ARMIDALE Regional Council

MINUTES

ORDINARY MEETING OF COUNCIL

Held on

Wednesday, 22 July 2020
4pm

at

Armidale Council Chamber

PRESENT: Mr VHR (Viv) May PSM (Interim Administrator)

IN ATTENDANCE: Mr Scot MacDonald (Director Businesses & Services), Mr Scott Waterson (Principal Advisor Governance & Risk), Ms Kelly Stidworthy (Manager Financial Services), Mr Ambrose Hallman (Manager Development and Regulatory Services), Mr Shane Anderson (Manager Utilities), and Ms Leah Cook (Manager Asset Management & Strategic Planning), Ms Stacey Drew (Executive Policy Advisor).

1. CIVIC AFFIRMATION AND ACKNOWLEDGEMENT OF COUNTRY
   Delivered by Interim Administrator

2. STATEMENT IN RELATION TO LIVE STREAMING OF COUNCIL MEETING
   Delivered by Director Businesses and Services

3. APOLOGIES AND APPLICATIONS FOR LEAVE OF ABSENCE BY COUNCILLORS - NIL

4. DISCLOSURES OF INTERESTS – NIL

5. PUBLIC FORUM (HAVE YOUR SAY)

Mr Herman Beyersdorf spoke against item 13.4 FOR INFORMATION: Level 5 Water Restrictions

Mr Robert Richardson spoke against item 13.4 FOR INFORMATION: Level 5 Water Restrictions.

6. CONFIRMATION OF MINUTES

CONFIRMATION OF THE MINUTES OF THE ORDINARY COUNCIL MEETING HELD ON 24 JUNE 2020

OFFICER RECOMMENDATION:

That the minutes be taken as read and be accepted as a true record of the Meeting.

153/20 **Moved and declared carried by the Interim Administrator:**

That minutes of 24 June 2020 be adopted.

CONFIRMATION OF THE MINUTES OF THE CLOSED COUNCIL MEETING HELD ON 24 JUNE 2020

OFFICER RECOMMENDATION:

That the minutes be taken as read and be accepted as a true record of the Meeting.

154/20 **Moved and declared carried by the Interim Administrator:**

That minutes of 24 June 2020 be adopted.

7. INTERIM ADMINISTRATOR MINUTE

I wish to report on a number of matters that have occurred since the last Council meeting, principally in order to start to improve Council's communication with the Armidale Regional Council community.

The CEO of the Council Ms Susan Law submitted her resignation on 1 July and her last day with Council is 31 July. This has been a difficult time for Ms Law and I wish her well with her future endeavours and thank her for her contribution.

As required by law, I was consulted in the resignation of the General Manager Organisational Development, Ms Kim Bryan, and she finished her employ on 17 July. Her contribution to the Council is recognised.

In the future the term CEO will not be used by the Council and it will revert to the statutory and more appropriate title of General Manager.

I have been able to obtain the services of an Acting General Manager Mr John Rayner who is well known and highly respected in Local Government nationally. Mr Rayner cannot commence his duties until 24 August as he is presently working as Acting General Manager at Edward River Council. In the period between Ms Law's departure and Mr Rayner commencing I have yet to make a determination who will be Acting and have asked that delegations in that regard be listed at the Extraordinary Meeting of Council on 29 July 2020.

The appointment of a new General Manager will be one of the most important tasks that I will have to undertake during my term of Interim Administrator. I would be less than honest if I did not inform the ARC community that this will be a difficult assignment as unfortunately the Council does not have a good reputation for General Manager longevity.

It is also going to be necessary to appoint a new Director (again a more appropriate description of a second level role).

In my view the Council needs an experienced local government professional preferably from NSW to lead it through what will continue to be an extremely difficult period with so many issues needing to be addressed resulting from the dysfunction of the Council. Having sourced several expressions of interest the Council will be appointing Local Government Management Solutions from LG NSW to undertake the recruitment of both the General Manager and the Director.

For over 25 years this service has facilitated the recruitment of General Managers and Directors for a wide range of councils from remote rural, to regional centres to Metropolitan Sydney. They have broad ranging experience and I am confident will identify and secure the most suitable candidates. I would expect that the recruitment will commence in the second week of August for the General Manager and a month later for the Director as it is important that the new General Manager is involved in that process.

I have yet to determine the most appropriate way to ensure the community is involved in the recruitment interview process.

At the June meeting a report was presented on the Council's Manager Structure that was deferred as I found the structure to be confusing. It was noted in the report that Council was

being consulted in relation to the matter when in fact Section 332 of the Local Government Act clearly states the opposite.

A Council must, after consulting with the General Manager, *inter alia*, determine the roles and reporting lines of holders of Senior Staff positions and the resources to be allocated towards the employment of staff.

This matter should have been relisted on the current agenda; however, time has not allowed me to form a view excepting that it has not helped with the current situation of the Council. Many staff are confused and it is impacting on morale as is the so called Administration Hub.

I have asked the CEO to stop any more negotiations in relation to this latest restructure and now seek details and reports (including consultants and redundancy payments) on all restructures that have occurred since May 2016. The information required will take some time to put together but is to be available for the Acting General Manager when he commences in August so that he can form a view and to advise the new General Manager.

To be clear, I am not proposing that there be another wholesale restructure of the Council. My principal concern is the complexity of what appears to have occurred since amalgamation.

Another priority that will require a reference to the Acting General Manager is the deterioration in the Council's reserves and unrestricted cash position since amalgamation in May 2016. A high level report was made to Council in December 2019 in relation to the matter that was simply received, which in my view warranted the urgent attention of the elected body.

The newly formed Council was obviously living beyond its means and unsustainable financial decisions were made that now dramatically effect the Council's cash position. In short there has been a deterioration of available cash (internal reserve and unrestricted cash) of around 70% from the time of merger to June 2018. Since that time it appears to me that Council staff have worked to improve the cash position but it remains tenuous with a poor outlook and is now being also being further negatively influenced by the continuing impact of COVID-19.

These are matters that warrant detailed analysis which I believe will provide many explanations for criticism now being directed at Council for the lack of funds to finalise works underway and projected in the Strategic Plan.

At the initial meeting following my appointment as Interim Administrator I outlined a process for dealing confidentially to ensure people could discuss matters openly with me so I could form a view to allow me to make an Interim Progress Report as was required in my letter of appointment. I wish to thank suspended and former Councillors, staff both past and present and the many residents and organisations who I have met with over recent weeks.

The time has now come for me to give notice that from Monday 3 August I will be supported by an Executive Assistant; however, as is the norm any correspondence to me marked as confidential will be treated accordingly. Of course I will also do my best to respond to phone calls as expeditiously as possible.

The Land and Environment Court case is a matter that I must address as in my view there is a clear public interest. The decision to commence proceedings was not taken in this Chamber and is a matter I have unfortunately inherited.

From the information made available to me, all decisions of staff and the use of sub delegations have been based on written legal advice and whether that advice was correct or appropriate is for others to judge.

The result of the Case is clear and for the record the Judgement of Chief Justice Preston (File number 2020/140210) will be attached to the minutes.

Costs in the case have rightly attracted much community concern and I have been advised that the Council's direct costs are $155,368 and will be brought to account in the 2019/2020 financial statements.

While the Respondents were awarded costs against the Council and its CEO, I can confirm that Council's insurers have advised that they will not seek to recover costs incurred in defending Councillors for the matter raised by ARC. I'm advised that again, on legal advice Council agreed to indemnify the costs of the CEO when she became the Second Applicant in respect of any Orders made by the Court. I will be meeting with the insurers in early August to finalise the matter.

The next Ordinary Meeting of Council is scheduled for Wednesday 26 August and I have an important family matter that means I must be in Sydney on that date. Accordingly, the meeting will be held on Wednesday 19 August at 4pm. I apologise for this rescheduling but I have no alternative.

When I took on this role, I clearly indicated that I would act with honesty, openness and transparency. Every local authority has what I would describe as "council watchers," but in my opinion it is very important that the views of people who are not in the room are also taken into account. i.e. the community generally.

I have spoken to many people in my short time working with the ARC community and have done my best to better understand how we now find ourselves in this situation. When the CEO decided to resign some suspended Councillors thought that was the end of the matter.

In my view that decision was the start, not the conclusion of restoring community trust in the ARC. I have also stated publicly that we need to rebuild the confidence of the staff.

I would never breach the trust of confidentiality that has led so many residents making contact with me and what I have been told about suspended Councillors and staff both past and present. Some of what has been told to me is very disturbing but is the basis of my forming a preliminary view.

The resignation of the former Mayor, Deputy Mayor and two other Councillors has made my job all the more difficult. I have even been contact by some suspended councillors and read in the press that their reinstatement should be expedited.

The Minutes of the Meeting of Council of 1 June clearly state that some suspended Councillors do not acknowledge their behaviours are not acceptable and that the community has lost respect in their elected representatives. In my view this has not been helped by the actions of some staff members.

The LGA requires that I submit a report to the Minister for Local Government on any recommendations I may have to improving or restoring the proper or effective functioning of the Council and I am still working on that report.
Given my experience to date I believe the community needs nothing short of a fresh start and not only with its General Manager.

Clearly the future of the Council is in the hands of the Minister for Local Government but in accordance with my already stated principles I advise the ARC community that I will be requesting a three-month extension of my appointment.

I move that the advices be received and the actions outlined in this Minute be endorsed.

MOTION: INTERIM ADMINISTRATOR MINUTE

155/20 **Moved and declared carried by the Interim Administrator:**

That the advices be received and the actions outlined in this Minute be endorsed.

8. NOTICES OF MOTION – N/A

9. REPORTS FOR DECISION - LEADERSHIP FOR THE REGION

9.1 FOR DECISION: Resignation of Councillors *Ref: AINT/2020/21628 (ARC16/0001-5)*

Principal Advisor Governance & Risk introduced the item.

OFFICER RECOMMENDATION:

That Council:

a) Acknowledge the resignation of Councillors Gray, Martin, and Widders, and Mayor Murray, and move a vote of thanks for their service;

b) Dispense with a by-election to replace the vacancies caused by the resignation of Councillors Gray, Martin and Murray in accordance with s294 of the Local Government Act.

156/20 **Moved and declared carried by the Administrator:**

a) That Council acknowledge the resignation of Councillors Gray, Martin, and Widders, and Mayor Murray, and move a vote of thanks for their service;

b) defer a decision on whether to hold a by-election to elect four (4) Councillors to the 19 August Council meeting, to take advice on the risk that full representative democracy is not served in the Armidale regional Council Local Government Area if the by-election is not held.

9.2 FOR DECISION: Mayor and Councillor Remuneration 2020/21

Ref: AINT/2020/22142 (ARC16/0001-5)

Principal Advisor Governance & Risk introduced the item.

OFFICER RECOMMENDATION:

That council:

a) Fix the 2020/21 fee payable to Councillors at $24,320;

b) Fix the 2020/21 fee payable to the Mayor at $60,080; and

c) Note that the annual fee fixed and payable to the Mayor is in addition to the fee paid to the Mayor as a Councillor.

157/20 **Moved and declared carried by the Interim Administrator:**

That council:

a) Fix the 2020/21 fee payable to Councillors at $24,320;

b) Fix the 2020/21 fee payable to the Mayor at $60,080; and

c) Note that the annual fee fixed and payable to the Mayor is in addition to the fee paid to the Mayor as a Councillor.

10. REPORTS FOR DECISION - GROWTH, PROSPERITY AND ECONOMIC DEVELOPMENT - NIL

11. REPORTS FOR DECISION - ENVIRONMENT AND INFRASTRUCTURE

11.1 FOR DECISION: Planning Proposal to amend Armidale Dumaresq Local Environmental Plan 2012 for 345 and 347 Dangarsleigh Road, Armidale

Ref: AINT/2020/22043 (ARC20/4184)

Manager Development and Regulatory Services introduced the item.

OFFICER RECOMMENDATION:

a) Council determines that the Planning Proposal for 345-347 Dangarsleigh Road, Armidale to amend the Armidale Dumaresq Local Environmental Plan 2012, should not proceed to Gateway determination as it does not demonstrate sufficient strategic or site specific merit.
b) That the proponent be advised of Council's resolution.

158/20 **Moved and declared carried by the Interim Administrator:**

a) That Council determines that the Planning Proposal for 345-347 Dangarsleigh Road, Armidale to amend the Armidale Dumaresq Local Environmental Plan 2012, should not proceed to Gateway determination as it does not demonstrate sufficient strategic or site specific merit.
b) That the proponent be advised of Council's resolution.

11.2 FOR DECISION: Tender for Road Resurfacing Contract

Ref: AINT/2020/22294 (ARC16/0891)

Manager Utilities introduced the item.

OFFICER RECOMMENDATION:

That the Contractors and Order of Preference be adopted per the Tender Evaluation Report for Road Resurfacing Contract REGPRO162021.

Speaker for the item Shane Anderson requested an amendment made to the recommendation:

That:
a) Contractors and Order of Preference be adopted per the Tender Evaluation Report for Road Resurfacing Contract REGPRO162021. It be noted that: All tenders have been retained on the panel to provide resurfacing contract services

b) The tender evaluation report completed on 17 June 2020 remains confidential.

159/20 **Moved and declared carried by the Interim Administrator:**

a) That Contractors and Order of Preference be adopted per the Tender Evaluation Report for Road Resurfacing Contract REGPRO162021. It be noted that: All tenders have been retained on the panel to provide resurfacing contract services

b) The tender evaluation report completed on 17 June 2020 remains confidential.

11.3 FOR DECISION: Interim Hardship Policy Coronavirus (COVID-19)

Ref: AINT/2020/23597 (ARC19/3335)

Manager Financial Services introduced the item.

OFFICER RECOMMENDATION:

That Council endorse the amendments to the Interim Hardship Policy Coronavirus (COVID-19).

160/20 **Moved and declared carried by the Interim Administrator:**

That Council endorse the amendments to the Interim Hardship Policy Coronavirus (COVID-19).

12. REPORTS FOR DECISION - OUR PEOPLE AND COMMUNITY

12.1 FOR DECISION: Review of Advisory Committee Terms of Reference

Ref: AINT/2020/23586 (ARC16/0001-5)

Principal Advisor Governance & Risk introduced the item and noted a correction to page 16 of the business paper where the figure $22,687.00 be amended to $42,149.00.

OFFICER RECOMMENDATION:

That Council:

a) Adopt the Model Terms of Reference template as the basis for the Terms of Reference for each of the Environmental Sustainability, Arts, Culture & Heritage, Traffic Advisory, Sports Council, Regional Growth and Place Activation, and Community Wellbeing Advisory Committees, and that the Model Terms of Reference be tailored to meet the specific needs of each Committee;

b) Accept the revised Charter for the Audit, Risk and Improvement Committee incorporating anticipated changes to the Local Government Act around ARIC Committee functions.

c) Call for Expressions of Interest from suitably pre-qualified independent community members who may wish to become Members of the Audit, Risk and Improvement Committee.

161/20 **Moved and declared carried by the Interim Administrator:**

a) Adopt the Model Terms of Reference template as the basis for the Terms of Reference for each of the Environmental Sustainability, Arts, Culture & Heritage, Traffic Advisory, Sports Council, Regional Growth and Place Activation, and Community Wellbeing Advisory Committees, and that the Model Terms of Reference be tailored to meet the specific needs of each Committee;

b) Adopt the revised Charter for the Audit, Risk & Improvement Committee incorporating anticipated changes to the Local Government Act around ARIC Committee functions, noting:

i. the requirement for Members to meet the NSW Government's pre-qualification scheme to be waived until such time as legislative changes become mandatory; and

ii. the Charter incorporates any resolution of Council in relation to fees payable to ARIC Committee Members.

c) Call for Expressions of Interest from suitably pre-qualified independent community members who may wish to become Members of the Audit, Risk and Improvement Committee

d) Calls for a report to be presented to the September meeting, that in line with the recommendations of the NSW Government discussion paper "A new risk management and internal audit framework" dated September 2019, Council considers the stepped introduction of appropriate fees to be paid to ARIC Committee members, and that in the meantime fees be increased to $500.00 per member per meeting effective immediately.

13. REPORTS FOR INFORMATION

13.1 FOR INFORMATION: New England Weeds Authority Minutes

Ref: AINT/2020/22164 (ARC16/0463-2)

OFFICER RECOMMENDATION:

That the Minutes of the New England Weeds Authority meetings held 18 February 2020 and 21 April 2020 be noted.

162/20 **Moved and declared by the Interim Administrator that the minute be received and noted.**

13.2 FOR INFORMATION: Cash and Investment Report June 2020

Ref: AINT/2020/22252 (ARC16/0001-5)

Manager Financial Services introduced the item.

OFFICER RECOMMENDATION:

That Council receive and note the Cash and Investment Report for June 2020.

163/20 **Moved and declared carried by the Interim Administrator:**

That Council receive and notes the Cash and Investment Report for June 2020.

13.3 FOR INFORMATION: Quarterly Water Adjustment Report

Ref: AINT/2020/22527 (ARC16/0193-2)

Manager Financial Services introduced the item.

OFFICER RECOMMENDATION:

That Council note the report detailing water adjustments, made under the provisions of the Water Account Adjustment Management Policy, for the January/June 2020 quarters, totalling $5,233.00.

164/20 **Moved and declared carried by the Interim Administrator:**

That Council note the report detailing water adjustments, made under the provisions of the Water Account Adjustment Management Policy, for the January/June 2020 quarters, totalling $5,233.00.

13.4 FOR INFORMATION: Level 5 Water Restrictions *Ref: AINT/2020/23840 (ARC16/0193-2)*

Manager Utilities introduced the item.

OFFICER RECOMMENDATION:

That Council notes Level 5 Water restrictions are in force across the LGA and these restrictions will be reviewed by Council's Utilities personnel when the Bureau of Meteorology (BOM) summer rainfall outlook is available or dam storage increases significantly.

165/20 **Moved and declared carried by the Interim Administrator:**

That Council notes Level 5 Water restrictions are in force across the LGA and these restrictions will be reviewed by Council's Utilities personnel for report to Council when the Bureau of Meteorology (BOM) summer rainfall outlook is available or dam storage increases significantly.

14. REQUESTS FOR LEAVE OF ABSENCE – NIL

15. AUTHORITY TO AFFIX COUNCIL SEAL – N/A

16. COMMITTEE REPORTS

16.1 FOR INFORMATION: Minutes - Regional Growth and Place Activation Peak Advisory Committee - 09 July 2020 *Ref: AINT/2020/23539 (ARC16/0001-5)*

Director Businesses & Services introduced the item.

OFFICER RECOMMENDATION:

That the Minutes of the Regional Growth and Place Activation Peak Advisory Committee meeting held on 9 July 2020 be noted.

166/20 **Moved and declared carried by the Interim Administrator:**

That the Minutes of the Regional Growth and Place Activation Peak Advisory Committee meeting held on 9 July 2020 be received and noted.

16.2 FOR DECISION: Minutes - Traffic Advisory Committee 7 July 2020

Ref: AINT/2020/23805 (ARC16/0168-5)

Director Businesses & Services introduced the item.

OFFICER RECOMMENDATION:

a) That the Minutes of the Traffic Advisory Committee meeting held via email for the 7th July 2020 be noted and endorsed.

b) That a No Stopping zone be installed on the eastern side of Taylor Street across the entry/exit of Newling Gardens.

c) That a No Parking Zone be installed on the northern side of Beardy Street in front of the West End Service Station for the length of 44m.

d) That a No Stopping Zone be installed on the southern side of Beardy Street in front of the West End Service Station for the length of 40m.

e) That new BB Centreline to extend from the intersection of Beardy and Golgotha Street to Phyllis Crescent.

167/20 **Moved and declared carried by the Interim Administrator:**

a) That the Minutes of the Traffic Advisory Committee meeting held via email for the 7th July 2020 be noted and endorsed.

b) That a No Stopping zone be installed on the eastern side of Taylor Street across the entry/exit of Newling Gardens.

c) That a No Parking Zone be installed on the northern side of Beardy Street in front of the

West End Service Station for the length of 44m.

d) That a No Stopping Zone be installed on the southern side of Beardy Street in front of the West End Service Station for the length of 40m.

e) That new BB Centreline to extend from the intersection of Beardy and Golgotha Street to Phyllis Crescent.

16.3 FOR INFORMATION: Minutes - Audit, Risk and Improvement Committee

Ref: AINT/2020/23831 (ARC16/0522-2)

Principal Advisor Governance & Risk introduced the item.

OFFICER RECOMMENDATION:

That the Minutes of the Audit, Risk and Improvement Committee meeting held on 5 May 2020 be noted.

168/20 **Moved and declared carried by the Interim Administrator:**

That the Minutes of the Audit, Risk and Improvement Committee meeting held on 5 May 2020 be received and noted.

17. MATTERS OF AN URGENT NATURE – NIL

18. QUESTIONS ON NOTICE – NIL

PROCEDURAL MOTION

RECOMMENDATION:

That Council move into closed Session to receive and consider the following items:

19.1 FOR DECISION: Employee Matters. (AINT/2020/22132) - *As this report deals with personnel matters concerning particular individuals (Section 10A(2)(a) of the Local Government Act 1993). Council closes the meeting, in accordance with Council's Code of Meeting Practice, as consideration of this matter in open Council would be contrary to the public interest.*

a) That Council exclude the press and public from the proceedings of the Council in Confidential Session pursuant to Section 10A, subsections 2 & 3 and section 10B of the Local Government Act 1993, on the basis that the items to be considered are of a confidential nature.

b) That Council make the resolutions made in Confidential Session public as soon as practicable.

169/20 **The Interim Administrator detailed that Item 19.1 in the Closed Session is a matter of public interest and is to be brought into open Council.**

19.1 FOR DECISION: Employee Matters *Ref: AINT/2020/22132 (ARC18/2692)*

170/20 **MOTION DECLARED LAPSED BY THE INTERIM ADMINISTRATOR.**

There being no further business the Interim Administrator declared the meeting closed at 4.59pm.

Confirmed ……..……
Viv May
Interim Administrator
Date 19 August 2020

Land and Environment Court

New South Wales

Case Name:	Armidale Regional Council v O'Connor
Medium Neutral Citation:	[2020] NSWLEC 77
Hearing Date(s):	10 and 11 June 2020
Date of Orders:	23 June 2020
Decision Date:	23 June 2020
Jurisdiction:	Class 4
Before:	Preston CJ
Decision:	The Court orders: (1) The proceedings are dismissed. (2) The first and second applicants are to pay the costs of the proceedings of the respondents.
Catchwords:	CIVIL ENFORCEMENT – proceedings to remedy or restrain a threatened breach of the Local Government Act 1993 – Council meeting called to consider motion to terminate general manager's contract – whether power to terminate general manager's contract is an implied power under s 334 of the Local Government Act 1993 or an entitlement under the terms of the contract – whether exercise of implied statutory power conditioned by procedural fairness requirements – whether Councillors failed to accord procedural fairness to general manager – whether apprehension of bias by reason of Councillors being accusers – no apprehended bias as Councillors are not accusers – whether apprehension of bias by prejudgment of Councillors – no apprehended bias through prejudgment – whether failure to afford general manager opportunity for a hearing – duty to accord procedural fairness owed by Council as decision maker and not individual Councillors – no threatened failure by

	Council to afford general manager opportunity for a hearing – no threatened statutory breach – proceedings dismissed with costs
Legislation Cited:	Aboriginal Land Rights (Northern Territory) Act 1976 s 64 Acts Interpretation Act 1901 (Cth) s 33 Interpretation Act 1987 ss 21, 47 Local Government Act 1993 ss 222, 223, 334, 336, 338, 370, 371, 672, 673, 674 Police Service Act 1990 s 51
Cases Cited:	Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 Annetts v McCann (1990) 170 CLR 596 Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338; (1979) 2 ALD 1 DeBattista v Minister for Planning and Environment (2019) 240 LGERA 69; [2019] NSWCA 237 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438; [2002] HCA 51 Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 Jarratt v Commissioner of Police for NSW (2005) 224 CLR 44; [2005] HCA 50 McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504; [2008] NSWCA 504 Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326; [2015] HCA 40 Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17 Minister for Indigenous Affairs v MJD Foundation Ltd (2017) 250 FCR 31; [2017] FCAFC 37 Minister for Local Government v South Sydney Council (2002) 55 NSWLR 381; [2002] NSWCA 288 Re Macquarie University; Ex parte Ong (1989) 17 NSWLR 1 Re Refugee Review Tribunal; Ex parte H (2001) 75 ALJR 92; [2001] HCA 28 Ridge v Baldwin [1964] AC 40 Stollery v Greyhound Racing Control Board (1972) 128 CLR 509

	White v Ryde Municipal Council [1977] 2 NSWLR 909
Category:	Principal judgment
Parties:	Armidale Regional Council (First applicant) Susan Law (Second applicant) Margaret O'Connor (First respondent) Debra O'Brien (Second respondent) Jonathan Galletly (Third respondent) Dorothy Robinson (Fourth respondent) Ian Tiley (Fifth respondent)
Representation:	Counsel: Ms Margaret Allars SC (First applicant) Mr Roland Hassall (solicitor) (Second applicant) Mr Shane Prince SC (Respondents) Solicitors: Lindsay Taylor Lawyers (First applicant) Sparke Helmore (Second applicant) Centennial Lawyers (Respondents)
File Number(s):	2020/140210
Publication Restriction:	Nil

JUDGMENT

A Council seeks to restrain a threatened statutory breach by itself

1 Armidale Regional Council (the Council) and its General Manager (called the Chief Executive Officer), Ms Susan Law, have brought proceedings under s 673 and s 674 of the *Local Government Act 1993* (the Act) respectively to remedy or restrain a breach of the Act. The phrase "a breach of the Act" includes "a threatened or apprehended contravention of or a threatened or apprehended failure to comply with" the Act: s 672(a)(ii) of the Act.

2 The threatened or apprehended breach is that the Council might deny procedural fairness to Ms Law in threatening to exercise an implied statutory power to terminate Ms Law's contract of employment as General Manager. A notice of motion has been lodged on 28 April 2020 by six Councillors calling for an extraordinary meeting of the Council in order to debate and vote on a motion that the Council terminate Ms Law's contract of employment as general

manager of the Council pursuant to subcl 10.3.5 of the contract. The Council and Ms Law contend that, for the Council to do so, would deny Ms Law procedural fairness.

3 One would have envisaged, with the argument expressed in this way, that the respondent in the proceedings would have been the Council, being the person who threatens to deny Ms Law procedural fairness and thereby breach the Act. But reality in this topsy turvy case is like the world imagined by Alice in Alice's Adventures in Wonderland, "nothing would be what it is, because everything would be what it isn't". So, instead of the Council as the person who threatens to breach the Act being the respondent, the respondents are five Councillors who the Council and Ms Law argue will cause the Council to be in breach of its duties to accord procedural fairness to Ms Law. I will refer to the five respondents collectively as the Councillors. In short, the Council and Ms Law seek orders against the Councillors to prevent them from causing the Council to fail to comply with the Act.

4 Although both the Council and Ms Law have brought the proceedings, the Council being the first applicant and Ms Law being the second applicant, the Council is the driving force in the proceedings. The Council has drafted and amended the summons commencing the proceedings, claimed the threatened or apprehended breach of the Act, particularised its claims, and formulated and revised repeatedly the orders seeking to remedy or restrain the threatened or apprehended breach of the Act. Ms Law has merely adopted and followed the Council's case and its running of the case. With one exception made in final submissions, Ms Law's case and arguments are identical to the Council's case and arguments. For ease of reference, I will therefore refer from now simply to the Council's argument, but it should be understood that this is also Ms Law's argument. Only where there is the one divergence will I identify their separate arguments.

5 The Council contends that in order to terminate Ms Law's employment as its general manager, the Council must exercise the implied power to terminate the appointment of Ms Law under s 334 of the Act. That section in terms only applies to the appointment of a person as general manager of a council.

Section 334(1) provides in part: “A council must appoint a person to be its general manager.”

6 The Council firstly argues that this statutory provision not only imposes a duty to appoint a general manager but also confers the power to appoint a general manager in order to perform this duty.

7 Secondly, the Council argues that the power in s 334 to appoint a person to be its general manager impliedly confers a power to terminate the appointment. The Council cites *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338; (1979) 2 ALD 1 at 2, 18-19 and *Minister for Indigenous Affairs v MJD Foundation Ltd* (2017) 250 FCR 31; [2017] FCAFC 37 at [162], [172] in support of this proposition. For reasons I will come to later, these cases may not in fact support interpreting s 334 of the Act as authorising the termination of the appointment of a person as a council’s general manager, but at this stage I am only recording the Council’s arguments.

8 Thirdly, the Council argues that exercise of the implied statutory power to terminate the appointment of a person as general manager is conditioned on compliance with the rules of procedural fairness. The Council invokes the oft cited statement of principle in *Annetts v McCann* (1990) 170 CLR 596 at 598 that:

> “when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.” See also *Jarratt v Commissioner of Police for NSW* (2005) 224 CLR 44; [2005] HCA 50 at [24], [26].

9 The Council argues that there are no plain words of necessary intendment in s 334 of the Act or elsewhere that indicate that the implied power to terminate the appointment of a person as general manager may be exercised other than in accordance with the rules of procedural fairness.

10 Fourthly, the Council argues that a failure to comply with the rules of procedural fairness in the exercise of the implied power under s 334 of the Act is a failure to comply with the Act and a breach of the Act within the meaning of s 672 of the Act: see *Minister for Local Government v South Sydney Council* (2002) 55 NSWLR 381; [2002] NSWCA 288 at [14]. This is because “the

common law attaches the principles of natural justice to the exercise of public power, relevantly a statutory power": at [15].

11 Fifthly, the Council argues that there is a threatened or apprehended failure to comply with the rules of procedural fairness in three respects: apprehended bias by reason of the Councillors being in the position of an accuser (ground 1(a)); apprehended bias by reason of the prejudgment of the Councillors (ground 1(b)); and failure to afford Ms Law an opportunity for a hearing (ground 2). Although the relief sought by the Council kept changing, by the end of the hearing the Council sought to remedy the threatened breaches of the rule of procedural fairness by the Court making two declarations (see proposed orders in Exhibit C).

12 In relation to the threatened breach occasioned by the apprehended bias of the Councillors (grounds 1(a) and (b)), the Council sought for the Court to make a declaration that the Councillors be excluded from being present at any meeting at which the notice of motion dated 28 April 2020 to remove Ms Law from the position of general manager of the Council is considered and voted on. The Council sought to remedy the threatened breach occasioned by the failure to give Ms Law a fair opportunity to be heard (ground 2) by the Court making a declaration that Ms Law is entitled to be informed by the Council of the allegation against her, the issues and the relevant material to be taken into account and to be given a reasonable opportunity to present her case before the Council exercises its implied power under s 334 of the Act to remove her from the position of general manager.

13 Whilst the subject of the first declaration are the Councillors, the subject of the second declaration is the Council. The Council seeks a declaration that its threatened failure to give Ms Law a fair opportunity to be heard, is, in effect, a failure to accord Ms Law procedural fairness. One would have thought that the appropriate remedy for such a threatened breach by the Council would have been for the Council itself to give Ms Law a fair opportunity to be heard, that is to say to remedy the breach, rather than to seek a declaration that the Council will be in breach by continuing to fail to provide Ms Law a fair opportunity to be heard. But this is yet another illustration of the "curiouser and curiouser" nature

of this case (to invoke Alice's departure from "good English" in Alice's Adventures in Wonderland). With this outline of the Council's case effectively against itself, I will examine the key steps in its case.

Is there a breach of the Act?

14 Critical to the Council's case is that the threatened action of terminating Ms Law's contract of employment as general manager involves the exercise of statutory power under the Act. This is because the rules of procedural fairness can only attach to the exercise of a statutory power under the Act. The Council contends that the statutory power that needs to be exercised in order for the Council to terminate Ms Law's employment as general manager is s 334 of the Act. The Council contends that, just as there needs to be statutory power to appoint a person as the general manager of a council, there needs to be statutory power to terminate the appointment of a person as general manager of a council. The Council contends that s 334 provided the authority for the Council to enter into the contract of employment with Ms Law appointing her as general manager of the Council. The Council contends that s 334 also provides the authority for the Council to exercise any right it might have under subcl 10.3 of the contract of employment to terminate the contract. The Council referred to what occurred in *Jarratt v Commissioner of Police (NSW)* as illustrating the need for statutory authorisation for removing a person from a statutory office.

15 The Councillors dispute that the termination of Ms Law's contract of employment, called for in the notice of motion dated 28 April 2020, involves the exercise of any statutory power under the Act, whether s 334 or otherwise. The Councillors contend that the Council would simply be exercising its rights under subcl 10.3 of the contract of employment to terminate the contract. No statutory authority is needed for the Council to exercise this contractual right. I will expand on the Councillors' argument.

16 The Councillors noted that s 338 of the Act requires the general manager and senior staff of the Council to be employed under contracts and specifies the nature and terms of the contracts. Amongst other requirements, a general manager and other senior staff are to be employed under the standard form of contract approved by the Departmental Chief Executive (s 338(5) and (6) of the

Act). The Council did employ Ms Law under the "Standard Contract of Employment of General Managers of Local Councils in New South Wales" approved by the Departmental Chief Executive of the Department of Local Government.

17 The Councillors accept that the Council needed statutory authority to enter into that contract to employ Ms Law as the general manager of the Council. That statutory authority was provided by s 334 of the Act. However, once the Council entered into the contract of employment with Ms Law, the Council did not need any further statutory authority to exercise any rights under the contract. The authority to exercise rights under the contract is provided by the contract itself. One of the rights under the contract is to terminate the contract before the termination date.

18 Clause 10.3 of the contract provides that the contract may be terminated before the termination date in any of five ways:

> **"10.3 Termination by either the employee or Council**
>
> This contract may be terminated before the termination date by way of any of the following:
>
> 10.3.1 written agreement between the employee and Council,
>
> 10.3.2 the employee giving 4 weeks' written notice to Council,
>
> 10.3.3 Council giving 4 weeks' written notice to the employee, or alternatively by termination payment under subclause 11.1, where:
>
> (a) the employee has been incapacitated for a period of not less than 12 weeks and the employee's entitlement to sick leave has been exhausted, and
>
> (b) the duration of the employee's incapacity remains indefinite or is likely to be for a period that would make it unreasonable for the contract to be continued,
>
> 10.3.4 Council giving 13 weeks' written notice to the employee, or alternatively, by termination payment under subclause 11.2 where Council:
>
> (a) has conducted a performance review, and
>
> (b) concluded that the employee has not substantially met the performance criteria or the terms of the performance agreement,
>
> 10.3.5 Council giving 38 weeks' written notice to the employee, or alternatively, by termination payment under subclause 11.3."

19 In the present case, the notice of motion dated 20 April 2020 called for the Council to terminate the contract under subclause 10.3.5. The notice of motion states in part:

> "1. That the contract of employment of Council's Chief Executive Officer Ms Susan Law be terminated effective immediately pursuant to clause 10.3.5 of the contract.
>
> 2. That the Council make the termination payment to Ms Law required under subclause 11.3 of the contract of employment."

20 Subclause 11.3 of the contract provides:

> "On termination of this contract under subclause 10.3.5, where written notice has not been given, Council will pay the employee a monetary amount equivalent to 38 weeks' remuneration calculated in accordance with Schedule C, or the remuneration which the employee would have received if the employee had been employed by Council to the termination date, whichever is the lesser."

21 The Councillors submit that because the notice of motion calls on the Council to terminate the contract under the terms of the general manager's contract with the Council, it is not necessary to exercise any statutory power to terminate the contract. The authority derives from the contract that the Council was authorised to enter into under s 334 of the Act.

22 In these circumstances, there is no threatened exercise of any statutory power to which the rules of procedural fairness can attach. The rules of procedural fairness do not attach to the exercise of any right under the contract of employment. There cannot be, therefore, any threatened or apprehended denial of procedural fairness to Ms Law in the Council's threatened exercise of its right under subcl 10.3.5 of the contract of employment to terminate the contract. In short, there is no threatened or apprehended contravention of or threatened or apprehended failure to comply with the Act, which is capable of being remedied or restrained.

23 I agree with the Councillors' argument. The notice of motion calls for the Council to act in accordance with and under the terms of the contract of employment with Ms Law. The Council has a right, as does Ms Law, to terminate the contract before the termination date by way of any of the methods in subcl 10.3.1 to subcl 10.3.5 of the contract. The notice of motion calls the Council to employ the method in subcl 10.3.5 of "giving 38 weeks'

notice to the employee [Ms Law], or alternatively, by termination payment under subcl 11.3". The notice of motion calls for the Council to employ the alternative provided in subcl 10.3.5 of making a termination payment under subcl 11.3.

24 If the Council exercises this contractual right to terminate the general manager's contract with the Council, Ms Law will be removed from the position of general manager. This will create a vacancy in the position of general manager. Section 336(2)(f) of the Act provides that:

> "(2) A vacancy occurs in the position of general manager if the general manager"
>
> …
>
> (f) is removed from the position for breach of or under the terms of the general manager's contract with the council."

25 By termination of the contract under subcl 10.3.5 the general manager is removed from the position "under the terms of the general manager's contract with the Council". A vacancy thereupon occurs. Under s 336(1), once a vacancy occurs in the position of general manager, "the council must immediately appoint a person under section 334 to the vacant position or appoint a person to act in the vacant position."

26 The notice of motion calls for the Council to appoint a person to act in the vacant position of general manager pending appointment of a person to the position of general manager:

> "5. That Council makes an appointment to the position of Acting Chief Executive Officer for a period of 12 months, or until a new Chief Executive Officer commences duties if that occurs earlier."

27 The appointment of a person under s 334 to the vacant position of general manager or to act in the vacant position of general manager does require the exercise of statutory power, being s 334, but the removal of a person from the position of general manager under the terms of a general manager's contract with a council does not require the exercise of statutory power, as it is done under the terms of the contract.

28 The analogy with the situation in *Jarratt v Commissioner of Police for NSW* is inapt. There, the Commissioner of Police sought to remove Mr Jarratt from the

office of Deputy Commissioner of Police, otherwise in accordance with and under the terms of the contract of employment, which had appointed Mr Jarratt to the office of Deputy Commissioner of Police for a term of 5 years. The Commissioner of Police wished to terminate the contract before the termination date. This could not be achieved under the terms of the contract. The Commissioner of Police had first sought to invoke the Crown's right to dismiss a Crown servant at pleasure but later relied on s 51 of the *Police Service Act 1990* that empowered the Governor, on the recommendation of the Commissioner of Police and with the approval of the Minister, to remove an executive officer from office at any time. Either way, therefore, the removal from office involved the exercise of public power.

29 In the present case, the removal of Ms Law from the position of general manager would be under the terms of the general manager's contract with the Council. It would only be necessary to invoke statutory power to remove Ms Law from the position of general manager if such removal were being sought to be done otherwise than in accordance with and under the terms of the general manager's contract with the Council. In that circumstance, the contract could not provide the necessary authorisation for the Council's action to remove the general manager from the position of general manager and some other source of authority in the Act would be required, but this is not the situation in the present case.

30 As the Council's threatened action of terminating the contract of employment with Ms Law will be under the terms of the contract and will not involve the exercise of any statutory power under the Act, there can be no threatened or apprehended breach of the Act. The common law attaches the rules of procedural fairness only to an exercise of a statutory power under the Act, not the exercise of a right under a contract of employment. Hence, irrespective of whether or not there might be an apprehension of bias or a denial of a fair opportunity for a hearing, as alleged by the Council, there can be no breach of the Act as there is no breach of a statutory provision to which the rules of procedural fairness attach.

31 As the Council and Ms Law have failed to establish any threatened or apprehended breach of the Act, the proceedings must be dismissed. This conclusion is sufficient to dispose of the proceedings. However, as allegations have been made against the Councillors that their conduct will cause the Council to deny Ms Law procedural fairness, I will address these claims by the Council and Ms Law.

Is there an implied power to terminate the employment of the general manager?

32 The Council contends that s 334 not only confers power to appoint a person to be a general manager of a council but also impliedly confers power to terminate the appointment as general manager. The Council relied on two cases, *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* and *Minister for Indigenous Affairs v MJD Foundation Ltd,* but they do not offer strong support for the proposition. Those cases concern whether there was implied power to revoke a licence in one case and a payment of funds in the other case under the relevant statute. In neither case was there an express power to revoke the licence that had been granted or the decision that had been made under the statute. The power of revocation conferred by the *Acts Interpretation Act 1901* (Cth) was held not to be applicable. The only other source of power was to imply a power of revocation from the terms of the power to grant the licence or to make the decision in question.

33 In *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd,* the majority held that the licence there concerned was not in its nature revokable and there was no implied power to revoke the licence (at 2-3 per Bowen CJ and 14-19 per Smithers J). In *Minister for Indigenous Affairs v MJD Foundation Ltd*, the majority held that s 33(1) of the *Acts Interpretation Act 1901* (Cth) was not applicable to authorise the Minister to revoke a decision under s 64(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* to direct that certain amounts be debited from the Aboriginal benefits accounts and paid to or applied for the benefit of the Aboriginals living in the Northern Territory: [100], [102], [128] and [133] per Mortimer J with whom Perry J agreed at [256]. Furthermore, the Court would be slow to find an implied power of revocation where a statute provides a power to confer a benefit with conditions and

specifies what will happen upon breach of a condition: at [135], [162] per Mortimer J with whom Perry J agreed at [256].

34 The Council did not refer to s 47 of the *Interpretation Act 1987* (NSW), subs (1) of which provides:

> "If an Act or instrument confers a power on any person or body to appoint a person to an office—
>
> (a) the power may be exercised from time to time, as occasion requires, and
>
> (b) the power includes—
>
> (i) power to remove or suspend, at any time, a person so appointed,
>
> (ii) power to appoint some other person to act in the office of a person so removed or suspended,
>
> (iii) power to appoint a person to act in a vacant office, whether or not the office has ever been filled, and
>
> (iv) power to appoint a person to act in the office of a person who is absent from that office, whether because of illness or otherwise."

35 Section 334 of the Act does confer on the Council power to appoint a person to an office (which is defined in s 21 of the *Interpretation Act 1987* to include a position), being the position of general manager. By s 47(1)(b)(i) of the *Interpretation Act 1987,* that power includes the power to remove, at any time, a person so appointed. Unlike the circumstances in *Minister for Indigenous Affairs v MJD Foundation Ltd*, I do not discern a contrary intention evinced in the scheme of the Act, either in Part 2 dealing with the general manager and other senior staff or elsewhere in the Act.

36 Indeed, s 336(2)(f) of the Act may provide some textual support for an implied power to revoke the appointment of a person as general manager. That provision refers to a person being removed from a position of general manager under "the terms of the general manager's contract with the council". The Council has a right under subcl 10.4.1 of the contract to terminate the contract to terminate the contract at any time and without notice if the employee commits any act that would entitle an employer to summarily dismiss the employee. One such act is "(a) serious or persistent breach of any of the terms of this contract". If the Council exercised this right under subcl 10.4.1 to summarily dismiss the employee for serious or persistent breach of any of the terms of the contract, this would meet the circumstance in s 336(2)(f) of a

person being removed from a position for breach of the terms of the general manager's contract with the Council. But so too would a breach of any of the terms of the contract that falls short of being a serious or persistent breach. In this circumstance, the Council would not have the right to summarily dismiss the employee under subcl 10.4.1 of the contract, and the Council would need to invoke another source of power. The power under s 334, implied by s 47 of the *Interpretation Act 1987,* to remove a person appointed to the position of general manager would be a source of power. The removal of a person from the position of general manager under this implied power would satisfy the circumstance in s 336(2)(f) of the Act.

37 The upshot is that the power in s 334 to appoint a person as general manager includes the power to remove the person so appointed by reason of s 47(1)(b)(i) of the *Interpretation Act 1987.*

Is exercise of the implied power conditioned on according procedural fairness?

38 It is well settled that the rules of procedural fairness regulate the exercise of statutory power unless they are excluded by plain words of necessary intendment: see *Annetts v McCann* at 598; *Jarratt v Commissioner of Police for NSW* at [24]. The duty of procedural fairness arises because the statutory power involved is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations": *Annetts v McCann* at 598 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576.

39 There are no plain words of necessary intendment in s 334 of the Act or elsewhere that indicate that the implied power to remove a person appointed to the position of general manager may be exercised without according that person procedural fairness.

Is there an apprehension of bias by reason of the Councillors being accusers?

40 Grounds 1(a) and 1(b) allege a threatened breach of procedural fairness because there is an appearance of disqualifying bias in the Councillors voting on the notice of motion dated 28 April 2020 to terminate Ms Law's contract of employment as general manager at any meeting of the Council in two ways: first, the Councillors are the accusers of Ms Law and cannot be the judge of

their accusations (ground 1(a)) and, secondly, the Councillors have prejudged the outcome of the notice of motion (ground 1(b)). I will deal with the first way in this section of the judgment and the second way in the next section.

41 The test for the appearance of disqualifying bias in an administrative context is often stated in terms drawn from the test for apprehended bias in a curial context: *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20 at [57] and see [22]. Where an administrative decision is to be made in private, the test for apprehended bias is whether a hypothetical fair-minded lay person, properly informed as to the nature of the process, might reasonably apprehend that the decision-maker might not bring an impartial mind to making the decision: *Re Refugee Review Tribunal; ex parte H* (2001) 75 ALJR 92; [2001] HCA 28 at [28]; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; [2002] HCA 51 at [68]; *Isbester v Knox City Council* at [57] and see also [20], [23].

42 Application of the principle of apprehended bias to administrative decision makers rather than judicial decision makers needs to recognise and accommodate the differences between court proceedings and administrative decision-making. The analogy with the curial process is less apposite, the further the decision-making process diverges from the judicial paradigm: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at [181]; *Isbester v Knox City Council* at [22].

43 The content of the test for an administrative decision may also differ. What is expected of a judge in judicial proceedings will often be different to what is expected of a person making a purely administrative decision: *Hot Holdings Pty Ltd v Creasy* at [70]; *Isbester v Knox City Council* at [22]. For an administrative decision, the test for the appearance of disqualifying bias will accommodate the particular statutory framework and decision-making process and the particular factual context of the particular exercise of power: *Isbester v Knox City Council* at [55].

44 Where there is a multi-stage decision-making process or a multi-member decision-making body, the test for apprehended bias needs to accommodate these circumstances and will focus on “the overall integrity of the decision-making process”. The test in these circumstances has been stated as “whether

a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits": *Isbester v Knox City Council* at [58].

45 Application of the test for the appearance of disqualifying bias in the administrative context involves the same three analytical steps as application for the test for apprehended bias in a curial context:

> "Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as a result of a neutral evaluation of the merits. Step two is identification of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.
>
> Where the factor identified at the first analytical step concerns one person who is a participant in a multi-stage decision-making process or in a multi-member decision-making body, the second analytical step can be seen to divide into two elements: articulation of how the identified factor might affect that person individually, and articulation of how that effect on that person individually might in turn affect the ultimate resolution of the question within the overall process of decision-making. It has accordingly been emphasised that, if an appearance of disqualifying bias is hypothesised to have resulted from conduct or circumstances of a person who is not the ultimate decision-maker, 'then the part played by that other person in relation to the decision will be important'": *Isbester v Knox City Council* at [59], [60].

46 One factor that almost inevitably gives rise to the appearance of disqualifying bias in an administrative context is where a decision maker is both the accuser and the judge. A fair minded observer might reasonably apprehend that if an administrative decision maker is an accuser, the decision maker should not be a judge. The reason is that "a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person": *Isbester v Knox City Council* at [63].

47 If a person who is or has been an accuser is not the ultimate decision maker, the role of the person in relation to the decision by the ultimate decision maker needs to be examined:

> "But it will ordinarily be sufficient to support the reasonableness of an apprehension that the resultant decision might not have been reached as a result of neutral evaluation of the merits that the person participated in, or even that the person was present during, the substantive deliberations which resulted either in the decision or in the making of a recommendation that the decision be made": *Isbester v Knox City Council* at [65].

48 For the first analytical step, the factor that might cause the Council to decide the notice of motion dated 28 April 2020 otherwise than as the result of a neutral evaluation of the merits, the Council alleges that each Councillor "has engaged in a sustained history of complaints about the CEO [Ms Law] and her performance, some being of a very serious nature and/or Code of Conduct complaints". The Council identifies what it says are these complaints (paragraphs 3.6-3.10 of the first applicant's submissions). The Council claims that, by making these complaints, each Councillor has put himself or herself in the position of an accuser in relation to Ms Law.

49 As to the second analytical step, how the identified factor might cause a deviation from a neutral evaluation of the merits, the Council argues that by being an accuser, each Councillor cannot impartially deliberate and vote on the notice of motion dated 28 April 2020 seeking the termination of the contract of employment with Ms Law that each of the Councillors signed. The identified factor of making complaints about Ms Law's performance might cause each Councillor to vote on the notice of motion otherwise than as a result of a neutral evaluation of the merits. Each Councillor would in effect be both an accuser and a judge.

50 The Council contended that the attendance, debating or voting of any of the Councillors who are accusers at a meeting of the Council at which the notice of motion is debated and voted on would give rise to an apprehension of bias on the part of the Council. The Council cited *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 517, 527 and *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 1.

51 The Council submitted that the attendance, debating or voting of any Councillor who is an accuser at the meeting will be sufficient to support the reasonableness of an apprehension that any resultant decision of the Council might not have been reached as a result of a neutral evaluation of the merits.

Indeed, the Council argued, even if the Councillors only attended the meeting, but did not debate or vote on the notice of motion, there would still be an apprehension of disqualifying bias.

52 The Councillors disputed that they were in the position of "accuser". They denied that the various statements made by them about Ms Law's performance, labelled by the Council as "complaints", disentitle them from voting on the notice of motion concerning the Council's right to terminate Ms Law's contract of employment without cause pursuant to subcl 10.3.5 of the contract.

53 The Councillors contend that the identified factor of the alleged complaints has not been shown to be one that might cause a deviation from a neutral evaluation of the merits of the notice of motion. That is because the notice of motion calls for the Council to exercise its contractual right under subcl 10.3.5 to terminate Ms Law's contract of employment without cause. Any decision by the Council to exercise this contractual right does not involve the laying of charges against Ms Law. Indeed, no complaint about Ms Law's performance is mentioned in the motion. The resolution of the notice of motion does not involve any judging of any charge, or any complaint, against Ms Law. To the contrary, the Council's exercise of its contractual right under subcl 10.3.5 to terminate Ms Law's contract of employment would be without cause.

54 The Councillors further submit that any apprehension that the identified factor of the alleged complaints might cause a deviation from a neutral evaluation of the merits of the notice of motion would not be reasonable. Each of the Councillors have denied that the making of the statements alleged to be complaints would cause them not to consider and vote on the notice of motion on its merits and that they have any personal interest in the result of the vote on the notice of motion. The Councillors have expressed a willingness to give genuine consideration in voting on the motion.

55 I find that the Council has not established a threatened appearance of disqualifying bias if the Council were to resolve to pass the motion to terminate Ms Law's contract of employment under subcl 10.3.5 of the contract.

56 The question of whether there is a reasonable apprehension of disqualifying bias in an administrative context depends on the nature of the decision to be made and its statutory context, what is involved in making the decision and the identity of the decision maker (including whether it is a multi-member decision-making body): *Isbester v Knox City Council* at [23].

57 The decisions to be made in this case are the motions proposed in the notice of motion dated 28 April 2020 including that "the contract of employment of Council's Chief Executive Officer be terminated immediately pursuant to subcl 10.3.5 of the contract" and that "the Council make the termination payment to Ms Law required under subcl 11.3 of the contract of employment". As noted earlier, subcl 10.3.5 of the contract entitles the Council to terminate the contract before the termination date by giving 38 weeks' written notice to Ms Law or alternatively by paying her the termination payment under subcl 11.3.

58 The entitlement to terminate the contract under subcl 10.3.5 is not dependent on the happening of any event or the establishment of any cause, unlike termination under the other clauses of the contract. Termination under subcl 10.3.3 requires ongoing incapacity of the employee, under subcl 10.3.4 requires failure of the employee to meet substantially performance criteria and under subcl 10.4.1 requires serious or persistent breach by the employee of the contract or other serious misconduct of the nature specified in the subclause.

59 As I have held earlier, I do not consider that the Council's exercise of its contractual right under subcl 10.3.5 to terminate Ms Law's contract of employment as general manager involves exercising the implied statutory power under s 334 of the Act to terminate the employment of Ms Law as general manager. But even if statutory authorisation under s 334 of the Act is needed to exercise the contractual right under subcl 10.3.5, this statutory power does not change the nature of the decision to be made by the Council or what is involved in making the decision. The decision remains whether the Council should or should not exercise its contractual right under subcl 10.3.5 to terminate the contract of employment. What is involved in making that decision

remains what is specified in subcl 10.3.5 and, if the alternative of making a termination payment under subcl 11.3 is desired, the terms of subcl 11.3.

60 Importantly, what is not involved in making a decision under subcl 10.3.5 is finding that the employee has committed any breach of the contract, or engaged in misconduct of any kind, or has failed to meet any performance criteria under the contract.

61 The identity of the decision maker is the Council itself. The Council itself appointed Ms Law as its general manager. Authorised under s 334 of the Act, the Council entered into a contract of employment with Ms Law that met the requirements of s 338 of the Act. The Council, if it so decides, will exercise its contractual right under subcl 10.3.5 to terminate that contract with Ms Law. True it is that the decision of the Council to appoint Ms Law as general manager and, if it decides to do so, to terminate that appointment needs to be made by the Council as a collegiate decision-making body at a meeting of the Council. The decision of the Council will be a decision supported by a majority of the votes at a meeting of the Council at which a quorum is present (s 371 of the Act). Each Councillor of the Council is entitled to one vote (s 370(1) of the Act). But this does not mean that each Councillor individually is a decision maker exercising the statutory and contractual powers to appoint or to terminate the appointment of the general manager.

62 It is in this statutory context that the test for apprehension of disqualifying bias needs to be applied. The factor that the Council hypothesises might cause it to decide to exercise its contractual right under subcl 10.3.5 to terminate Ms Law's contract of employment as general manager are the various statements of concern made by Councillors about Ms Law's performance as general manager. The Council labels these statements as "complaints" but not all can properly be categorised as complaints. The Council acknowledged that the statements of concern lie in a spectrum from the less serious to the very serious.

63 However, the Council pitches its case too highly, not only by labelling every statement as a complaint, but also by combining less serious statements made by the Councillors with more serious statements. The Council also addresses

the Councillors' conduct collectively and not individually. Although the Council identifies separately each Councillor's conduct, thereafter the Councillors' conduct is treated as having the same potential effect of causing a deviation from a neutral evaluation of the merits. No attempt is made by the Council to articulate how the statements of each Councillor might affect that person individually or articulate how that effect on that person individually might in turn affect the Council's overall process of decision-making.

64 Consider, for example, the only statement of the second respondent, Councillor O'Brien, that is relied upon by the Council as giving rise to an apprehension of bias. This statement was in an email sent on 8 April 2020 to other Councillors, continuing an email discussion started by Councillor Galletly (another respondent) on the subject of a workshop on the Council's finances. The Councillors had earlier attended a councillor briefing by teleconference to discuss the Council's financial position and a document titled "2019/2020 Budget Implications" had been sent to the Councillors earlier. The budget briefing document noted that there would be negative financial impacts relating to, inter alia, the coronavirus pandemic as well as financial impacts if there is "senior staff changeover". The briefing document stated:

> "Should the Chief Executive Officer's contract be terminated, direct costs associated with termination of the contract, a temporary replacement and recruitment of a new candidate will likely be in the order of $859,000 but could be higher."

65 The issue of senior staff changeover was raised because there had been an earlier notice of motion on 27 February 2020 calling for the Council to terminate Ms Law's contract of employment as general manager. That notice of motion lapsed after the 12 March 2020 extraordinary meeting.

66 After the workshop on finances on 8 April 2020, in response to requests for further information from Councillor O'Brien and another Councillor, a Council officer, Mr Brown, emailed the Councillors on 8 April 2020 breaking down the cost of $859,000 for replacing the general manager.

67 Councillor Galletly sent an email on 8 April 2020 to other councillors to which Councillor O'Brien responded. Councillor O'Brien noted in her email the financial impact of the coronavirus pandemic and opined that "any bottom line

obsession at the expense of our community's health will be in line for severe criticism by State and federal governments when all of this is over. Everyone is taking a hit." She then made the statement that the Council alleges is the complaint that gives rise to apprehended bias:

> "Protection of our community comes first. I don't know what the community would feel about the spending of thousands of dollars on legal fees to protect one job and to fight your own staff when so many have lost their livelihoods."

68 The "one job" is not identified but presumably it is the job of Ms Law as general manager. The reference to people losing their livelihoods is a reference to people doing so as a result of the coronavirus pandemic.

69 Although the Council did not commence these proceedings until 11 May 2020, Ms Law had instructed lawyers to provide advice to the Council and the Councillors on liability for unlawful termination of Ms Law's contract, so that they could, in the words of Ms Law in her email of 8 April 2020 responding to Councillor O'Brien's email, "help mitigate their risks against any claims". The claims referred to would be claims made by Ms Law for unlawful termination.

70 Councillor O'Brien's statement in her email of 8 April 2020 is alleged by the Council to be the factor that might cause her not to evaluate neutrally on the merits the subsequently lodged notice of motion dated 28 April 2020. The Council does not articulate how Councillor O'Brien's statement in her email of 8 April 2020, in the particular factual context in which it was made, including responding to the discussion on senior staff changeover in the budget briefing document, the workshop on finances, the email from Mr Brown and the email from Councillor Galletly, might cause Councillor O'Brien to deviate from a neutral evaluation of the merits of the notice of motion date 28 April 2020 or how any such effect on Councillor O'Brien might in turn affect Council's decision on the notice of motion.

71 The Council further does not evaluate the reasonableness of any apprehension of deviation being caused by that factor in that way. Why might a hypothetical fair minded observer, with knowledge of the statutory framework and factual context, reasonably apprehend that Councillor O'Brien individually and the Council as a collegiate decision-making body might not resolve the notice of motion dated 28 April 2020 as a result of a neutral evaluation of the merits?

72 I have used the example of the statement by Councillor O'Brien in her email of 8 April 2020, which is alleged by Council to be the factor that might cause the notice of motion to be resolved otherwise than as a result of a neutral evaluation of the merits, to illustrate why the Council has failed to establish a threatened appearance of disqualifying bias in the Council if the Council were to resolve the notice of motion dated 28 April 2020 by deciding to terminate Ms Law's contract of employment as general manager.

73 The Council's case is not assisted by labelling each of the Councillors as an accuser. The Councillors' various statements of concern do not place the Councillors in the position of an accuser, so as to give rise to a conflict of interest in the Councillors debating and voting on the motion dated 28 April 2020. In short, the Councillors are neither an accuser nor a judge of Ms Law.

74 The Councillors' raising of concerns about Ms Law's conduct and performance as general manager of the Council was an essential part of their role as members of the governing body of the Council. The Councillors comprise the governing body of the Council (s 222 of the Act). Section 223(1) of the Act specifies the role of the governing body:

> "(a) to direct and control the affairs of the council in accordance with this Act,(b) to provide effective civic leadership to the local community,(c) to ensure as far as possible the financial sustainability of the council,(d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and polices of the council, (e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council, (f) to determine and adopt a rating and revenue policy and operational plans that support the optimal allocation of the council's resources to implement the strategic plans (including the community strategic plan) of the council and for the benefit of the local area, (g) to keep under review the performance of the council, including service delivery,(h) to make decisions necessary for the proper exercise of the council's regulatory functions, (i) to determine the process for appointment of the general manager by the council and to monitor the general manager's performance, (j) to determine the senior staff positions within the organisation structure of the council, (k) to consult regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities,(l) to be responsible for ensuring that the council acts honestly, efficiently and appropriately."

75 The governing body is to consult with the general manager in directing and controlling the affairs of the Council (s 223(2) of the Act).

76 Each of the statements made by the Councillors, alleged by the Council to be complaints, were made in furtherance of these various roles of the governing body. In particular, they involve monitoring the general manager's performance, including in enabling the discharge of these roles of the governing body. It is to be remembered that the general manager and other senior staff of a council are to be employed under contracts that are performance based (s 338(1) of the Act).

77 If councillors of a council, in discharging their role as members of the governing body of the council, identify matters where the performance of the council and the general manager of the council, fall short if what is required, they would be remiss in discharging their role as members of the governing body of the council if they did not raise their concerns about the performance of the council and the general manager.

78 Accordingly, the Councillors in raising the matters that they raised in their statements, were not accusing the general manager or charging her with the matters raised in those statements. The Councillors were not engaged in investigating, building up or prosecuting any case against the general manager. The Councillors, by expressing their concerns, did not become the adversary of Ms Law, rather the Councillors were discharging their role as Councillors comprising the governing body of the Council.

79 If the Councillors' concerns justified, in their opinion, raising for the discussion and decision of the governing body of the Council, the question of the termination of the general manager's contract of employment, the procedural means by which this was required to be done was by lodging a notice of motion calling for an extraordinary meeting of the Council. This is what the five Councillors, together with a sixth councillor, did in lodging the notice of motion dated 28 April 2020 to debate and vote on the motions set out in the notice of motion. No Councillor would lodge a notice of motion proposing a motion for the termination of the general manager's contract of employment without first having concerns about the ongoing employment of the general manager. The existence of prior concerns about the general manager's performance cannot, by itself, disentitle a councillor from proposing, and debating and voting on, a

motion to terminate the general manager's contract of employment. If it were, the Councillors could never discharge their proper role as members of the governing body of the Council, including monitoring the performance of the general manager.

80 The Council's argument results in paralysis of the governing body of the Council. If Councillors do not have and do not raise concerns about the general manager's performance (so that, on the Council's argument, they do not become accusers), they will not propose a motion for the Council to terminate the general manager's contract of employment. Only if the Councillors do have and do raise concerns about the general manager's performance would they propose a motion for the Council to terminate the general manager's contract of employment. But on the Council's argument, the Councillors thereupon become accusers and cannot attend, debate or vote on such motion for the termination of the general manager's contract, or even attend any meeting of the Council at which such a motion is debated or voted on.

81 The above discussion should be read as applying to the facts of this case. There might be other factual situations where councillors might step outside their role as members of the governing body of the council in evaluating and acting on their evaluation of the performance of the general manager. For example, if a councillor were to have performed the investigative and prosecuting functions that the council officer performed in *Isbester v Knox City Council* regarding serious misconduct of a general manager, the councillor might be in the position of accuser. In that circumstance, the test for appearance of disqualifying bias might be satisfied if the councillor were to attend, debate and vote on a motion for the council to terminate the general manager's contract on the basis of that misconduct.

82 But this is not the situation here. None of the Councillors have engaged in the performance of investigative or prosecuting functions against Ms Law. They have not stepped into the position of an accuser.

83 I reject ground 1(a).

Is there an apprehension of bias by the prejudgment of the Councillors?

84 The second way in which the Council claims there is an apprehension of disqualifying bias is that the Councillors have pre-judged how they will vote on the notice of motion dated 28 April 2020 when it comes to be debated and voted on at a meeting of the Council.

85 The relevant bias that a fair minded observer might reasonably apprehend is that of the Council as the collegiate decision-making body not that of the individual Councillors. It is the Council as the collegiate body that is called upon by the notice of motion dated 28 April 2020 to decide whether or not terminate Ms Law's contract of employment as general manager of the Council. Hence, the relevant enquiry is whether the fair minded observer might reasonably apprehend that the Council might not bring an impartial mind to making the decision to terminate Ms Law's contract of employment as general manager of the Council.

86 In the case of a collegiate decision-making body like the Council, this enquiry needs to be undertaken in two steps: first, ascertaining whether any one or more of the Councillors constituting the governing body of the Council were affected by apprehended bias by reason of prejudgment and, secondly, if so, whether this affected the whole of the decision-making process of the Council.

87 As to the first step, decision makers, including administrative decision makers, can approach their task "with a tendency of mind or predisposition, sometimes one that has been publicly expressed", without being accused of apprehension of bias by reason of prejudgment*: Minister for Immigration and Multicultural Affairs v Jia Legeng* at [71]. The rules of procedural fairness do not require "the absence of any predisposition or inclination for or against an argument or conclusion": *Minister for Immigration and Multicultural Affairs v Jia Legeng* at [72].

88 As Gleeson CJ and Gummow J observed in *Minister for Immigration and Multicultural Affairs v Jia Legeng*, "the question is not whether a decision maker's mind is blank; it is whether it is open to persuasion" (at [71]). Spigelman CJ similarly observed in *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 504 at [12]: "No doubt in most contexts an open

mind must be regarded as a good thing. However, a mind that never shuts will generally be a public nuisance."

89 What constitutes prejudgment in an administrative context? Prejudgment is a state of mind that is "incapable of persuasion": *McGovern v Ku-ring-gai Council* at [15]. In *Minister for Immigration and Multicultural Affairs v Jia Legeng,* Gleeson CJ and Gummow J held:

> The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented." (at [72]).

90 Hayne J in the same case described a decision maker as having prejudged a matter in issue where the decision maker has an opinion on a relevant aspect of the matter in issue, which the decision maker will apply to that matter in issue, "without giving the matter fresh consideration in the light of whatever might be the facts and arguments relevant to the particular case": at [185]. Of importance is not that the decision maker has preconceived opinions but that those opinions will be applied in disregard of the evidence: at [186].

91 The assessment of whether or not there is prejudgment must have regard to the nature of the decision to be made and its statutory context, the process for making the decision and the identity of the decision maker, including whether it is a multi-member decision-making body.

92 In the present case, the power to terminate the general manager's contract of employment, both the contractual power and, if necessary, the statutory power, is "vested in the democratically elected Council exercising a discretionary power expressed in broad terms to which multiple considerations apply and with respect to which the range of permissible opinion is extraordinarily wide": *McGovern v Ku-ring-gai Council* at [13], and see also *DeBattista v Minister for Planning and Environment* (2019) 240 LGERA 69; [2019] NSWCA 237 at [77].

93 The Council's decision to exercise the discretionary power to terminate the general manager's contract of employment will be formed by a majority of votes of the councillors, the democratically elected representatives, at a meeting of the Council at which a quorum is present (s 371 of the Act). The councillors are each entitled to one vote at the meeting (s 370(1)). However, the councillors are not precluded from considering or forming a preliminary

opinion on the matter in issue, or discussing their preliminary opinion with other councillors before the meeting. As Spigelman CJ observed in *McGovern v Ku-ring-gai Council*:

> "In the context of a multi-member elected decision-making body, there is no requirement that each of the decision-makers must keep an 'open mind' until every decision-maker is prepared to make a decision. It is perfectly legitimate for one member of such a collegial body to make up his or her mind before others do so and, in accordance with a process of democratic decision-making, to seek to persuade other decision-makers to agree with his or her conclusion, if necessary by changing their minds.
>
> Nothing in such a process, in my opinion, constitutes a proper or reasonable basis for an apprehension of bias for purposes of the application of the test. I agree with Basten JA that it is not a manifestation of pre-judgment bias to maintain a position that has been arrived at after due consideration." (at [51]-[52]).

94 For a multi-member decision-making body such as the Council, it is not sufficient to establish prejudgment on the part of any individual councillor; there needs to be an apprehension of disqualifying bias of the Council as the collegiate decision-making body. This requires establishing that the councillor affected by apprehended bias will influence the entire collegiate body. Spigelman CJ in *McGovern v Ku-ring-gai Council* considered that "a 'but for' test should generally be applied, that is, the Court should ask whether or not the person(s) reasonably suspected of pre- judgment decided the outcome." (at [45]). Basten JA in the same case considered that it would be sufficient to establish that a decision of the council is tainted by partiality to establish partiality on the part of any councillor involved in the meeting of the council at which the decision was made at [98], [103]. Campbell JA assumed, but did not decide, that "if the two councillors in question met the legal test for reasonable apprehension of bias, the decision of the Council would thereby be vitiated" (at [237].

95 In this case, of course, the Council as a collegiate body has yet to decide the matter in issue in the notice of motion dated 28 April 2020 of whether or not to terminate the general manager's contract of employment. On any of the approaches suggested in *McGovern v Ku-ring-gai Council*, it will be necessary to determine, first, whether any of the Councillors will meet the test for reasonable apprehension of bias by reason of prejudgment at the time they come to vote on the notice of motion, secondly, that a majority of the votes of

the councillors present at the meeting who vote on the notice of motion accords with the prejudged vote of the councillors, so that this is the decision of the Council, and thirdly, that the prejudgment of the Councillors influences and vitiates the decision of the Council.

96 The Council submits that a fair minded observer might reasonably apprehend that each of the Councillors might not bring "an unprejudiced mind" to the exercise of their vote on the notice of motion dated 28 April 2020 at any meeting of the Council. The Council first refers to the fact that each of the Councillors was a signatory to the notice of motion dated 28 April 2020. They had also been signatories, with two other councillors, to an earlier notice of motion dated 27 February 2020 that also had sought the termination of the general manager's contract of employment. The Councillors explained, by way of background to that earlier notice of motion, that:

> "A majority of Councillors have lost confidence in the general manager/CEO and there is a 'breach of trust'".

97 That earlier notice of motion was scheduled to be considered at an extraordinary meeting of the Council on 12 March 2020. In preparation for the meeting, if the motion were to be passed, one of the Councillors, Councillor Tiley, directed a Council officer, Mr Brown, to prepare a deed of release in respect of the general manager's contract of employment and provided him with a copy of a deed used when the Council terminated the employment of a previous general manager in 2016. Councillors O'Connor, O'Brien and Robinson participated in a telephone call when Councillor Tiley gave that direction. The later notice of motion dated 28 April 2020 proposed, in motion 3, that Councillors Tiley and Galletly be delegated authority to implement the termination of the general manager's contract of employment. The Council submits that this preparation for implementing any decision of the Council to terminate Ms Law's contract of employment evidences prejudgment.

98 The Council next submits that the prejudgment by each of the five Councillors as to the matter in issue before the Council in the notice of motion dated 28 April 2020 is expressed in those statements of concern of the Councillors, labelled by the Council as "complaints", that have been earlier referred to. The Council submits that a fair minded observer might reasonably apprehend that if

the notice of motion dated 28 April 2020 were put and voted on at a meeting of the Council constituted in part by the Councillors, being five of the six signatories to the notice of motion, the eleven member Council (now ten members as one Councillor has resigned) might not bring an unprejudiced mind to the matter. Each of the Councillors has prejudgment and a majority resolution in terms of the notice of motion would not be made but for their votes. The Council submits that both of the tests set out in *McGovern v Ku-ring-gai Council* are satisfied.

99 The Councillors denied that they have prejudged the matter in issue raised by the notice of motion dated 28 April 2020 of whether Ms Law's contract of employment as general manager should be terminated. The Councillors submit that the Council has not established on the evidence the test for apprehended bias by prejudgment.

100 To raise legitimate concerns about Ms Law's performance as general manager before proposing a notice of motion calling for the Council to terminate the general manager's contract of employment is not to prejudge the outcome of the matter. The Councillors do not prejudge that matter by formulating a preliminary view of the appropriateness of termination sufficient to cause them to propose and sign the notice of motion.

101 The Councillors have not accused Ms Law, or laid charges against her, by raising their concerns. The proposing and signing of a notice of motion calling for an extraordinary meeting of the Council to consider and vote on a motion for the Council to exercise its contractual right under subcl 10.3.5 to terminate Ms Law's contract of employment as general manager without cause does not accuse Ms Law. The Councillors' earlier expressed lack of confidence as a basis for dismissal requires no accusation of any breach of contract or misconduct by Ms Law. The only opinion required to be formed is whether or not it is in the best interest of the community for Ms Law to continue as general manager of the Council.

102 The Councillors submit that the evidence does not establish that they have formed a concluded opinion that cannot be dislodged. They each gave evidence that they are open to persuasion by new evidence or arguments.

They said that they would welcome Ms Law making any submission that she would like to make on the matter and that they would consider these submissions. Indeed, their solicitor has written on their behalf to Ms Law on 9 June 2019 setting out the Councillors' concerns and the issue to be determined by the notice of motion and providing Ms Law with the opportunity to respond to these concerns. They said they will consider any response that Ms Law chooses to make.

103 I find that the Council has not established that the Councillors have prejudged the issue of whether the Council should terminate Ms Law's contract of employment as general manager. The Council has not established that the Councillors have the state of mind necessary to be described as apprehended bias in the form of prejudgment, being one so committed to a conclusion already formed to vote in support of the motion for the termination of Ms Law's contract of employment as general manager as to be incapable of alteration, whatever evidence or arguments may be presented before the Councillors come to vote on the motion.

104 The Council's case of prejudgment rests on two bases: first, the complaints made by the Councillors about the general manager's performance and secondly, the Councillors signing two notices of motion proposing that the Council terminate Ms Law's contract of employment as general manager. Neither basis is sufficient to establish prejudgment. As I have explained in dealing with the Council's ground of apprehended bias by the Councillors being in a position of accuser, the Councillors' statements of concern about the performance of the general manager were made in furtherance of their role as councillors of the governing body of the Council. One of their responsibilities as councillors is to monitor the performance of the general manager. If the Councillors had concerns about the performance of the general manager, it was incumbent on them to raise these concerns. If the Councillors considered that these concerns justified raising the issue of whether the general manager's contract of employment should be terminated at a meeting of the Council, it was proper that they do so by proposing a notice of motion calling for an extraordinary meeting of the Council to consider and vote on a motion for the

termination of the general manager's contract of employment. The undertaking of these actions is a proper discharge of the Councillors' role as a councillor.

105 Neither the raising of concerns about the general manager's performance nor the proposing of a notice of motion for the termination of the general manager's contract of employment involves the expression of a final opinion on the issue of the termination of the general manager's contract of employment that is incapable of change, no matter what evidence or arguments might be presented. Hence, the Council has not established that these past actions of the Councillors gives rise to prejudgment.

106 Nevertheless, the issue of prejudgment cannot be resolved by reference only to these past actions of the Councillors. The Council's case is unusual in that it involves a pre-emptive strike before the Councillors have even had a chance to vote on the notice of motion dated 28 April 2020 at an extraordinary meeting of the Council to consider and vote on the notice of motion. That extraordinary meeting has not yet occurred. It was to be held on 11 May 2020, but it was adjourned as a result of the Council commencing these proceedings and obtaining interlocutory injunctive relief restraining the Councillors from attending the meeting and voting on the notice of motion. The meeting was adjourned to 10 June 2020, the first day of the hearing of these proceedings. On 10 June 2020, the Mayor further adjourned the meeting until 24 June 2020.

107 In the meantime, the Councillors have had an opportunity to consider the Council's evidence and arguments made in these proceedings that they have prejudged the issue. The Councillors have prepared comprehensive affidavits responding to the Council's evidence and arguments, including asserting that they are open to persuasion regarding the matter of the termination of Ms Law's contract of employment as general manager. The Councillors have been cross-examined on their affidavit evidence, including their assertion that they are open to persuasion. The Councillors, through their solicitor, have written to Ms Law notifying her of the Councillors' concerns and the matter in issue of the termination of her contract of employment and inviting her to make any submissions she wishes to make on these concerns and the issue of the

termination of her contract of employment. The Councillors have undertaken to consider any submission that Ms Law might make.

108 In these circumstances and on this evidence, the Council has not established that the Councillors will have the necessary state of mind described as bias in the form of prejudgment if and when they come to vote on the notice of motion dated 28 April 2020 for the termination of Ms Law's contract of employment as general manager.

109 Importantly, the Council has not established that each of the Councillors will vote in favour of the motion to terminate the general manager's contract of employment. This case differs from other cases on prejudgment in that the persons alleged to have prejudged the matter in issue have not yet made a decision on the matter. At best, there is a potentiality but no actuality of prejudgment affecting the persons' decision.

110 The upshot is that the Council has not established that a fair minded observer, properly informed about the particular decision-making process and particular factual context of the particular exercise of power, might reasonably apprehend that each of the Councillors might not bring an impartial mind to casting their vote on the notice of motion dated 28 April 2020 at any meeting of the Council by reason of prejudgment.

111 This finding is dispositive of the Council's allegation of apprehended bias by reason of prejudgment. If none of the Councillors can be shown to have prejudged the issue of the termination of the general manager's contract of employment, there can be no apprehension that the Council as the collegiate decision-making body is biased.

112 But even if any of the Councillors could be seen to have prejudged the issue, which prejudgment would remain until the Councillor voted on the notice of motion at any future meeting, the Council has not established that such prejudgment might affect the whole of the decision-making process by the Council.

113 True it is that the test for apprehension of bias "is one of possibility (real and not remote), not probability": *Ebner v Official Trustee in Bankruptcy* (2000) 205

CLR 337; [2000] HCA 63 at [7]. Deciding whether an administrative decision maker might not bring an impartial mind to the resolution of an issue that has not been determined requires no prediction about how the administrative decision maker will in fact approach the matter: at [7].

114 However, where the decision maker is a multi-member decision-making body such as the Council, this approach needs to accommodate the different decision-making process involved. In this case, the actual decision maker is the Council, not the individual Councillors. It is the Council's decision on the issue of the termination of the general manager's contract of employment to which the test of apprehended bias is to be applied. Might a fair minded observer reasonably apprehend that the Council might not bring an impartial mind to its decision on the notice of motion by reason of the prejudgment of any one or more of the Councillors?

115 The problem is that, in advance of the Council making a decision, by a majority of votes at a meeting of the Council at which a quorum is present, to terminate the general manager's contract of employment, the fair minded observer cannot answer this question. The Council has not established on the evidence how all of the councillors, not just the Councillors alleged to have prejudged the issue, will vote at any meeting of the Council to consider the notice of motion dated 28 April 2020. The majority of votes cast at any meeting of the Council to consider the notice of motion might not pass the motion to terminate the general manager's contract of employment. In this circumstance, any prejudgment of the five Councillors might not actually affect the decision of the Council, as that decision would be to the contrary. Even if a majority of votes were to pass the motion, one or more of the Councillors alleged to have prejudged the issue might not vote in favour of the motion, but might instead vote against the motion or abstain from voting. In this circumstance, the decision of the Council would not be affected by the vote of the particular Councillor or Councillors alleged to have prejudged the issue. There might also be other reasons why any prejudgment by one or more of the Councillors does not affect the decision of the Council, whether the "but for" test of Spigelman CJ in *McGovern v Ku-ring-gai Council* or the lower threshold test for vitiation of a council's decision of Basten JA is applied.

116 The point is that the onus is on the Council to establish that any decision the Council might make on the notice of motion dated 28 April 2020 might be affected by apprehended bias. The Council has not discharged this onus.

117 Ground 1(b) should be rejected.

Will there be a failure to afford a fair opportunity for a hearing?

118 The Council claims that the five Councillors have failed to afford Ms Law an opportunity for a hearing. The Council cites the well known utterance of Lord Reid in *Ridge v Baldwin* [1964] AC 40 at 66 that "an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation". The Council submits that the affected officer here, Ms Law, "should be notified as to the charge or allegation; the issues should be disclosed; the relevant material as to her performance to be taken into account should be disclosed, including any significant, relevant and credible material from a source other than the officer; and a reasonable opportunity afforded to prepare and present a case in response" (paragraph 5.1 of the first applicant's written submissions).

119 The Council noted that in *Jarratt v Commissioner for Police (NSW)* at [53] and [145], the High Court accepted that, if procedural fairness was implied, the appropriate content of a fair hearing was that Mr Jarratt should be notified of the proposal for termination, be advised of any specific allegations against him and the content of any adverse report, and be given an opportunity to respond to those allegations and any criticism of his performance as Deputy Commissioner.

120 The Council contested the Councillors' submission that notice of the charge or allegation made against Ms Law did not need to be made because the notice of motion called for the Council to exercise its contractual right to terminate Ms Law's contract of employment without cause. The Council submitted that the rules of procedural fairness are not "trumped" by the terms of the contract. The requirement for procedural fairness in exercising the impliedly statutory power to terminate Ms Law's employment as general manager co-exists with the contractual entitlement to terminate.

121 Although the Council, in reply submissions, ultimately accepted that the duty to afford Ms Law an opportunity for a hearing in fact is owed by the Council itself, which employs Ms Law as its general manager, the Council nevertheless contended that "for practical purposes" the duty of the Council has to be discharged by the Councillors who are the signatories to the notice of motion dated 28 April 2020 (paragraph 5.3 of the first applicant's written submissions in reply).

122 The Council sought to rely on *White v Ryde Municipal Council* [1977] 2 NSWLR 909 at 923-925 that, although "as a general proposition, it is plain enough that he who decides must hear", a collegiate decision-making body such as the Council can discharge its duty to afford a hearing through a specialised committee which makes a recommendation to the Council. The Council submitted that "regard is to be given to the practical realities of the situation", citing *White v Ryde Municipal Council* at 925. Only the Councillors as signatories to the notice of motion knew what was the charge against Ms Law and they did not inform Ms Law or the other councillors as to what the charge was. In the circumstances, the Councillors were responsible for discharging the Council's duty "to notify Ms Law of the charge, disclose the issues and any significant, relevant and credible material that she needed to address, and give her a reasonable period of time to provide evidence and submissions" (paragraph 5.6 of the first applicant's written submissions in reply).

123 The Council contends that the Councillors have failed to discharge this duty to afford Ms Law an opportunity for a hearing. First, the Council notes that the Councillors did not give Ms Law notice of their proposal to lodge the notice of motion dated 28 April 2020 before they sent it to the Mayor. Under rule 3.3 of the Meeting Code of Practice, the notice of motion was required to be placed on the agenda of the extraordinary meeting of the Council to be held within 14 days. This was done and an extraordinary meeting was called on 11 May 2020. That meeting did not proceed because the Council and Ms Law sought interlocutory injunctive relief in this Court to restrain the Councillors from attending and voting at the meeting. The meeting was adjourned to 10 June 2020 and has been further adjourned to 24 June 2020.

124 Secondly, the Council contends that the Councillors have not disclosed to Ms Law "the charge it proposes to consider as the basis for the proposed exercise of power [to terminate Ms Law's contract of employment as general manager] in advance of the decision maker's exercise of the particular power" (paragraph 5.1 of the first applicant's written submissions in reply). The Council submits that it is insufficient to leave Ms Law to guess what is the charge, by reference to the history of the Councillors' interactions with Ms Law or by making enquiries of third parties. Unless Ms Law is given notice of the charge, she does not know on what basis she might prepare her case against termination.

125 Thirdly, the Council contends that even after Ms Law became aware of the Councillors lodging the notice of motion dated 28 April 2020, she had inadequate time to prepare her case before the originally scheduled extraordinary meeting of the Council on 11 May 2020.

126 Fourthly, the Council orally submitted at the hearing that the recent letter to Ms Law from the Councillor's solicitor dated 9 June 2020 notifying Ms Law of the Councillors' concerns, identifying the matter in issue of the termination of Ms Law's contract of employment without cause under subcl 10.3.5 of the contract, and inviting her to make any submissions she wishes within 14 days is inadequate. The reason was not clearly articulated although it appeared to be that, even if the letter did notify Ms Law of the charges or allegations made against her and the matter in issue, it did not disclose all significant, relevant and credible material to be taken into account by the Councillors. If this is the reason, it is not correct because, although the letter itself did not attach such material, it states that the concerns set out in the letter are those detailed in each of the Councillors' affidavits read in the proceedings, which Ms Law had. Those affidavits explain each of the concerns raised by the Councillors and attach all of the documentary material relevant to the concerns. This affidavit and documentary evidence provides the significant, relevant and credible material to be taken into account by the Councillors.

127 In this respect, the Council's case diverged from Ms Law's case. Mr Hassall, the solicitor who appeared for Ms Law at the hearing, accepted that the Councillors' solicitor's letter of 9 June 2020 did give notice to Ms Law of the

charges or allegations made against her and the matter in issue, disclosed the material to be taken into account by the Councillors, and provided Ms Law a reasonable opportunity to prepare and present a case in response. Ms Hassall accepted that Ms Law could prepare her response in the 14 day time period offered in the letter. Mr Hassall accepted that, in these circumstances, ground 2 was no longer pressed, because an opportunity for a hearing had been provided to Ms Law.

128 The Councillors submit that what is required in order to afford Ms Law procedural fairness in the Council making a decision to terminate her employment as general manager depends on the legal framework within which the decision is to be made, citing *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 at [30]. The legal framework in which this decision is to be made is the Act, which permits termination of Ms Law's contract of employment in accordance with its terms. The terms of the contract permit termination at large, subject to giving 38 weeks' notice or equivalent compensation (cl 10.3.5). The question is, therefore, what is required in order to ensure that this decision to terminate the contract in accordance with a term permitting termination at large and without cause is made fairly?

129 The Councillors submit that what has been done by the Councillors already to notify Ms Law of their concerns and to provide her with an opportunity to be heard, is sufficient to ensure that any decision that the Council might make to terminate her contract of employment in accordance with its terms is fair. Whatever might have been the situation at the time the Councillors signed the notice of motion dated 28 April 2020, since then Ms Law has been given ample notice of the Councillors' concerns about her performance and ample opportunity to respond.

130 Through the pleading process, including the request for particulars and provision of particulars, the Council and Ms Law have identified the Councillors' concerns about her performance as general manager. Indeed, the Council detailed each of the Councillors' concerns, labelling them complaints, to mount

its argument of apprehended bias by reason of the Councillors being in the position of accusers. Ms Law adopted the Council's pleadings and arguments.

131 The Councillors' affidavits filed and read in these proceedings chronicle in detail each Councillor's concerns and attach the documentary material relevant to those concerns. Ms Law has had an opportunity to prepare an affidavit or otherwise give oral evidence in response to the Councillors' evidence, but has elected not to do so.

132 The Councillors' solicitor wrote on 9 June 2020 to Ms Law outlining the Councillors' concerns and inviting Ms Law to respond within 14 days. Ms Law's solicitor accepts that this letter gives her notice and an opportunity to be heard. In these circumstances, the Councillors submit that there can be no apprehension that the Council has not afforded, and will not afford before it makes any decision whether or not to terminate Ms Law's contract of employment, a reasonable opportunity to Ms Law to be heard.

133 I find that the Council has not established that it will not afford Ms Law an opportunity to be heard before it makes a decision on the notice of motion dated 28 April 2020 as to whether or not to terminate Ms Law's contract of employment as general manager under subcl 10.3.5 of the contract. As the Councillors have submitted, Ms Law has been given notice of the concerns raised by the Councillors about Ms Law's performance (the so-called charges or allegations against her) and the matter in issue of whether Ms Law's contract of employment should be terminated without cause under subcl 10.3.5 of the contract, provided with the relevant material as to her performance that might be taken into account by the Councillors in voting on the notice of motion, and given a reasonable opportunity to prepare a case in response.

134 Notice of the concerns about Ms Law's performance as general manager has been given informally by the Councillors raising their concerns with Ms Law (the so-called complaints) and in the Councillors' affidavits filed and read in these proceedings. Notice has been given formally through the Councillors' solicitor's letter of 9 June 2020. Notice has been given of the matter in issue by the terms of the notice of motion dated 28 April 2020, the Councillors' affidavits and the Councillors' solicitor's letter dated 9 June 2020. The relevant material

on which the Councillors might make their decision has been disclosed to Ms Law, attached to the Councillors' affidavits provided to Ms Law.

135 That Ms Law is aware of the Councillors concerns and the matter in issue – the case against her – is evidenced not only by the pleadings and particulars provided, and the arguments made in these proceedings, by the Council and adopted by Ms Law, but also by Ms Law's solicitor accepting at the hearing that the Councillors' solicitor's letter of 9 June 2020 gave adequate notice of the Councillors' concerns and the matter in issue.

136 Ms Law has been given a reasonable opportunity to respond to these concerns. Whether or not the 14 day period between the lodging of the notice of motion on 28 April 2020 and the originally scheduled meeting of the Council on 11 May 2020 was adequate, since then Ms Law has had ample opportunity to respond. Ms Law was entitled to, but elected not to, file an affidavit or give oral evidence in these proceedings that she has brought with the Council responding to the Councillors' evidence about their concerns about Ms Law's performance. Ms Law has been given a further opportunity to respond to the Councillors' concerns and the matter in issue detailed in the Councillors' solicitor's letter of 9 June 2020. Ms Law's solicitor accepted that the 14 day period offered in that letter was sufficient for Ms Law to respond. That 14 day period will end on 23 June 2020, one day before the date of the adjourned extraordinary meeting of the Council on 24 June 2020. The Councillors have promised to consider any submissions made by Ms Law before they vote on the notice of motion dated 28 April 2020.

137 As I stated at the outset of the judgment, the peculiarity of this case is that the Council is seeking for the Court to grant relief declaring, in effect, that the Council will be in breach of its duty of procedural fairness by the Council not giving Ms Law an opportunity to be heard. But the remedy is in the Council's hands. If the Council considers it needs to give Ms Law an opportunity to be heard, it can do so. The Council should not refrain from discharging what it perceives to be its duty of procedural fairness so as to seek declaratory relief of the Court that it has breached its duty of procedural fairness.

138 Nevertheless, on the evidence of the events that have happened, the Council and Ms Law have not established any threatened failure by the Council to give Ms Law a fair opportunity for a hearing. I reject ground 2.

Conclusion and orders

139 The Council and Ms Law have not established any threatened or apprehended breach of the Act, including any threatened denial of procedural fairness. The proceedings should be dismissed. Costs should follow the event. The Council and Ms Law, being unsuccessful in the proceedings, should pay the costs of the Councillors.

140 The Court orders:

(1) The proceedings are dismissed.

(2) The first and second applicants are to pay the costs of the proceedings of the respondents.

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