

LOCAL GOVERNMENT

PECUNIARY INTEREST TRIBUNAL

ANNUAL REPORT 2004

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 complaints 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, senior staff and other designated persons are required to disclose their pecuniary interests and refrain from taking part in decisions on Council matters in which they have a pecuniary interest.

If a complaint of 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 11 April 2001 I was appointed to hold the office for a period of five 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 2003 to 30 June 2004. 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 steps 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 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 2003 to 30 June 2004 the Tribunal received from the Director-General one notice of decision by him to investigate a complaint:

1. **PIT 1/2004** (Notice received 3 May 2004) - **Councillor Ian Longbottom, Lane Cove Council** - Alleged contravention of s.449 of the *Local Government Act 1993* in that he failed to lodge his 2001-2002 pecuniary interest return by 30 September 2002.

REPORTS OF INVESTIGATIONS - ACTION BY TRIBUNAL

There have been no Reports of the Director-General's Investigations received by the Tribunal during the period under review. The Tribunal's actions in respect to reports referred to in the Tribunal's 2003 Annual Report are as follows:

1. PIT 2/2001 (Notice received 18 December 2001) - Councillor Christopher Gulaptis, Maclean Shire:

This matter was referred to in the Tribunal's Annual Report 2003 at page 4 and involved allegations of alleged contraventions of s.451 of the *Local Government Act 1993* concerning a decision that a Gulmarrad s.94 Road Contribution Plan be prepared, a decision by the Council to acquire certain land from Dovoni Pty Ltd, and an application by Australian Indigenous Christian Ministries Ltd for the establishment of a recreation establishment at Ashby.

On 29 October 2002 the Tribunal determined to conduct proceedings into the complaints and issued a Notice of its decision. Thereafter Councillor Gulaptis made an application to the Tribunal that the proceedings be summarily dismissed without a hearing on the basis that there was no case to answer.

Following submissions from the Department and further submissions by Councillor Gulaptis, the Tribunal determined that the application for summary dismissal be refused.

The proceedings were subsequently conducted, evidence presented and submissions made by both the Department and by Councillor Gulaptis.

The first complaint arose out of the fact that Councillor Gulaptis and his wife beneficially held one half of the issued capital of Silkpen Pty Limited, which in turn beneficially held 50% of the capital of Lanai Pty Limited, which owned certain land in Gulmarrad. The issue was whether Councillor Gulaptis, by virtue of shareholding in Silkpen Pty Limited and its shareholding in Lanai Pty Limited, had a reasonable likelihood or expectation of

appreciable financial gain or loss from a decision by the Council to prepare a s.94 Road Contributions Plan for the Gulmarrad area.

The Tribunal concluded that the existence of the Plan itself did not result in any reasonable likelihood or expectation of appreciable financial gain and that even if the roadworks identified in a planning report had in fact been carried out, the evidence did not satisfy the Tribunal that there would have been any appreciable impact on land values, let alone any that would translate into Councillor Gulaptis' share value.

The second complaint concerned the fact that Councillor Gulaptis had, until April 2000, been an employee of a local firm of surveyors, known as Gulaptis & Smith Pty Limited. Any interest previously held by him or his wife, either as shareholders or directors, ceased. Thereafter, he had, from time to time, carried on some consulting work for the company at its request. Whilst employed by Gulaptis & Smith Pty Limited, he had carried out work for a company called Dovoni Pty Ltd, but he had not done any work for that company since early 1999.

On 19 January 2001 a Council meeting considered a report concerning the acquisition of certain land owned by Dovoni Pty Ltd. Councillor Gulaptis was present and did not declare a pecuniary interest in the matter and indeed, voted in favour of the Resolution.

The Tribunal was not satisfied that there was any reasonable likelihood or expectation of appreciable financial gain to Councillor Gulaptis arising because of the perceived ability of Gulaptis & Smith Pty Ltd to obtain approval on matters before the Council, in circumstances where Gulaptis & Smith Pty Ltd had no involvement at all in the Dovoni Pty Ltd matter before the Council at the meeting in question.

The third complaint concerned Australian Indigenous Christian Ministries and a development application by that company before the Council on 11 April 2001 for the establishment upon certain land of a recreation establishment. As at that date, Councillor Gulaptis and his wife had ceased to be shareholders in Gulaptis & Smith Pty Ltd and Councillor Gulaptis had ceased to be a director of that company. Councillor Gulaptis had

not had any previous involvement with the Applicant before the Council.

The Tribunal was not satisfied that merely being an occasional consultant to Gulaptis & Smith Pty Limited was sufficient for Councillor Gulaptis to have any pecuniary interest in the matter before the Council.

Further, the Tribunal was satisfied that any interest which he may have had was so remote or insignificant that it could not reasonably be regarded as likely to influence any decision he might make in relation to the matter then before the Council.

2. PIT 1/2000 (Notice received 11 June 2000) - Councillor Carmel Del Duca, City of Canada Bay Council:

The matter was referred to in the Tribunal's Annual Report 2003 at page 4 and involved an allegation that Councillor Del Duca failed to complete and lodge a written return within the prescribed period of time under s.449(1) of the *Local Government Act 1993*.

During the period covered by this report, a hearing was conducted into this matter, evidence taken and submissions received. The Tribunal was not able to be satisfied, one way or the other, as to whether Councillor Del Duca had placed the preliminary Pecuniary Interest Return in an unaddressed envelope on the General Manager's papers at some Council meeting, as contended for by Councillor Del Duca.

The Tribunal concluded that even if that had occurred, then Councillor Del Duca had not satisfied her obligations under s.449 of the *Local Government Act 1993* to "lodge with the Manager" the Return, and that the Return had not been "completed". In so concluding there were various dates on the form which had been left blank.

The Tribunal concluded that the concept of "lodging a Return" involved a degree of formality and the concept of actual receipt of the form by the General Manager. To merely send such a return to the General Manager by post or, in the instant case, to place it amongst his work papers, did not, of itself, constitute evidence that the document had

been "lodged" in the sense of physically deposited with him.

In the circumstances, the Tribunal ordered that Councillor Del Duca be reprimanded for her breaches of the Act.

3. PIT 3/2001 (Notice received 10 December 2001) - Councillor Brian Eichorn, Uralla Shire Council:

This matter was referred to in the Tribunal's Annual Report 2003 at page 5 and involved allegations of alleged contraventions of s.451 of the *Local Government Act 1993* concerning the purchase and sale by the Council of certain property and the marketing of that property for sale.

In the period covered by this Annual Report, a hearing into the allegations concerning Councillor Eichorn was conducted. The issue that arose did so because at the time in question, Councillor Eichorn's wife and their son were the directors and shareholders of a real estate company known as Brian Eichorn & Co Pty Limited. Councillor Eichorn's personal directorship and shareholding in the company ceased as at 31 August 1988. There was a property in the Uralla Shire called "Lakeview". The vendor's agent on the proposed sale of this property was Brian Eichorn & Co Pty Limited.

The Council at a meeting on 23 February 2001 was considering, in substance, proposals that the Council provide short term financial assistance to the proposed purchaser of the property. Councillor Eichorn was present at the meeting and took an active part in the discussions prior to him declaring a pecuniary interest, because of his family's involvement in Brian Eichorn & Co Pty Limited. This discussion took place when the Standing Orders for the meeting had been suspended. It was submitted on behalf of Councillor Eichorn that the suspension of Standing Orders and the lack of a formal motion actually before the meeting was sufficient for there to be no relevant discussion/consideration upon which a breach of s.451 could be founded. The Tribunal rejected that submission. The Section speaks in the widest terms of "any matter with which the Council is concerned" and, as a matter of construction of the Act, there is no

justification for limiting "matter" to discussions or considerations that take place in the context of a formulated Motion or Resolution, or while Standing Orders are not suspended.

It was also submitted, on behalf of Councillor Eichorn, that he had complied in fact with a Code of Meeting Practice adopted by the Uralla Shire Council. The Tribunal emphasised that as a matter of law a Code of Meeting Practice cannot be contrary to or modify the impact of the *Local Government Act* and the obligations cast upon Council members. It also held that, in any event, Councillor Eichorn in fact had not complied with the Code of Meeting Practice.

The Tribunal, accordingly, found that the breach of the Act contended for had been made out.

The second ground of complaint concerned an expression of interest by Rod Eichorn Estate Agencies Pty Limited (in which Councillor Eichorn's wife and sons were shareholders) to provide marketing advice in respect of the Lakeview property.

At the meeting in question the Council had before it a report from the Acting General Manager, recommending, in substance, that the appointment of an agent to sell Lakeview be deferred, but that certain advice concerning one of the parties providing an expression of interest be sought from the Council's solicitors.

The Tribunal was not satisfied that there was a causal relationship between the possible outcomes of the question of whether or not to seek further information from the Council's solicitors and the present or future financial welfare or prospects of Councillor Eichorn's wife and sons. This complaint was accordingly dismissed.

The third complaint involving Councillor Eichorn concerned a meeting discussing the advice which Council had received, and also the question of selection of an agent to be charged with the sale of the Lakeview property and the method of placing the property on the market. Councillor Eichorn declared a pecuniary interest at the commencement of

the item of business but nevertheless, whilst still Chairman of the Council meeting, addressed the Councillors on the matter before the Council and in particular, the most appropriate method of marketing the property. He did so, the Tribunal found, in breach of s.451 of the *Local Government Act 1993*. To the extent to which Councillor Eichorn relied upon the Code of Meeting Practice, the Tribunal held that he had, in any event, not complied with it.

The Tribunal's decision in relation to what consequences ought to flow from these findings will be reported in the next Annual Report.

4. PIT 4/2001 (Notice received 10 December 2001) - Councillor Peter Kemper, Uralla Shire Council:

This matter was referred to in the Tribunal's Annual Report 2003 at pages 5 and 6 and involved alleged breaches of s.451 of the *Local Government Act 1993* concerning the purchase and sale of certain real estate.

Councillor Kemper was an employee of Brian Eichorn & Co Pty Limited. That company was the vendor's agent on the proposed sale of the property "Lakeview". That company, as the vendor's agent, stood to gain an agency commission in the vicinity of \$20,000 in the event that the sale went ahead. At a Council meeting on 23 February 2001, when the Standing Orders were suspended and after they were resumed, there were discussions concerning the proposed sale and purchase of Lakeview. Councillor Kemper took part in the consideration and discussions on that subject matter.

On the evening of 22 February 2001, Councillor Kemper had purported to resign as an employee of Brian Eichorn & Co Pty Limited, so as to put beyond question any matter concerning his pecuniary interest. The Tribunal held that as at the time of the Council meeting on 23 February 2001, the resignation was not effective and accordingly, Councillor Kemper was still employed by the proposed vendor's agent. As such, he should not have participated as he did.

As in the case of Councillor Eichorn, above, the Tribunal rejected a submission from Councillor Kemper that because the Standing Orders were suspended, and there was no formal Motion before the Council, there could be no consideration or discussion of a matter within s.451.

The Tribunal also, in the case of Councillor Kemper, reiterated that the Code of Meeting Practice could not in any way alter, modify or affect the statutory obligations of the Council under s.451 of the *Local Government Act 1993* and that, in any event, Councillor Kemper had not complied with it.

The General Manager of Uralla Shire Council sought advice from the Department of Local Government concerning a person in the employ of a local real estate agent in an attempt to clarify, in his mind, the "remoteness test" set out in s.442(2) of the *Local Government Act 1993* in circumstances where it was clear to the Tribunal that both the General Manager and Councillor Kemper were labouring under a misapprehension as to the meaning of that Section which had been discussed by this Tribunal in the case of *Councillor Fern, Bega Valley Shire Council* (PIT No.4/1997, 13 March 1998).

The Department responded to the General Manager's letter and expressly drew attention to *Fern's* case and advised that a copy of it could be obtained on the Internet.

Notwithstanding this advice and the fact that the "remoteness test" did not apply as Councillor Kemper thought it did, he resumed employment with Brian Eichorn & Co Pty Limited and attended three further meetings of the Council and participated in discussions where his employer, Brian Eichorn & Co Pty Limited was either the exclusive agent of a property owner, or at least one of the agents and had furnished an expression of interest in relation to the marketing of certain property.

At each of the three meetings, Councillor Kemper participated in circumstances where he breached s.451 of the Act, because his employer had a pecuniary interest in the matter before the Council, and as an employee of that company, Councillor Kemper was taken to have a pecuniary interest, by virtue of the provisions of s.443(2) of the Act.

In the result, the Tribunal found the four complaints involving Councillor Kemper had been established.

The result of a further determination concerning penalty will be reported in the next Annual Report.

OUTSTANDING COMPLAINTS

The Investigations and Review Branch of the Department has reported to the Tribunal that no complaints under s.460 of the Act were received in the twelve months to 30 June 2004. The Director-General made one complaint pursuant to s.460.

29 October 2004

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D.P.F. OFFICER QC
Pecuniary Interest Tribunal