recently, in June 2013 a further application was made by the Secretary and other Councillors alleging another 24 acts of misconduct arising in June 2011 and thereafter - **subsequent** to the Orders made by consent in 2011. The further instances of misconduct are set out in #7 (para 67). They included telling the Mayor the job was “slightly above your head” and calling him an “albino” and the Councillors “gooses (sic)”; asserting in emails that the Council was “dysfunctional”, “disgraceful”, had “personal agendas” and were “fools”; again using inappropriate language and again using the electronic billboard on his business premises for inappropriate signs. The conduct was accepted by the Tribunal as being “seriously disruptive and partially crippling of the attempts of the council, its councillors, staff and officers in carrying out the municipal business of the City of Greater Shepparton” [85].

The notion of who is a fit and proper person to hold the office of Councillor was canvassed. The Tribunal noted matters such as compliance with the Councillor Code of Conduct; the definitions in the LGA of misconduct, serious misconduct and gross misconduct; the primary principle of Councillor conduct (s. 76 B LGA); and general Councillor conduct principles (s 76BA LGA). (see paras 19 – 28 #7)

The hearing in #7 was conducted in the absence of the Councillor, who, following unsuccessful attempts to have the applications adjourned, or to have the Tribunal reconstituted, left the Tribunal and was not seen again.

In reflecting on the role of local government, and the behaviour of the Councillor, the Tribunal made the following observations:

[88] We are conscious that a system of local democracy applies to local government throughout Victoria. Municipal affairs are conducted by municipalities under municipal councils constituted by elected councillors. It is no light matter to

interfere with the rights of an elected councillor to exercise the rights and duties afforded to councillors under the LGA.

- [91] Having regard to all the evidence and circumstances, we are of a clear view that Councillor Muto is not a fit and proper person to hold the office of councillor and that this has been amply demonstrated by his behaviour in various ways and over a considerable period in spite of previous orders of this Tribunal and the efforts of the previous mayor and others to counsel and advise him. We see no basis for a conclusion that there is any reasonable prospect of a change of attitude or behaviour of Councillor Muto, at least in the immediately foreseeable future, if he was to continue or able to resume full duties as a councillor.
- [105] The purpose of making orders under s 81K is not, in our view for the purpose of punishing the respondent, but rather for the protection of the council, the councillors, the council officers and staff and of good order and good government in the relevant municipality.....
- [106] We have come to the conclusion that ... we should disqualify him for four years from 1 July 2013 and declare his current office as a councillor of the City of Greater Shepparton to be vacated.

## **Conclusion**

The behaviour of the Councillor became an increasing burden on those subjected to it and handicapped the efficient running of the council, its administration and its formal and informal meetings. It is unfortunate for the Council and ratepayers of the municipality that this matter swallowed up so much time, energy, emotions, resources and finances. The Councillor has been disqualified for four years and the Council now consists of six Councillors, instead of seven. The VCAT decisions provide a careful and considered analysis of the law and the facts. It is to be hoped that the VCAT will not be called upon in similar circumstances into the future. The applicant was ordered to pay the costs of the application for leave to appeal and of the appeal in #6. The costs of the VCAT application in #7 have been reserved. We may see more about this.

## **Definitions**

The terms “gross misconduct”, “misconduct” and “serious misconduct” are defined (alphabetically) in s 81A LGA.

Gross misconduct, the Tribunal said (#7 at [29]) , is behaviour that demonstrates a councillor is not of good character or alternatively, demonstrates that a councillor is not a fit and proper person to hold the office of councillor.

## **References:**

Numbers in square brackets (eg [xx]) refer to paragraph numbers.

The cases referred to are:

#1 Secretary to the Department of Planning and Community Development v Muto (General). [2010] VCAT 1327 (application by the Secretary for an interim injunction under s 81E of the LGA alleging gross misconduct by the Councillor restraining the Councillor from carrying out any of his duties or exercising any of his powers as a Councillor until the hearing and determination of the gross misconduct application)

#2 Secretary to the Department of Planning and Community Development v Muto (General) (Correction) [2011] VCAT 328 (findings with respect to 13 instances of conduct constituting misconduct; Orders made by consent)

#3 Secretary to the Department of Planning and Community Development v Muto (Occupational and Business Regulation) [2012] VCAT 1986 (Application by the Secretary that the Councillor take leave of absence – granted).

#4 Secretary to the Department of Planning and Community Development v Muto (Occupational and Business Regulation) [2012] VCAT 1772 (application by the Councillor that VCAT matters be adjourned until after the blackmail proceedings had been concluded – dismissed)

#5 Secretary to the Department of Planning and Community Development v Muto (No 2) (Occupational and Business Regulation) [2012] VCAT 1974 (review of s 46E of Schedule 1 of the VCAT Act, constitution of the Tribunal for the purposes of s 81E of the LGA; directions and Orders for future hearing)

#6 Secretary to the Department of Planning and Community Development v Mr Milvan Muto [2013] VSCA 85 (Appeal to Supreme Court of Victoria, Court of Appeal by the Councillor for leave to Appeal and Appeal against the decision in #2 on the basis that the Tribunal was not properly constituted when it made its decision; leave to appeal allowed; Appeal allowed in part)

#7 Secretary to the Department of Planning and Community Development v Muto (no 4) (Review and Regulation) [2013] VCAT 1180 (application by Secretary and Councillors with respect to further conduct of the Councillor – Orders made against the Councillor)

***Julie is a member of the Victorian Bar, for many years practising in land development, planning, local government and associated areas with expertise appearing before VCAT in its many jurisdictions. Julie has experience working within local government, a metropolitan water company and private practice. 'A Barrister on Foley's List she can be contacted on 9225 7777, 0412322111 or [Julie.r.davis@vicbar.com.au](mailto:Julie.r.davis@vicbar.com.au).***

