

**LOCAL GOVERNMENT
PECUNIARY INTEREST TRIBUNAL**

ANNUAL REPORT 1996

DATED: 22 August, 1995

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The Local Government Pecuniary Interest Tribunal was established by the Local Government Act 1993.

The Tribunal's principal function is to determine allegations of contraventions of Part 2 of Chapter 14 of the Act.

Part 2 of that Chapter requires that the pecuniary interests of Councillors, Council delegates, senior staff and certain other persons involved in making decisions or giving advice on Council matters be placed on public record.

Councillors and designated persons are required to submit written returns for that purpose.

Councillors, staff and other designated persons are required to make disclosure and refrain from taking part in decisions on Council matters in which they have a pecuniary interest.

If a contravention is proved to the Tribunal, the Tribunal may, in the case of Councillors, Council committee members and Council advisers, counsel, reprimand, suspend or disqualify from civic office and, in the case of Council employees, recommend disciplinary action or dismissal.

The Tribunal is constituted by one part-time member appointed by the Governor. On 9 February 1994 I was appointed to hold office for three years.

The Act obliges the Tribunal to furnish an annual report to the Minister concerning proceedings that have been conducted before it during the year.

This report covers the period from 1 July 1995 to 30 June 1996. It includes reference to complaints of which notice of a decision by the Director-General to investigate has been given to the Tribunal under s.465 of the Act, reports of completed investigations presented to the Tribunal under s.468 of the Act and action taken by the Tribunal in respect of those reports during that period.

PROCEEDINGS BEFORE THE TRIBUNAL

The legislation requires complaints of contraventions to be dealt with in the first instance by the Director-General of the Department. There is a procedure laid down by the Act.

The Director-General has powers to investigate a complaint or refer it to another authority for investigation. The Act requires that when the Director-General decides to investigate or refer the complaint for investigation to another authority the Tribunal must be notified.

The Tribunal's functions are initiated by either a Report presented to the Tribunal by the Director-General or a Report received by the Director-General from another authority and presented by the Director-General to the Tribunal.

In either case the Tribunal, after considering the Report, may decide to conduct a hearing into the complaint, or it may decide, for reasons to be stated in writing, not to conduct a hearing. It may decide to refer the matter to

another authority to be dealt with if it considers that it is more appropriate that the authority deal with the matter and the authority agrees to the referral.

NOTICES OF INVESTIGATION

In the period to 30 June 1996 the Tribunal received from the Director-General three notices of decisions by him to investigate complaints.

The nature of the alleged contraventions under investigation in these cases was as follows:

1. **PIT4/1995** (Notice received 12 December 1995) - **Councillor Dianne Virginia Judge - Strathfield Municipal Council:** Alleged contravention of section 451 of Local Government Act, 1993 being failure to disclose her pecuniary interest in a development application being considered by a Council Committee meeting on 26 September 1995.
2. **PIT1/1996** (Notice received 8 February 1996) - **Former Councillor John Norman Frank Fisk - Burwood Council:** Alleged contravention of Part IV, Division 9A, section 46C of Local Government Act 1919 being failure to disclose his pecuniary interest in matters relating to a car yard and car sales business being considered by the Council at meetings held on 10 and 24 November 1992.
3. **PIT2/1996** (Notice received 14 May 1996) - **Councillor Bruce MacKenzie - Port Stephens Shire Council:** Alleged contravention of section 451 of Local Government Act 1993 being failure to disclose his pecuniary interest in matters relating to a development control plan and the associated Section 94 Contribution Plan that were being considered by the Council at a number of meetings in 1993 and 1994.

REPORTS OF INVESTIGATIONS - ACTION BY THE TRIBUNAL

The Reports of the Director-General's investigations received by the Tribunal during the period under review and the Tribunal's actions in respect thereof were as follows:

1. **PIT3/1994 - Councillor Wilton - Wollongong City Council** (Report received 23 June 1995, Supplementary Report received 1 August 1995).

This matter was referred to in the Tribunal's Annual Report 1995 (pp.10, 11). The complaint was that Councillor Graeme Leslie Wilton had failed to declare a pecuniary interest in a development application before the Council at meetings in November and December 1993. His pecuniary interest, if any, was not personal. It would have been derived from the offices he held as a trustee of the Kembla Grange Recreation Trust and a director of the Illawarra Turf Club Pty Limited both of which bodies were involved in or affected by the development application.

Further investigation into certain matters relating to those two bodies resulted in a supplementary report to the Tribunal which was received on 1 August 1995. The Tribunal then decided to conduct a hearing into the complaint and gave notice to the parties. The anticipated hearing was mentioned in the Tribunal's Annual Report 1995.

However, the hearing did not eventuate.

Councillor Wilton did not stand for re-election at the Local Government elections in September 1995 which occurred while preparations for the hearing were in progress. As Mr Wilton ceased to be a councillor before the hearing, the question arose whether, in the particular circumstances of his case, the public interest required that the proposed hearing should proceed.

The particular circumstances were, first, that he had no personal financial interest in the matters before Council in relation to the development application in question and nothing to gain or lose by the outcome; and, secondly, even if the Tribunal were to find at the

hearing that the complaint was proved, there being no illegality or impropriety other than a breach of section 451 associated with his actions, his conduct did not appear to warrant disqualification from civic office but only a reprimand or, at the highest, a period of suspension from civic office. Being no longer a councillor, suspension from civic office was not possible so it became a question whether, in the public interest, the hearing should be pursued when, if the complaint was proved, the only likely outcome was a reprimand. The Director-General was invited to make submissions. After considering those submissions and representations received from Mr Wilton's solicitors, the Tribunal reviewed the matter and, in the exercise of its discretion under section 469 of the Act, decided not to proceed to a hearing.

A Statement of Decision with detailed reasons dated 28 September 1995 was, pursuant to section 470 of the Act, furnished to the person who had made the complaint and the Director-General. Copies were furnished to Mr Wilton and the Wollongong City Council.

2. **PIT2/1995 - Councillor Niven - Orange City Council** (Report received 29 September 1995)

It was alleged that Councillor Niven had committed breaches of section 451 of the Local Government Act 1993 by failing to disclose a pecuniary interest in a development application and planning matters being considered at Council committee meetings in May 1994. The Acting Director-General made a formal complaint under section 460 and on 27 January 1995 authorised an investigation pursuant to section 462(1) of the Act. The Tribunal received the Report of this investigation on 29 September 1995.

After considering the Report the Tribunal decided not to conduct a hearing. A statement of this decision with reasons, dated 13 October 1995, was, pursuant to section 470, furnished to the Director-General.

Copies were provided to Councillor Niven and the Orange City Council.

The information in the Report showed that the sole basis for suggesting that Councillor Niven, a solicitor, had a pecuniary interest in the business before the Council was that a member of his firm was acting for a client who was objecting and threatening legal action against the Council if it should decide to install a median strip in Sale Street, Orange.

In the Tribunal's view, a person's pecuniary interest must relate to the matter with which the Council was concerned at the Council or Council committee meeting in question before the obligations of a Councillor under section 451 could arise.

The Tribunal concluded that (a) the material contained in the Report would fail to establish that the question of placing a median strip in Sale Street was a matter for consideration or decision at the Council committee meetings in question in this case and (b) the investigation left no reason to suppose that a hearing would produce any other evidence on that issue. Accordingly, there was not sufficient substance in the complaint to warrant a hearing.

It was discovered by the Director-General in investigating the above allegation against Councillor Niven that he and nine other Councillors of Orange City Council had lodged their pecuniary interest returns for the period ending 30 June 1993 after the due date. A formal complaint on this count was included as a separate item in the Report on Councillor Niven. The facts ascertained by the investigation disclosed that by an administrative error the Councillors had not been provided by the Council's administration with the necessary forms or reminded of their obligations to lodge returns until after the date for lodgment had expired. Councillor Niven had promptly responded to the reminder and lodged his return a short time later. The Tribunal decided that, on the facts in the Report, the breach did not warrant a

hearing. Both the Director-General and the Council had already taken steps to ensure that the administrative error would not be repeated.

The Tribunal's decision and reasons on the matter were included in its Statement dated 13 October 1995 referred to above.

3. **PIT1/1996 - Former Councillor John Norman Frank Fisk - Burwood Council** (Report received 28 May 1996)

The Report to the Tribunal relates to the investigation of which notice was received on 8 February 1996 (listed as No. 2 under the above heading "Notices of Investigation").

After considering the Report, the Tribunal decided to conduct a hearing. Notice was given to the parties on 6 June 1996.

(Proceedings were delayed for a short period by Mr Fisk's absence overseas but at the date of this Report a preliminary hearing on procedural matters has been held and the hearing has been set down for 30 September 1996).

INVESTIGATION OF COMPLAINTS BY DIRECTOR-GENERAL

As mentioned in the Tribunal's Annual Report 1995, when complaints are made to the Department the Director-General's general practice is to make preliminary inquiries before deciding to conduct an investigation under s.462 of the Act. The Director-General has a discretion under s.463 of the Act to decide to take no action concerning a complaint but only on certain specific grounds that are particularised in that section. One of the specific grounds is that the subject matter of the complaint does not warrant investigation. The preliminary inquiries assist the Director-General in exercising his discretion under s.463.

In the case of some complaints received under the new Act the Director-General will refer the results of his preliminary inquiries to the Tribunal and seek the Tribunal's comments before deciding how he will exercise his discretion. In such cases the Tribunal may consider it proper and helpful to

comment but it will do so only on the basis that it remains entirely within the Director-General's own discretion to decide the matter as he deems proper.

In the Tribunal's view this is an acceptable practice as it does not undermine the independence or integrity of the Tribunal and may assist in achieving the object of s.463 which is to avoid, in the public interest, unnecessary or unwarranted investigation of complaints.

The matters dealt with in this way in the period under review related to:

- **Byron Shire Council** (22 September 1995) - a self-reported possible breach of section 451 by a Councillor who professed to have been ignorant of the zoning of part of his land at the relevant time and conscientiously endeavoured to make amends for his breach immediately after becoming aware of his error.
- **Orange City Council** (16 October 1996) - failure by a number of Councillors to lodge pecuniary interest returns in due time contributed to by administrative deficiencies on the part of Council's administration, afterwards rectified with better administrative procedures adopted for the future.
- **Wyong Shire Council** (3 November 1995) - an arguable contravention by a senior officer of the Council of the obligations imposed upon Council staff as designated persons under sections 441 and 445 of the Act to disclose pecuniary interests in accordance with section 459. Any possible pecuniary interest of the officer in the matter would have existed only because of a tenuous financial interest of a relative. The officer, by a misconception on his part (which was accepted as genuine by the General Manager who had investigated the complaint in the first instance), did not appreciate that he could

have had a pecuniary interest within the meaning of the legislation.

- **Coffs Harbour City Council** (17 November 1995) - alleged failure by a Councillor to refrain from participation in a decision on a matter which would financially benefit a family member. The complaint was made by a member of the public based on the minutes of a Council committee meeting. The validity of the complaint could depend upon the accuracy or correctness of the form of the committee's resolution as recorded in the minutes or the manner in which the business for the meeting was presented to the members of the Council for decision. It appeared that the family member was already legally entitled to the financial benefit and no resolution by the Council was necessary to or could have affected that legal entitlement. Further investigation was considered desirable in this case.
- **Port Stephens Council** (8 February 1996) - This matter raised questions as to what considerations would be relevant in dealing with an alleged contravention of section 451 by a Councillor where, assuming that there may have been a pecuniary interest, the Councillor's participation could have been contrary, or without regard, to his own interests.
- **Nymboida Shire Council** (1 April 1996) - Possible breaches of the pecuniary interest provisions of the Act by Councillors and Council officers in relation to three different matters. The first related to proposed amendments to a local environmental plan and posed the possibility of breaches by all the Councillors then in office and one of the Council's senior staff because of their respective ownership of lands in the relevant area. All of the Councillors and the staff member rejected the view that they might have had pecuniary interests in the proposal and there were grounds on which their beliefs

could have been genuinely based. There was room in the wording of the material provisions of the Act for considerable confusion and uncertainty as to the meaning and intent of those provisions. (This has since been the subject of recommendation by the Director-General to the Minister for amendments to clarify the legislation.)

The second matter raised the question whether a Councillor and a senior staff member had pecuniary interests in issues before the Council concerning the operation of a cattle feedlot in the vicinity of their respective lands. The existence of the suggested pecuniary interests depended on whether or not the outcome of the Council's consideration of the issues was capable of affecting the value of the land owned by the Councillor and the staff member respectively. Directed to this question, the investigation had found contradictory opinions, insubstantial grounds for contending for a detrimental effect on value and only speculative arguments as to any effect on value. The third matter related to a number of deficiencies in the completion of the pecuniary interest returns required by sections 444 and 445 of the Act. The nature of the deficiencies suggested ignorance or carelessness not unique at the time to Councillors and officers of that particular Council. The Director-General and the officers of the Department had already embarked on implementing recommendations designed to dispel any such ignorance of the Act's requirements and to heighten the awareness of their obligations on the part of Councillors and staff.

- **Oberon Shire Council** (16 April 1996) - A possible breach of the pecuniary interest provisions by a senior staff member of the Council in performing duties for the Council in relation to a matter in respect of which the staff member had a financial

interest in the outcome of the Council's deliberations. Matters relating to the Director-General's powers and the public interest in pursuing an investigation of the matter were raised.

OUTSTANDING COMPLAINTS

The Investigations & Review Branch of the Department has reported to the Tribunal that, including the three investigations under section 462 of which notice has been given to the Tribunal as mentioned earlier in this Report, twenty-six new complaints under section 460 of the Act were received in the twelve months to 30 June 1996.

In the same period there were six complaints carried over from the previous year, making thirty-two in all. Their status as at 30 June 1996 was as follows:

- 12 were declined formal investigation.
- 15 were undergoing preliminary inquiries (no notice to the Tribunal under section 465 having yet been given).
- 3 were subject to formal investigation under section 462 (continuing).
- 2 were the subject of reports to the Tribunal under section 468.

ACKNOWLEDGMENT

The Tribunal continues to receive the benefit of full support and assistance from the Director-General, Officers of the Department and the Tribunal's staff, for which, once again, I express my appreciation.

Dated: 22 August, 1996



K J HOLLAND Q.C.

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