

**LOCAL GOVERNMENT
PECUNIARY INTEREST TRIBUNAL**

ANNUAL REPORT 1995

Dated: 29 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 Councillor 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. I am the first appointment. 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 is the first Annual Report to be submitted. A report was not furnished in respect of the year ended 30 June 1994. No proceedings had been conducted before the Tribunal during that year. Although this Report will relate to proceedings conducted during the year ended 30 June 1995 it is considered appropriate to report also on the work done between 9 February and 30 June 1994 to set up facilities for the Tribunal and prepare for the conduct of hearings. Accordingly, the report covers the period from 9 February 1994 to 30 June 1995. 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.

ESTABLISHMENT

Following my appointment on 9 February 1994, the first task was to establish the necessary facilities to enable the Tribunal to function.

Consultations were undertaken with Mr Garry Payne, the Director-General of the Department of Local Government & Co-operatives, and his Officers in consequence of which the Department obtained for the Tribunal suitable rented space on Level 3 of Stockland House, 181 Castlereagh Street, Sydney and fitted it out to provide an appropriately equipped office, public registry and chambers for the appointed member.

The office is computerised with laser printer, photocopier, facsimile and telephone answering machines and micro-cassette dictation facilities.

An appropriate data base has been set up in the computer to enable ready production of repetitive documents such as notices and summonses and to facilitate the production of the Statements of Decision required by s.484 of the Act.

Computerised and hard copy Registers have been established to record Notices of Investigations pursuant to s.465 of the Act, Reports to the Tribunal under s.468 of the Act and the action taken by the Tribunal on such Reports.

A suitable system for keeping files and records of matters dealt with by the Tribunal has been organised.

A comprehensive Office Procedure Manual, which includes instructions for operating the Tribunal's office systems, precedents of letters, notices and other documents used by the Tribunal, requirements for organising hearings and procedures in dealing with the Department, has been produced by the Tribunal's principal Executive Assistant, Ms Christine Cargill, for the guidance of other casual staff who are on call.

It has not been necessary to keep the Tribunal's office and registry open full time at present. It is manned only on demand but is fully operational for use whenever required.

As the initial workload was not expected to require full-time hearing facilities, arrangements were made with the Department of Consumer Affairs for the Tribunal to have the occasional use as required of the hearing rooms and professional and public facilities provided for the Commercial Tribunal. These are also in Stockland House, on Level 8.

I wish to acknowledge the co-operation I received from Mr Stephen Cavanagh, Chairman of the Commercial Tribunal, and its Registrar, Mr R Connolly, in implementing these arrangements.

It was anticipated that for the convenience of parties and witnesses it would be desirable to conduct some hearings in country areas. In one case that has already occurred. With the co-operation of the Department of Courts Administration, hearing facilities at Raymond Terrace Courthouse were provided to the Tribunal.

The Local Government & Shires Associations of New South Wales have offered to assist in identifying alternative suitable venues for hearings in country areas when required by the Tribunal.

STAFF

As it was not possible to make any reliable estimate of the quantity or regularity of the work the Tribunal might be required to perform, it was decided to arrange for a panel of suitably qualified part-time staff, the members of which the Tribunal could call on to perform a variety of tasks as needed.

The Tribunal has been fortunate in obtaining a panel of three experienced persons willing to be employed as Executive Assistants on a "temporary/casual" basis (i.e. on call). The suitability of this arrangement is open to review in the light of experience gained as the work of the Tribunal develops.

LOCAL GOVERNMENT & SHIRES ASSOCIATIONS SEMINAR

On 9 June 1994 I delivered a paper on the nature and functions of the Pecuniary Interest Tribunal to a Pecuniary Interest Seminar conducted by the Local Government & Shires Associations of New South Wales. The Associations arranged for circulation of the paper to their members and I forwarded a copy to the then Minister for his information.

PROCEDURES

The Act makes the Tribunal responsible for determining its own procedures. After consultation with the Department's legal Officers I made a determination of procedures and forms generally to be followed in the conduct of business before the Tribunal. The procedures laid down are simple and flexible and designed to enable each case to be dealt with in the manner most conducive to a fair and just hearing and an economical and expeditious determination of the particular complaint once it reaches the Tribunal.

The Department produced a publication containing the procedures and relevant extracts of the legislation. Copies were circulated free of charge to all Council's and other interested bodies. Additional copies are kept available for purchase from the Department and the Tribunal.

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 1995 the Tribunal received from the Director-General six notices of decisions by him to investigate complaints. All were complaints against Councillors, each of whom was of a different Council.

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

1. Alleged contravention of Division 9A (Section 46B) Local Government Act, 1919 - failure to lodge declaration of interests returns for 1991 and 1992.
2. Alleged breach of Section 449 Local Government Act, 1993 - late lodgment of declaration of interests return for 1993.
3. Alleged breaches of Section 451 Local Government Act, 1993 - failure to disclose pecuniary interest in a development application being considered at Council meetings in November and December 1993.
4. Alleged breaches of Section 451 Local Government Act, 1993 - failure to disclose pecuniary interest in a development application being considered by Council and Council committees in August, September, October and November 1994.
5. (a) Alleged breaches of Section 451 Local Government Act, 1993 - failures to disclose pecuniary interest in a development application and planning matters being considered at Council committee meetings in May 1994.
(b) Alleged breach of Section 449 Local Government Act, 1993 - late lodgment of declaration of interest return for 1993.
6. Alleged breaches of Section 451 Local Government Act, 1993 - failures to disclose pecuniary interest in a road closure proposal being

considered by Council and Council committee meetings held in and prior to October 1994.

At the date of this Annual Report the Tribunal had received from the Director-General a report of the investigations into the first four of the above matters (see below). Reports on the others are still awaiting completion of the investigation or of the Report.

As the legislation requires the Tribunal to decide, "after considering a report presented to it", whether or not to conduct a hearing, I believe that, in fairness, it is preferable not to name the Councillors under investigation or their respective Councils before the Tribunal has received the Director-General's Report and made its decision whether or not to conduct a hearing. Accordingly, I refrain from naming in this Annual Report the Councillors whose conduct is still under investigation by the Director-General.

REPORTS OF INVESTIGATIONS - ACTION BY THE TRIBUNAL

The Reports received by the Tribunal of the Director-General's investigations of the first four of the complaints listed above and the Tribunal's actions in respect thereof were as follows:

1. **Councillor MacKenzie - Port Stephens Council (PIT No. 1/1994 - Report received 5 December 1994)**

The complaint the subject of this investigation originated in March 1993 but was unresolved when in June 1994 the Director-General decided to make a complaint pursuant to section 460(1) of the Local Government Act, 1993. The complaint was made against Councillor Bruce MacKenzie of Port Stephens Council. It alleged possible contraventions of provisions of Division 9A of the Local Government Act, 1919, being failures to comply with s.46B of that Act in respect of the lodgment in 1991 and 1992 of returns disclosing Councillor MacKenzie's pecuniary interests.

The Director-General's complaint was made under Regulation 29 of the Local Government Act (Savings & Transitional) Regulation, 1993 which provides as follows:

29(1) A person may make a complaint to the Director-General, or the Director-General may make a complaint, that a person has or may have contravened Division 9A of the old Act.

(2) Part 3 of Chapter 14 of the new Act applies to a complaint made under this clause in the same way as it applies to a complaint made under Section 460 of the new Act.

After considering the Director-General's Report of the investigation, the Tribunal decided to conduct a hearing into this complaint.

In accordance with the procedures determined by the Tribunal, Notice of this decision was given to the Director-General and served on Councillor MacKenzie on 23 January 1995.

After some delay in effecting service of the Notice and in obtaining a response from Councillor MacKenzie, a hearing was appointed at Raymond Terrace. It occupied three days, 27, 28 and 29 March 1995. In addition to a large body of documentary material put before the Tribunal, eleven witnesses gave evidence at the hearing.

In the written statement of its decision, dated 8 May 1995, the Tribunal found that the complaint against Councillor MacKenzie had been proved.

As Councillor MacKenzie, by his own choice, had not been legally represented at the hearing, he was given an opportunity to make

submissions on what action the Tribunal should take in consequence of its findings against him.

A further hearing for that purpose took place in Sydney on 22 May 1995 when Councillor MacKenzie appeared in person. After hearing his submissions, the Tribunal, pursuant to s.482(1)(c) of the Act, ordered that he be suspended from civic office from 22 May to 22 July 1995. A written statement of the Tribunal's decision and reasons dated 22 May 1995 was delivered to the parties and the Port Stephens Council.

2. **Councillor McNaughton, Mayor - Newcastle City Council (PIT No. 2/1994 - Report received 13 March 1995)**

This complaint was made on 24 February 1994. It alleged that the Lord Mayor of the Newcastle City Council, Councillor John McNaughton A.C., had contravened s.449 of the Act by failing to lodge his pecuniary interest return for the period 1 July 1992 to 30 June 1993 by 31 December 1993, the date required for such return by s.449(3) and Schedule 7, Clause 53 of the Act.

Councillor McNaughton denied the allegation, claiming that he had followed his practice of previous years in signing and lodging his return in due time and that it must have been lost in transit or filing at the Council's offices. He filed a substitute return to replace it.

After preliminary inquiries, the Director-General, on 19 October 1994, decided to conduct a formal investigation under s.462 of the Act and notified the Tribunal. The Tribunal received his report of the investigation on 13 March 1995.

The Tribunal after considering the report, decided not to conduct a hearing into the complaint.

In accordance with s.470 of the Act, the Tribunal on 11 May 1995 provided the parties with a written statement of its decision setting out its reasons.

For the reasons there given, the Tribunal concluded (a) that, having regard to the thoroughness of the Director-General's investigation, no further or different evidence was likely to emerge on a hearing, and on the evidence in the Report, the most likely outcome would be a finding that the alleged contravention was not proved; and (b) that, even if the alleged contravention was found to be proved, it was unlikely that any action by the Tribunal would be called for because, according to the material in the report, the failure would have been an isolated lapse by a Councillor who recognised and respected his obligations and had conscientiously performed them prior to and since the occasion in question. In the Tribunal's judgment, neither the public interest nor justice to the parties required a hearing to be conducted in these circumstances.

3. **Councillor Wilton - Wollongong City Council (PIT No. 3/1994 - Reports received 23 June 1995 and 1 August 1995)**

The complaint in this matter was made on 4 March 1994. It was alleged that Councillor Graeme Leslie Wilton had failed to declare a pecuniary interest in a development application before Wollongong City Council at meetings in November and December 1993. On 27 October 1994 the Director-General decided to investigate the complaint. He presented his Report to the Tribunal on 23 June 1995.

As it appeared from the Report that the Councillor's pecuniary interest, if any, was not personal but might have existed because he was a trustee of the Kembla Grange Recreation Trust which made the

development application and a member and director of the Illawarra Turf Club Pty Limited which the application was designed to benefit financially, the Tribunal on 29 June 1995 requested the Director-General to conduct further investigations into the legal status and constitution of these two bodies, the legal and financial relationship between them, and the Councillor's position in relation to each of them at the relevant times.

The further investigation has now been completed and a supplementary Report was furnished to the Tribunal on 1 August 1995. After considering the above Reports, the Tribunal decided to conduct a hearing into the complaint. Notice of this decision has been given to the parties. The hearing will be conducted in the near future.

4. **Councillor Roberts - Hastings Council (PIT No. 4/1995 - Report received 19 May 1995)**

A complaint was made to the Director-General in December 1994 that Councillor Graeme Frank Roberts of Hastings Council had failed to declare a pecuniary interest in relation to a proposed shopping centre complex at Port Macquarie for which a development application and proposals for the sale of Council land to the developer were under consideration at Council and Council committee meetings in the period 3 August 1994 to 9 November 1994. On 11 October 1994 the consulting engineering company of which Councillor Roberts was a shareholder and director had responded to an invitation dated 19 September 1994 to put in a tender of a fee-proposal for the provision of certain services on the proposed project. This tender was not accepted until December 1994.

On 24 January 1995 an investigation into the complaint was instituted under s.462(1) of the Act. On 19 May 1995 a Report of the investigation was presented to the Tribunal.

After considering the Report, the Tribunal decided to conduct a hearing. As there was a voluminous amount of material in the Report the Tribunal held a preliminary hearing in Sydney on 20 June 1995 for the purpose of ascertaining what matters were in dispute and identifying the factual and legal issues that needed to be determined so that time would not be wasted at the hearing. This course succeeded in reducing a potentially very lengthy hearing to only two days and requiring only two witnesses to attend to give oral testimony.

Although occurring outside the reporting period, it should be reported that the further hearings took place on 19 and 20 July 1995 and the Tribunal's written Statement of Decision was made and forwarded to the parties on 3 August 1995. For the reasons given therein, the complaint was found to have been proved in relation to one meeting, a Special Meeting of the Council held on 9 November 1994 at which the Council approved the proposed development subject to conditions. In relation to all other meetings, the complained was dismissed.

The Tribunal decided that the only action required in the circumstances of the case was counselling of Councillor Roberts by the Tribunal.

As explained in the Statement of Decision, the evidence established that Councillor Roberts, a consulting engineer, in participating in the business before the Council in relation to the proposed shopping centre, had acted conscientiously and, out of a sense of public duty, had contributed his expertise to beneficially advance the interests of the Council and the community in the matter for as long as he believed he was legally able to do so before being required by the Act to declare a pecuniary interest. He had addressed his mind to that question and decided that, in the circumstances in which it was made,

his company's tender of 11 October 1994 did not give rise to a pecuniary interest within the meaning of the Act.

The Tribunal found that he had erred in his legal interpretation of the requirements of the Act and, instead of choosing to act on his own view of the law, would have been wiser to seek legal advice directed specifically to the problem that had arisen. The Tribunal counselled Councillor Roberts accordingly.

As the facts of the case gave rise to a number of important legal issues regarding the interpretation and application of the provisions of the new Local Government Act, 1993 in relation to pecuniary interests, copies of the Tribunal's Statement of Decision have been provided by the Tribunal to the Local Government & Shires Associations of New South Wales as well as to the Law Society of New South Wales, the New South Wales Bar Association and some law libraries and publishers.

INVESTIGATION OF COMPLAINTS BY DIRECTOR-GENERAL

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 the discretion under s.463.

In the case of some complaints received under the new Act the Director-General has referred the results of his preliminary inquiries to the Tribunal and sought the Tribunal's views before deciding how he will exercise his discretion. In the cases in question the Tribunal considered it proper to

express its opinion but did so on the basis that it remained within the Director-General's discretion to decide the matter as he deemed proper.

In the Tribunal's view, there is no reason why this practice should not continue 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 related to:

- **Newcastle City Council** - an administrative error resulting in unintended late lodgment of pecuniary interests returns for 1994 by Councillors and Designated Persons.
- **Bathurst City Council** - late lodgment of pecuniary interests return for 1994 by a Councillor who, asserting that he had lodged the return and that it must have gone astray, lodged another return.
- **Bega Shire Council** - failure of a committee member (non-councillor) in April 1994 to declare a pecuniary interest in a matter. At the time of the contravention the Tribunal had no power under the Act to take action against a committee member who had contravened the Act but was not a councillor. That omission has since been corrected by an amendment to the Act which was not retrospective.

OUTSTANDING COMPLAINTS

The Investigations Review Branch of the Department has reported that, in addition to the six investigations of which notice has been given to the Tribunal as mentioned earlier in this Annual Report, eight other complaints under s.460 of the Act had been received up to 30 June 1995. Four of these had been declined. The other four were subject to preliminary inquiries to determine whether they should be the subject of a formal investigation under s.462 of the Act. Those preliminary inquiries are continuing at the date of this

Annual Report and no notices under s.465 in respect of them have yet been received by the Tribunal.

RECOMMENDATIONS

When I was appointed as the Tribunal the then Minister invited me to make in due course any recommendations regarding amendments to the legislation or other matters that I considered might improve the disclosure of interests provisions of the Act and the operations of the Pecuniary Interest Tribunal.

I believe that more experience of the working of the legislation and the Tribunal in practice is desirable before making any such recommendations and I therefore refrain from doing so in this Annual Report. I expected to do so in a future Report or before then if it is called for.

ACKNOWLEDGMENT

The Tribunal has had from the outset and 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 I express my appreciation.

Dated:29 August, 1995



K J HOLLAND Q.C.

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