



New South Wales

Local Government Amendment (Conduct) Act 2012 No 94

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Local Government Amendment (Conduct) Act 2012 No 94

Act No 94, 2012

An Act to amend the *Local Government Act 1993* to make further provision in relation to the conduct and discipline of councillors and council staff, delegates and administrators; and for related purposes. [Assented to 21 November 2012]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Local Government Amendment (Conduct) Act 2012*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Local Government Act 1993 No 30

[1] Section 10A Which parts of a meeting can be closed to the public?

Insert after section 10A (2) (h):

- (i) alleged contraventions of any code of conduct requirements applicable under section 440.

[2] Section 56 Application of Division

Omit the note.

[3] Sections 57, 58 (1), 59 (1), 60, 61, 62 (1) and (2), 63 (1), 65 and 66 (1), (3) and (4)

Omit “Minister for Land and Water Conservation” wherever occurring.

Insert instead “Minister for Primary Industries”.

[4] Section 234 When does a vacancy occur in a civic office?

Insert “440I,” after “section” in section 234 (1) (d).

[5] Section 328A General manager to keep register of political donation disclosures

Insert “, *Expenditure*” after “*Funding*” wherever occurring in section 328A (2) and the note.

[6] Sections 328B Reference by general manager to Director-General of political donation matters

Omit section 328B (2) and (3).

[7] Chapter 14 Honesty and disclosure of interests

Omit “and staff of councils” from the Introduction.

Insert instead “, staff of councils and administrators of councils”.

[8] Chapter 14, Introduction

Insert “and enables the Director-General to investigate and take action against councillors who engage in misconduct” after “functions of councils”.

[9] Section 439 Conduct of councillors, staff, delegates and administrators

Insert after section 439 (2):

- (3) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.

[10] Section 440 Codes of conduct

Insert after section 440 (8):

- (9) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.

[11] Section 440AA

Insert after section 440:

440AA Administration of code of conduct

- (1) The regulations may prescribe a procedure (the *model procedure*) for administering the model code referred to in section 440.
- (2) The model procedure is to set out the procedures for dealing with alleged contraventions of the model code.
- (3) A council must adopt a procedure (the *adopted procedure*) that incorporates the provisions of the model procedure. The adopted procedure may include provisions that supplement the model procedure.
- (4) A council's adopted procedure has no effect to the extent that it is inconsistent with the model procedure as in force for the time being.
- (5) Councillors, members of staff and delegates of a council must comply with the applicable provisions of:
 - (a) the council's adopted procedure, except to the extent of any inconsistency with the model procedure as in force for the time being, and
 - (b) the model procedure as in force for the time being, to the extent that:
 - (i) the council has not adopted the model procedure, or
 - (ii) the adopted procedure is inconsistent with the model procedure, or
 - (iii) the model procedure contains provisions or requirements not included in the adopted procedure.

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- (6) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.

[12] Chapter 14, Part 1, Division 3

Omit the Division. Insert instead:

Division 3 Misconduct

440F Definitions

- (1) In this Division:
misconduct of a councillor means any of the following:
- (a) a contravention by the councillor of this Act or the regulations,
 - (b) a failure by the councillor to comply with an applicable requirement of a code of conduct under section 440,
 - (c) a failure by a councillor to comply with an order issued by the Director-General under this Division,
 - (d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council.
- (2) However, a contravention of the disclosure requirements of Part 2 is not misconduct.
Note. A contravention of the disclosure requirements of Part 2 is dealt with under other provisions of this Chapter.
- (3) A reference in this Division to misconduct includes a reference to misconduct that consists of an omission or failure to do something.

440G Formal censure of councillor for misconduct

- (1) A council may by resolution at a meeting formally censure a councillor for misconduct.
- (2) A formal censure resolution may not be passed except by a motion to that effect of which notice has been duly given in accordance with regulations made under section 360 and, if applicable, the council's code of meeting practice.
- (3) A council may pass a formal censure resolution only if it is satisfied that the councillor has engaged in misconduct on one or more occasions.

- (4) The council must specify in the formal censure resolution the grounds on which it is satisfied that the councillor should be censured.
- (5) A motion for a formal censure resolution may, without limitation, be moved on the report of a committee of the council and any such report must be recorded in the minutes of the meeting of the council.

440H Director-General may investigate misconduct by a councillor

- (1) The Director-General may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct.
- (2) The Director-General may conduct such an investigation:
 - (a) on his or her own initiative, or
 - (b) if the general manager of a council refers an allegation of misconduct by a councillor to the Director-General, or
 - (c) if a council, by resolution, refers an allegation of misconduct by a councillor to the Director-General, or
 - (d) if the Ombudsman states in a report that the Ombudsman is satisfied that a councillor has or may have engaged in misconduct, or
 - (e) if the Independent Commission Against Corruption states in a report that the Commission is satisfied that a councillor has or may have engaged in misconduct.
- (3) For the purpose of an investigation, the Director-General may, by order in writing served on any relevant person, direct the person to do any one or more of the following:
 - (a) provide written information, by the date specified in the order, and to verify the information by statutory declaration,
 - (b) produce, at a time and place specified in the order, any document specified in the order that is in the person's custody or control.

Note. Failure to comply with the direction is an offence under section 661.

- (4) The Director-General may take copies of or extracts from any document to which the Director-General gains access under this section.

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- (5) The Director-General may arrange for a departmental report to be prepared in relation to an investigation conducted under this section.
 - (6) The preparation of a departmental report is a prerequisite to a decision by the Director-General to take disciplinary action against a councillor, unless the disciplinary action is taken on the basis of a report by the Ombudsman or Independent Commission Against Corruption.
 - (7) This section authorises reports relating to misconduct to be made by the Ombudsman or Independent Commission Against Corruption and a reference to a report of the Ombudsman or Independent Commission Against Corruption is a reference to a report made to the Director-General under the authority of this subsection or under any other provision of this or any other Act.
 - (8) The powers conferred on the Director-General by this section may also be exercised for the purposes of determining if an administrator has engaged in conduct that would be misconduct if the administrator were a councillor.
 - (9) In this section:
administrator means an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66).
relevant person means a councillor, a member of staff of a council, a delegate of a council or an administrator.

440I Director-General may take disciplinary action for misconduct

- (1) The Director-General may take disciplinary action against a councillor if the Director-General is satisfied that:
 - (a) the councillor has engaged in misconduct (whether on the basis of a departmental report or a report by the Ombudsman or Independent Commission Against Corruption), and
 - (b) disciplinary action is warranted.
- (2) The Director-General may take one or more of the following actions (and any such action is disciplinary action):
 - (a) counsel the councillor,
 - (b) reprimand the councillor,
 - (c) by order, direct the councillor to cease engaging in the misconduct,

- (d) by order, direct the councillor to apologise for the misconduct in the manner specified in the order,
 - (e) by order, direct the councillor to undertake training,
 - (f) by order, direct the councillor to participate in mediation,
 - (g) by order, suspend the councillor from civic office for a period not exceeding 3 months,
 - (h) by order, suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 3 months (without suspending the councillor from civic office for that period).
- (3) In determining which disciplinary action, if any, to take against a councillor who has engaged in misconduct, the Director-General may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.
 - (4) The Director-General is to notify the councillor of any decision to take disciplinary action under this section and the reasons for the decision.
 - (5) A copy of the decision and the statement of reasons for the decision are to be provided to the council.
 - (6) The Director-General is to make any decision to suspend a councillor from civic office or to suspend a councillor's right to be paid any fee or other remuneration under this section, and the statement of reasons for the decision, publicly available.
 - (7) The Director-General may make any other decision to take disciplinary action against a councillor, and the statement of reasons for the decision, publicly available.
 - (8) No liability (including liability in defamation) is incurred for making a decision publicly available as permitted or required by this section or for publishing in good faith a fair report or summary of such a decision.

440J Alternatives to disciplinary action by the Director-General

- (1) The Director-General may before, during or after an investigation into an allegation of misconduct by a councillor decide to take no further action against the councillor, if satisfied that no further action is warranted.

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- (2) The Director-General may, instead of taking disciplinary action against a councillor:
 - (a) refer the matter to the council concerned with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise, or
 - (b) refer the matter to the Pecuniary Interest and Disciplinary Tribunal for consideration.
 - (3) A matter is referred to the Tribunal under this section by means of a report presented to the Tribunal by the Director-General. A report may contain or be accompanied by such material and observations as the Director-General thinks fit.
 - (4) The Director-General is to notify the councillor concerned of any decision to refer the matter to the Tribunal.
 - (5) The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section.

440K Suspension of a councillor

- (1) A councillor, while suspended from civic office:
 - (a) is not entitled to exercise any of the functions of the civic office, and
 - (b) is not entitled to any fee or other remuneration to which he or she would otherwise be entitled as the holder of the civic office.
- (2) The period of suspension under an order made by the Director-General commences on the date 7 days after the service of the order on the councillor or the date specified in the order for the commencement of the period of suspension, whichever is the later.

440L Appeals against disciplinary action

- (1) A councillor against whom disciplinary action is taken by the Director-General may appeal to the Pecuniary Interest and Disciplinary Tribunal against the decision of the Director-General to take disciplinary action.
- (2) An appeal must be made within 28 days after the day on which the councillor is notified of the Director-General's decision to take disciplinary action against the councillor.
- (3) The Tribunal may stay any decision made by the Director-General until such time as the Tribunal determines the appeal.

- (4) On hearing the appeal, the Tribunal may:
 - (a) confirm the decision, or
 - (b) amend the decision, or
 - (c) set aside the decision and substitute a new decision.
- (5) If a decision is amended or substituted, the decision as amended or substituted has effect as if it had been made in that form by the Director-General.
- (6) If the Tribunal sets aside a decision to suspend a councillor, any fee or other remuneration withheld under the suspension is payable to the councillor.
- (7) The regulations may make provision for or with respect to the making, hearing and determination of appeals under this section.

440M Expenses to be borne by council

- (1) The Director-General may recover from a council the reasonable expenses incurred by or in respect of the Department in the conduct of an investigation into a councillor of the council under this Division.
- (2) The Director-General may make a determination of the amount of the expenses referred to in subsection (1) and serve a notice on the council requiring the amount so determined be paid in recovery of the Department's expenses.
- (3) An amount equal to the expenses as so determined is payable to the Department as a debt by the council concerned, except as determined by the Director-General.
- (4) The council may apply to the Administrative Decisions Tribunal for a review of whether any part of the expenses so determined are not reasonable expenses.
- (5) The Director-General must give effect to any decision of the Tribunal on a review of the determination of the amount of the expenses.
- (6) A reference in this section to expenses incurred includes a reference to remuneration paid to departmental staff.

440N Investigation of former councillors

- (1) The Director-General may conduct an investigation for the purpose of determining whether a former councillor engaged in misconduct during the period in which the former councillor was a councillor.

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- (2) For that purpose, sections 440H and 440M apply as if a reference in those sections to a councillor includes a reference to a former councillor.
 - (3) The Director-General may before, during or after an investigation into an allegation of misconduct by a former councillor decide to refer the matter to the Pecuniary Interest and Disciplinary Tribunal for consideration.
 - (4) Section 440J applies to the referral of the matter to the Tribunal in the same way as it applies to a referral of a matter relating to a councillor to the Tribunal.

440O Self-incrimination

- (1) This section applies where, under section 440H, the Director-General directs a natural person to provide any information or produce any document for the purposes of an investigation.
- (2) A person is not excused from complying with the direction on the ground that the information or document might incriminate the person or make the person liable to a penalty.
- (3) If the information or document tends to incriminate the person and the person objects to providing the information or producing the document at the time, the fact of the direction or the information or document itself (if produced) may not be used in any criminal proceedings against the person (except in proceedings for an offence relating to the failure to produce a document or information or the production of a document or information that is false or misleading).
- (4) Despite any such objection, the information or document may be used in connection with an investigation and the taking of disciplinary action against the person under this Division and is admissible in proceedings under this Act relating to misconduct.

[13] Chapter 14, Part 3, Division 3, heading

Omit “**misbehaviour**”. Insert instead “**misconduct**”.

[14] Section 470A Pecuniary Interest and Disciplinary Tribunal to decide whether or not to conduct proceedings into a misconduct matter

Omit “section 440N” from section 470A (1). Insert instead “section 440J”.

[15] Sections 470B (1), 478 (5), 480 (1) (c), 482A (1) and 484 (1)

Omit “section 440N” wherever occurring. Insert instead “section 440J”.

[16] Section 482 Decision of Pecuniary Interest and Disciplinary Tribunal—pecuniary interest matters

Insert after section 482 (4):

- (5) In determining which action, if any, to take against a person under this section, the Tribunal may take into account any previous complaints proved against the person, any action previously taken against the person and any other relevant matters.
- (6) To avoid doubt, a reference in subsection (1) to a councillor includes a reference to a former councillor.

[17] Section 482A Decision of Pecuniary Interest and Disciplinary Tribunal—misconduct matters

Insert after section 482A (2) (c):

- (c1) disqualify the councillor from holding civic office for a period not exceeding 5 years, or

[18] Section 482A (3) and (4)

Insert after section 482A (2):

- (3) In determining which action, if any, to take against a councillor, the Tribunal may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.
- (4) In this section, *councillor* includes a former councillor.

[19] Section 485 Appeals to Supreme Court

Omit “section 440M” from section 485 (1). Insert instead “section 440L”.

[20] Section 661 Failure to comply with certain directions

Insert “or section 440H” after “Chapter 13”.

[21] Section 674 Remedy or restraint of breaches of this Act—other persons

Omit the note to section 674 (5). Insert instead:

Note. Section 440L confers a right of appeal to the Pecuniary Interest and Disciplinary Tribunal against disciplinary action taken by the Director-General against a councillor under Division 3 of Part 1 of Chapter 14.

[22] Schedule 8 Savings, transitional and other provisions consequent on the enactment of other Acts

Insert at the end of clause 1 (1):

any other Act that amends this Act

[23] Schedule 8

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Local Government Amendment (Conduct) Act 2012

Definition

In this Part, *amending Act* means the *Local Government Amendment (Conduct) Act 2012*.

Application of amendments

- (1) Division 3 of Part 1 of Chapter 14, as substituted by the amending Act, (the *new Division*) extends to misconduct that occurred before the commencement of the new Division if at the time that it occurred it was misbehaviour under Division 3 as in force before that substitution.
- (2) However, if the Director-General or the Tribunal decides to take disciplinary action or to impose a penalty in respect of misconduct that occurred before the commencement of the new Division, the disciplinary action or penalty must be a type of disciplinary action or penalty that could have been taken or imposed under this Act at the time the misconduct occurred.
- (3) An investigation into an allegation of misbehaviour by a councillor that was validly initiated but not finalised before the commencement of the new Division (an *ongoing investigation*) is taken to have been validly initiated under the new Division. Accordingly, the new Division applies to the ongoing investigation.
- (4) The amendments made to Part 3 of Chapter 14 by the amending Act do not apply to proceedings that were referred to the Tribunal or that were commenced in the Tribunal before the commencement of those amendments. Such proceedings are to be dealt with as if the amendments had not been made.
- (5) Section 440I (3) as inserted by the amending Act extends to incidents of misconduct by a councillor and disciplinary action

taken against the councillor that occurred before the commencement of that subsection.

- (6) Sections 482 (5) and 482A (3) as inserted by the amending Act extend to complaints proved against a person, incidents of misconduct by a councillor and any action taken against a councillor or other person before the commencement of those subsections.

Authorised investigators

- (1) A member of staff of the Department who is authorised to conduct an investigation under section 440J (2), immediately before its repeal by the amending Act, is taken, on that repeal, to have been delegated the functions of the Director-General with respect to investigations under section 440H.
- (2) Nothing in this clause prevents the Director-General from revoking or amending the delegation.

[Second reading speech made in—
Legislative Assembly on 18 October 2012
Legislative Council on 24 October 2012]