

**LOCAL GOVERNMENT
PECUNIARY INTEREST TRIBUNAL**

ANNUAL REPORT 1998

14 July 1998

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The Local Government Pecuniary Interest Tribunal was established by the Local Government Act 1993 which commenced on 1 July 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 financial 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 declare and refrain from taking part in decisions on Council matters in which they have a pecuniary interest.

If a contravention is proved, 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. On 9 February 1997 I was re-appointed for a further 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 1997 to 30 June 1998. 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 1 July 1997 to 30 June 1998 the Tribunal received from the Director-General four notices of decisions by him to investigate complaints.

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

1. **PIT3/1997** (Notice received 8 July 1997) – **Councillor Barry Noel Cotter, Mayor, Marrickville Council:** Alleged contravention of section 449(3) of Local Government Act, 1993 by failure to disclose certain interests in Returns as required under that section for the periods 1993/1994, 1994/1995 and 1995/1996.
2. **PIT4/1997** (Notice received 5 September 1997) – **Councillor Donald John Fern – Bega Valley Shire Council:** Alleged contravention of section 451 of Local Government Act, 1993 by failure to declare a pecuniary interest and participation as a Councillor at Council Meetings held in November 1995, April and May 1996 in the matter of removal by the Council of a moratorium previously placed by the Council on all development at Tathra and the Tathra River Estate requiring sewerage.
3. **PIT5/1997** (Notice received 23 September 1997) – **Councillor Richard Harold Hamparsum – Kempsey Shire Council:** Alleged contravention of section 451 of Local Government Act, 1993 by failure to declare a pecuniary interest and participation as a Councillor at Council Meetings held on 3 and 24 June 1997 relating to an issue as to whether the Council should re-imburse him for expenses incurred by him in obtaining legal advice for himself and the purchase of telephone answering machine equipment.

4. **PIT6/1997** (Notice received 10 December 1997) – **Councillor I J Burrell, Gilgandra Shire Council**: Alleged contravention of section 451 of the Local Government Act, 1993 by participation as a Councillor in a matter before the Council at a meeting on 17 April 1997 concerning inclusion of land owned by a relative of Councillor Burrell within amended zoning boundaries under the Council's draft Local Environmental Plan.

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. **PIT3/1996 – Councillor Jillianne Patricia Deering – Sutherland Shire Council** (Report received 18 February 1997)

This was a complaint made by a fellow Councillor that Councillor Deering had contravened section 449(1) of the Local Government Act, 1993 by failing to lodge the prescribed return of her interests within 3 months of her election to Council on 13 September 1995. (The matter was mentioned in the Tribunal's Annual Report 1997: p.3, para.1; p.10, para.5)

A hearing into the complaint was necessitated by the fact that Councillor Deering, whilst claiming that she could not recollect lodging her Return, declined to admit that she had not done so and relied on circumstances which, she suggested, indicated that she may have done so. The issues thus raised involved members of Council staff. Two of the Council's officers who were witnesses became legally represented at the hearing for the purpose of protecting their reputations and career interests. The matter became complicated and, after a preliminary hearing on 24 March 1997, required four days to complete, 1, 2, 22 May and 30 June 1997.

The Tribunal found that the complaint was proved and ordered that Councillor Deering be suspended from civic office for two months (1

September to 31 October 1997). Its Statement of Decision under section 484 of the Act was published to the parties and the complainant on 21 August 1997.

2. **PIT1/1997 – Councillor David York – Barraba Shire Council** (Report received 4 September 1997)

This matter was mentioned in the Annual Report 1997, p.4, para.6.

The Director-General made a complaint that Councillor York may have contravened section 451 of the Local Government Act, 1993 by reason of his participation in the consideration and discussion at Council meetings on 24 January and 9 February 1996 of matters relating to the future use of the Barraba Post Office Building in respect of which he had declared a pecuniary interest.

The Director-General's investigation established that Councillor York's pecuniary interest arose from negotiations between Councillor York and a proposed licensee from Australia Post for the rental of a building owned by Councillor York in which postal services could be provided by the licensee in the event that current negotiations with Australia Post for the use by the licensee of the existing post office building should fail.

The Report also established that Councillor York's personal interest was in retaining the existing post office building for Barraba's postal services and that his purpose in offering his own building for rent was only as an alternative. He had disclosed his dealings with the proposed licensee to the Council but could not resist having input to the debate to support, against his own financial interest, the retention of postal services in the existing post office building.

Councillor York did not dispute any of the evidence found by the investigation. He admitted that he was wrong and in breach of the Act. He explained that he had acted "in the heat of the moment" out of frustration with Australia Post, regretted his action and apologised.

On the basis of the Report the Tribunal decided to conduct a hearing into the complaint but, as the relevant facts did not appear to be in dispute, to proceed by offering the parties the option of accepting as

correct the facts set forth in a Statement of Prima Facie Facts prepared by the Tribunal so as to avoid the necessity of a full hearing. The parties were invited to attend the hearing and make oral submissions or make written submissions if they wished.

The parties accepted the Tribunal's statement of the facts after which the Tribunal informed the parties of findings which the Tribunal proposed to make at the hearing. Councillor York notified the Tribunal that he did not intend to make any submissions and would not attend the hearing. The Director-General advised the Tribunal that a representative of his Department would attend the hearing to assist the Tribunal as required but would not make any submissions.

The hearing, held on 2 October, thus became formal and brief. The Tribunal found the complaint to be proved and having regard to all the circumstances ordered that Councillor York be reprimanded for his breach of the Act.

3. **PIT5/1996 – Councillor David John Redmond and PIT6/1996 – Councillor Thomas White – Sutherland Shire Council** (Report received 12 September 1997)

These matters were mentioned in the Annual Report 1997, p.3, paras 3, 4.

A complaint against both councillors was made by a fellow councillor alleging that they had contravened section 451 of the Act by participating in a number of Council meetings held between 15 April 1996 and 17 February 1997 on a controversial question before the Council whether to construct a public northern access road from Bundanoon Road, Woronora Heights, to The Crescent, Woronora. Councillors Redmond and White each owned and resided in residences in Woronora Heights by reason of which it was alleged that they had pecuniary interests in the question.

The validity of the complaint turned on the issue whether their property values were liable to be affected by the outcome of the question before the Council. The Department's investigating officers had investigated

that issue. Having considered the Director-General's report of the Investigation the Tribunal concluded that there was no reasonable prospect that it could be established at a hearing on a balance of probabilities that there was a reasonable likelihood or expectation that the property values would or might be affected by a decision of the Council on the matters in question at the relevant meetings. For this reason the Tribunal decided not to conduct a hearing. Its Statement of Decision was published on 4 November 1997.

4. **PIT2/1997 – Councillor John Frederick Miller – Orange City Council**
(Report received 17 September 1997)

This matter was mentioned in the Annual Report 1997, p.4, para.7. The Director-General made a complaint that Councillor Miller may have contravened section 451 of the Local Government Act, 1993 by reason of his failure to declare a pecuniary interest and his participation in meetings of the Council held on 7 and 21 November 1996 concerning a proposal before the Council that the Council provide financial assistance to the Orange Chamber of Commerce and Industry (OCCI) in a campaign to promote the idea of people doing their shopping at Orange. The alleged pecuniary interest was not personal to Councillor Miller but was derived, by virtue of the provisions of sections 442 and 443, from his position as elected Secretary of the OCCI and his employment as sub-editor of the Central Western Daily (CWD), an Orange local newspaper. Both OCCI and CWD stood to gain financially in the event that the Council resolved to provide the financial assistance sought for the proposed campaign.

From the material in the Director-General's Report, the basic facts did not appear to be in dispute. The Tribunal followed a similar course to that followed in Councillor York's case (PIT1/1997 – see para. 2 above).

The parties accepted as correct the Tribunal's Statement of Prima Facie Facts and the procedure proposed. Councillor Miller furnished written

explanations and submissions and appeared at the hearing on 19 November 1997 in person. Written submissions were furnished on behalf of the Director-General who was represented at the hearing by a legal officer of the Department.

The hearing was brief and formal, neither party wishing to take the opportunity to tender further material or submissions.

The Tribunal's Statement of Decision was published on 20 November 1997.

On the basis of the material in the Director-General's Report and Councillor Miller's admissions, the Tribunal found that the complaint had been proved.

Councillor Miller had demonstrated confusion and misunderstanding of his obligations in respect of derivative pecuniary interests in matters arising at Council meetings where he had no personal financial interests and had previously disclosed related interests in his Returns under section 449 of the Act. He pleaded honest mistake and expressed regret. Intending no future breaches he had notified the OCCl that he would not seek re-election to the office of Secretary. However, Councillor Miller appeared to consider that his contraventions were only a "technical" breach. The Tribunal counselled Councillor Miller against the wisdom of adopting such an attitude to his statutory obligations as a Councillor and ordered that he be severely reprimanded.

5. **PIT7/1996 – Mr Leigh Robins, Director of Technical Services, Oberon Council** (Report received 2 October 1997)

This complaint was mentioned in the Annual Report 1997, p.4, para. 5.

The complaint came to the notice of the Director-General via the Ombudsman and the Minister for Local Government after complaints made by the Oberon Ratepayers Association and representations to the Minister by the Honourable R J Clough, M.P., Member for Bathurst.

Mr Robins and his wife had purchased land on the eastern side of Blenheim Avenue, Oberon for the purpose erecting a residence thereon. There was then no sewerage service to which a residence on the block could be connected. The Council had under consideration the provisions of a sewerage system to which properties in Blenheim Avenue could be connected. In his capacity as Director of Technical Services Mr Robins came to be dealing with that matter for the Council in the course of his duties.

The complaint against him was that, being a designated person under the Local Government Act, 1993, he failed to comply with section 459(1) of the Act which required him to disclose in writing to the Council's General Manager any pecuniary interest he had in any Council matter with which he was dealing. Subsection (2) of that section required the General Manager, in that event, to deal with the matter or refer it to another person.

The Director-General's Report to the Tribunal of his investigation disclosed that both Mr Robins and the General Manager had assisted the Department's investigators in establishing the facts, as to which there was no dispute, and that the facts demonstrated that a breach of section 459 had occurred. The report also contained a full account of the circumstances in which the breach occurred.

The proposal to provide the sewerage system was not initiated by Mr Robins. It was already under consideration when he was appointed to his position which was shortly after the 1993 Act came into force.

Neither Mr Robins nor the General Manager had become aware of the requirements of section 459(1) of that Act at the time of the events in question. When the proposal came before the Council on 13 December 1993, Mr Robins advised the meeting that he had a pecuniary interest in the matter because he had recently purchased land in Blenheim Avenue on a loan from the Council made pursuant to a Council scheme to encourage new staff to live in the Council area. The Council had taken a mortgage of the land to secure the loan.

All of the Councillors confirmed to the investigators that they knew or were made aware by Mr Robins at that meeting of his pecuniary interest in the matter but they all desired him to remain at the meeting because they needed his expertise on the subject and they told him that, as senior Council officer responsible in that area, he had a duty to continue to deal with the matter. Both Mr Robins and the General Manager told the Investigators that, in their ignorance of section 459 of the new Act, they believed that Mr Robins' obligations of disclosure had been complied with by his disclosure to this meeting.

As the breach of the Act was admitted, the only question left for determination by the Tribunal at a hearing was whether the Tribunal's powers under section 482 of the Act should be exercised. There is no power of direct action by the Tribunal against a Council employee, the Tribunal can only recommend to the Council specified disciplinary action or dismissal. In the Tribunal's view the circumstances did not warrant a recommendation of dismissal. However, in the Tribunal's view, Mr Robins deserved to be reprimanded for his failure properly to inform himself as a senior Council officer of his statutory obligations in dealing with Council matters in which he had a financial interest; but, in the present case, that would require the Council itself to administer the reprimand. As the Council itself, knowing all the facts, had condoned and encouraged the conduct of Mr Robins that constituted the breach, it seemed to the Tribunal somewhat farcical for it to be recommending to the Council that it take such action against Mr Robins. As it seemed to the Tribunal that there was no appropriate action the Tribunal could take against Mr Robins if a hearing were to take place, the Tribunal decided not to conduct a hearing into the complaint.

The Tribunal's Statement of Decision was published to the parties, the Ombudsman and other relevant persons on 23 October 1997.

6. **PIT4/1997 – Councillor David John Fern – Bega Valley Shire Council** (Report received 15 October 1997)

This matter was originated by a complaint made pursuant to the Protective Disclosures Act 1994 to the Independent Commission Against Corruption which referred it to the Director-General pursuant to section 464 of the Local Government Act, 1993. That section requires the Director-General to deal with it as a formal complaint under that Act. The Bega Valley Shire Council had passed a resolution imposing a moratorium on all development at Tathra, and a large area of land called the Tathra River Estate, requiring sewerage. Under the terms of the resolution, apart from certain specified exceptions, no development requiring sewerage was to be permitted except by express resolution of the Council. The moratorium had been promoted by local interests because of reported deficiencies in the ability of the local sewerage system to cope with the demand at peak periods and claims that the Tathra River Estate lands were an environmentally sensitive area.

The complaint against Councillor Fern was that he had been a real estate agent at Tathra until he was elected to the Council at which time he passed his real estate agency over to his son who was continuing to operate it when, as Councillor, he attempted at Council meetings to have the moratorium removed. It was alleged that, by reason of his connections with and his son's financial interest in the real estate agency and his, his son's and the agency's connections with the developers who owned the Tathra River Estate, Councillor Fern had a pecuniary interest under sections 442 and 443 of the Act in the removal of the moratorium because it inhibited development and property sales generally and development of the Tathra River Estate lands in particular, thereby diminishing the prospects of earning real estate agent's commissions.

On the basis of the material presented to the Tribunal in the Director-General's Report of the investigation the Tribunal decided to hold a hearing into the complaint.

After a preliminary hearing in Sydney, further hearings to receive oral evidence from local witnesses were held in Cooma on 9 and 10 February 1998. Oral submissions commenced in Cooma were afterwards pursued in writing to the Tribunal in Sydney.

The Tribunal found on the whole of the evidence that at the relevant time Councillor Fern did not have any financial interest in the real estate agency in which he had been involved prior to his election to the Council or to which his son had succeeded and did not otherwise have any prospects of financial gain or loss arising out of the action he took in relation to the moratorium.

On the question whether, under section 443, Councillor Fern had a derivative pecuniary interest because his son had a financial interest in having the moratorium removed, the Tribunal found that although at the relevant time the son had a general financial interest in the moratorium being removed, his prospects of being able to earn a commission or other remuneration as a real estate agent in relation to the lands and properties affected by the moratorium were, within the meaning of section 442(2) of the Act, so remote that they could not reasonably be regarded as likely to influence the decision a person might make in relation to the matter and, consequently, the son did not have a pecuniary interest within the meaning of the Act.

As it followed from the foregoing findings that Councillor Fern did not have a pecuniary interest, the complaint against him was not proved and the complaint was dismissed.

The Tribunal's Statement of Decision was published on 13 March 1998 to the parties, the Independent Commission Against Corruption and the Bega Valley Shire Council.

7. PIT5/1997 – Councillor Richard Harold Hamparsum – Kempsey Shire Council (Report received 23 February 1997)

The Director-General made a complaint against Councillor Hamparsum following information received from the Council's General Manager.

Councillor Hamparsum was alleged to have been in attendance at meetings of the Council on 1 and 24 June 1997 concerning a claim for reimbursement of certain expenses incurred by him and to have contravened section 451 of the Act by failing to declare his pecuniary interest and discussing and voting on motions in relation to the matter.

The Director-General's Report of the investigation into the complaint established that the conduct complained of occurred during a turbulent period of division within the Council as well as public controversy concerning the renewal of the General Manager's contract of service with the Council. A threatening letter directed against a particular Councillor had received press publicity. The General Manager had engaged security staff and equipment to survey and conduct security checks on persons attending one of the Council's meetings. Councillor Hamparsum had made a complaint to the Mayor of a breach of confidentiality by the particular Councillor, alleging that the Councillor had conveyed to outsiders remarks made by Councillor Hamparsum during a confidential session of a Council meeting. Councillor Hamparsum reported to the police that he had received and he and his wife were disturbed by abusive telephone calls from two women concerning the threatening letter and the controversy in the Council. Councillor Hamparsum had sought urgent legal advice from his own solicitor concerning the alleged breach of confidentiality and the threatening letter. He had also purchased, on the advice of the police he claimed, a voice recording machine which could tape any further malicious telephone calls. He subsequently claimed reimbursement from the Council of the amount of the legal fees and the cost of the recording machine which he had incurred. This was on the basis that the expenditure arose out of Council business and the performance by him of his civic functions and duties as a Councillor. By a majority of five to three, the Council resolved that Councillor Hamparsum be reimbursed "as a one-off payment and that all such future payments to Councillors

be in accordance with Council policy.” Councillor Hamparsum voted in favour of the motion. The “policy” referred to was, in the Tribunal's view, the central issue in determining the validity of the complaint.

On the undisputed facts established by the investigation a finding that Councillor Hamparsum had, within the meaning of the Act, a pecuniary interest in the matter before the Council would be inescapable; but the question which arose was whether he was excused from full compliance with section 451 by section 452(e) which provides that section 451 does not prevent a person from taking part in consideration or discussion of, or from voting on, any question “relating to the payment of fees and expenses and the provision of facilities to Councillors.”

Sections 252 to 254 of the Act require Councils to adopt, after following a public notice procedure, a policy concerning the payment of expenses incurred or to be incurred by, and the provision of facilities to, Councillors in relation to discharging the functions of civic office. The Kempsey Shire Council had adopted such a policy but it did not extend to reimbursement of expenditure of the kind claimed by Councillor Hamparsum.

A question of interpretation of the Act thus arose as to whether section 452(e) should be construed as excusing compliance with section 451 in relation to any question before the Council as to the payment of expenses or the provision of facilities to Councillors or only in relation to a question as to the payment of expenses and the provision of facilities specified in the policy referred to in sections 252 to 254 of the Act.

This, in the Tribunal's opinion, is a debatable question but one which the Tribunal had to consider and decide in order to determine the complaint against Councillor Hamparsum. For the reasons set forth in its Statement of Decision, the Tribunal decided that, being perfectly general, the words of section 452(e) ought to be interpreted as intended to apply to any question being considered by a Council which would

answer the description contained in those words considered at large. Therefore, they could not be confined to only expenses and facilities as described in the policy which had been adopted by Kempsey Shire Council.

The Tribunal concluded that although Councillor Hamparsum had a pecuniary interest in the matter in question he was excused by section 452(e) from compliance with section 451 of the Act in relation to participation in debate and voting on the matter. Although, taking section 452(e) literally, he was not excused from declaring his interest at a meeting, his pecuniary interest in the matter at issue was self-evident in the form of the motion under consideration. For these reasons the Tribunal decided not to conduct a hearing into the complaint.

The Statement of Decision by the Tribunal was published on 24 March 1998.

8. **PIT3/1997 – Councillor Barry Noel Cotter – Mayor, Marrickville Council** (Report received 11 June 1998)

The complaint against Mayor Cotter is referred to in this Annual Report under the heading Notices of Investigation, page 3, para.1.

The matter is still current before the Tribunal. The Tribunal has decided to conduct a hearing into the complaint, notice of which was given to the parties on 2 July 1998. The future course of the proceedings depends on the response of the parties to a procedure to deal with the complaint which the Tribunal has proposed for their consideration. Their responses are due by 24 July 1998.

OUTSTANDING COMPLAINTS

The Investigations & Review Branch of the Department has reported to the Tribunal that twenty (20) new complaints under section 460 of the Act were received in the twelve months to 30 June 1997.

In the same period there were twelve complaints carried over from the previous year, making thirty-two (32) in all. Their status as at 30 June 1998 was as follows:

- 21 were declined formal investigation.

- 9 were undergoing preliminary inquiries (no notice to the Tribunal under section 465 having yet been given).
- 2 were subject to formal investigation under section 462 of which 1 is continuing and 1 was the subject of a report to the Tribunal under section 468.

[NOTE: Seven (7) matters that were the subject of continuing investigation as at 30 June 1997 resulted in reports to the Tribunal under section 468 which were finalised by decision of the Tribunal during the year and are included in this Report under “Reports of Investigations – Action by the Tribunal”, pp. 4 – 15)

AMENDMENTS TO LEGISLATION

DEFAMATION ACT 1974

Arising out of proposals within your department to publish the Tribunal's decisions on the Department's Homepage on the Internet, consultations took place between the Legal Branch of the Department and the Tribunal which culminated in amendments to the Defamation Act, 1974 to protect publications of the Tribunal and any reporting of those publications. The amendments were made by the Local Government Amendment Act, 1997 which commenced on 18 July 1997.

LOCAL GOVERNMENT ACT 1993

The Legal Branch of the Department also consulted with the Tribunal on amendments to the pecuniary interests provisions of the Local Government Act, 1993 which were proposed by the Department in August 1997. Subsequently, a number of amendments to those provisions was made by the Local Government Amendment Act, 1998 which commenced on 22 June 1998.

POWER TO DISPENSE WITH HEARING

Reports to the Tribunal by the Director-General of the investigation of complaints have included a number of cases where the facts were not in dispute, the alleged contravention was admitted, the only question to be determined was penalty and the public interest did not appear to the Tribunal to require a public hearing to be held to dispose of the complaint. In such

cases the hearing required under the Act can become a mere formality as was the case in relation to the complaints against Councillors York and Miller earlier mentioned in this Annual Report. There have been other similar cases.

On 4 December 1997 the Tribunal proposed for consideration by the Department's Legal Branch and the Director-General amendments to the Local Government Act, 1993 which would allow the Tribunal a discretion in certain cases to dispose of a complaint without conducting a hearing. The amendments proposed contain provisions to safeguard the interests of the parties and the public interest, including undisputed facts, the consent of the parties, the absence of public interest considerations requiring a hearing and publication in the local press to the effect that the complaint had been dealt with without a hearing and that a copy of the Tribunal's decision was available from the Tribunal.

On 3 April 1998 the Director-General advised the Tribunal that, following consultation with the Independent Commission Against Corruption and the Attorney-General's Department, the Tribunal's proposal will be included in your review of the act which will take place later this year pursuant to section 747 of the Act.

ACKNOWLEDGMENT

The Tribunal's appreciation and thanks are due to the Director-General, the Officers of your Department and the Tribunal's own staff for the full measure of support and assistance received by the Tribunal in the performance of its functions.

Dated: 14 July 1998



K J HOLLAND Q.C.

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL