

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 3/1997

DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT

RE: COUNCILLOR BARRY NOEL COTTER,
MARRICKVILLE COUNCIL

STATEMENT OF DECISION

Dated: 3 December 1998

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REPORT OF INVESTIGATION

On 11 June 1998 the Tribunal received from the Director-General, Department of Local Government, a Report of an Investigation carried out pursuant to section 462(1) of the Local Government Act, 1993 into a complaint under section 460 of that Act made by the Director-General that Councillor Barry Noel Cotter, being a Councillor and Mayor of Marrickville Council, had contravened section 449 of the Act by failing to disclose certain interests in Returns required by that section to be lodged by Councillors relating to prescribed periods in 1995/1996, 1994/1995 and 1993/1994.

ORIGIN OF COMPLAINT

The complaint against Councillor Cotter arose out of a proposal by four other Marrickville Councillors, Councillors Hale, Kozelj, Rees and Robinson, to raise questions on notice at a Council meeting to be held on 15 April 1997. On 4 April 1997 Councillor Hale wrote to the then General Manager of the Council, enclosing copies of sets of questions on notice directed partly to the General Manager and partly to the Mayor, Councillor Cotter. The letter

sought to have the questions and answers to the questions included on the agenda provided to Councillors before the commencement of the meeting.

The list of questions directed to Councillor Cotter alleged, in effect, that Councillor Cotter had contravened section 449 of the Local Government Act, 1993 by failing to disclose in his Return of interests for the period 1 July 1995 to 30 June 1996 that he was the owner of two parcels of real estate, the addresses of which were stated, and a director of three companies, the names of which were given in the notice.

The General Manager drew the allegations to the attention of Councillor Cotter who promptly, after discussions with the General Manager, acknowledged that his Return for 1995/1996 was deficient in respect of the matters itemised in the allegations contained in the questions on notice.

On 8 April 1997 Councillor Cotter wrote to the General Manager stating that he had become aware that he had “inadvertently not complied the Local Government Act provisions relating to disclosures of interests.” The letter stated that Councillor Cotter had disclosed an interest in each of the items complained of in his earlier Returns for 1993/1994 and 1994/1995 but admitted that he had not disclosed those interests in his 1995/1996 Return. According to his letter, his omission was –

“...due to a misunderstanding by me of the Local Government Act, I believed that disclosures of interest in real property outside the local government area were discretionary and that declaration of interest in corporations that were non-remunerative or where no financial interest was held were likewise not, as I did not believe it relevant, required. For that reason I have not further disclosed an interest in each of these categories.”

In relation to the real property, the letter stated that there was no issue that had arisen at Marrickville Council that would have led to a conflict of interest nor was it foreseeable that such a situation could have arisen. In relation to the corporations, the letter stated, in effect, that he was only an accommodation director appointed at the request of a personal friend to make up the number of directors required by law and that none of the companies had any interest or likely interest in the Marrickville Local Government area. The letter also asserted that no matter had appeared on the Council’s agenda and no issue had arisen in the Council in relation to any of the items not

disclosed involving any conflict of interest. The letter requested the General Manager to advise the Director-General that Councillor Cotter would “appear to have inadvertently breached the Act” and to include his letter of explanation.

On 9 April 1997 the General Manager wrote to the Director-General referring to discussions which he had had with Mr Fausto Sut, Manager of the Department’s Investigation Branch, in relation to the questions on notice directed to Councillor Cotter stating that pursuant to those discussions he had provided a copy of the questions on notice to Councillor Cotter who confirmed he had failed to disclose the interests in question in his Return for 1995/1996 and that Councillor Cotter had now provided written advice in relation to the non-disclosures, a copy of which was attached to the General Manager’s letter. The letter concluded by referring the breach to the Department for determination.

On 14 April 1997 Councillor Cotter wrote again to the General Manager attaching a new return for the period 1995/1996. An attachment to the new Return listed seven companies of which Councillor Cotter was stated to be a director. The list added three further companies in which Councillor Cotter’s position as director had not been disclosed in his original 1995/1996 Return. This letter to the General Manager requested that the new return and his letter of 8 April 1997 be inserted in the Council’s Register of Councillors’ Returns.

After making a number of preliminary inquiries, including communications by letter with Councillor Cotter, the Director-General, on 23 June 1997, decided that Councillor Cotter’s failures to disclose interests in the returns should be the subject of a complaint by the Director-General pursuant to section 460 and investigation under section 462 of the Act. An investigation by the Department ensued. This included a lengthy interview with Councillor Cotter conducted by investigation officers of the Department on 25 July 1997.

As required by section 468(1) of the Act, the Director-General furnished the Tribunal with a Report of the investigation which, as mentioned above, was received by the Tribunal on 11 June 1998.

DECISION TO CONDUCT A HEARING

After considering the Director-General's Report, the Tribunal decided, pursuant to section 469 of the Act, to conduct a hearing into the complaint.

In the course of the investigation Councillor Cotter's previous Returns for 1993/1994 and 1994/1995 were examined and Councillor Cotter was asked to provide explanations for certain deficiencies found in these earlier Returns as well as those found in relation to his Return for 1995/1996.

In his letters and interview Councillor Cotter provided the investigators with explanations for the various non-disclosures and explained the circumstances in which he had filled in the Returns, his understanding of the requirements of the legislation in that respect, and his approach to his obligations to comply with those requirements.

From the information and documents contained in the Director-General's Report, it appeared to the Tribunal that there would be little or no dispute as to the facts relating to the alleged non-disclosures and deficiencies in the Returns. Consequently, the Tribunal took the course of presenting the parties with a Statement of Prima Facie Facts and Issues as they appeared to the Tribunal from the Report of the investigation. The Statement included a summary of the explanations that had been put forward by Councillor Cotter in the course of the investigation. The parties were advised by the Tribunal that they were not bound to accept or adopt the Statement and were invited to contend if they wished that the issues for determination by the Tribunal differed from those put forward in the Statement.

In correspondence that ensued between the Tribunal and the parties the Tribunal's Statement of Prima Facie Facts and Issues was accepted by the parties in all material respects and, prior to the hearing, Councillor Cotter's solicitors furnished an affidavit by him and affidavits by three witnesses in support of the position which he had taken in relation to the allegations.

HEARING

The Tribunal's hearing into the complaint took place on 24 November 1998.

The Director-General was represented by Mr Michael Lawler of counsel instructed by Ms Jean Wallace, Legal Officer, Department of Local Government.

Councillor Cotter was represented by Mr Stephen Rothman, SC and Mr Latham of counsel instructed by Joseph G Capogreco & Associates, Solicitors.

The material before the Tribunal for the purposes of its determination of the complaint consisted of:

- (1) The Director-General's Report of his Investigation received by the Tribunal on 11 June 1998: Exhibit A.
- (2) Notice to the Parties of the Tribunal's Decision to Conduct a Hearing dated 2 July 1998: Exhibit B.
- (3) Statement of Prima Facie Facts and Issues dated 2 July 1998: Exhibit C.
- (4) Correspondence between the Tribunal and the parties 2 July 1998 to 12 November 1998: Exhibits D – N.
- (5) Additional material tendered by the parties at the hearing consisting of:
 - (a) Affidavit of Councillor Cotter dated 9 September 1998: Exhibit O.
 - (b) Affidavit of Barbara Bridges dated 9 September 1998: Exhibit P.
 - (c) Affidavit of Colin Mills dated 8 September 1998: Exhibit Q.
 - (d) Affidavit of Glen Batchelor dated 7.9.1998: Exhibit R.
 - (e) Affidavit of Peter Black dated 8 September 1998: Exhibit S.
 - (f) Australian Securities Commission documents re CERT Education & Welfare Pty Limited: Exhibit T.
 - (g) Character References for Councillor Cotter from Councillor J Shanahan 24 November 1998, Carmel Tebbutt, MLC 23 November 1998 and Councillor Vic Smith 24 November 1998: Exhibit U.

Mr Rothman informed the Tribunal that Councillor Cotter did not seek to dispute the facts as set forth in the Tribunal's Statement of Prima Facie Facts and Issues but wished to make what Mr Rothman described as a "plea in mitigation".

Subsequently Councillor Cotter entered the witness box for that purpose and while there was cross-examined by Mr Lawler on certain aspects of the explanations he had given to the Director-General and the investigators for the alleged non-disclosures in his Returns.

CONTRAVENTIONS AND EXPLANATIONS

A table of alleged contraventions which were admitted by Councillor Cotter or of which there was prima facie evidence in the Director-General's Report in relation to Councillor Cotter's Returns for each of the three periods in question is set out in Exhibit C, which is the Statement of Prima Facie Facts and Issues dated 2 July 1998 which was given by the Tribunal to the parties. As this table, as to the facts stated in it, is not disputed by Councillor Cotter, it is adopted by the Tribunal as containing relevant facts for the purpose of determining the Director-General's complaint. As both parties have accepted Exhibit C as a correct statement of the other factual matters contained in it, those facts are also to be taken as adopted by the Tribunal for the purposes of this decision. The course adopted by Councillor Cotter and the Director-General at the hearing enables the Tribunal to summarise the relevant facts without detailed reference to the evidence by which the facts were established.

Return 1995/1996

The Return, the correctness of which is challenged by the questions on notice, was the Return for 1995/1996 which covers the period 1 July 1995 to 30 June 1996. The date prescribed by the legislation for the lodgement of this Return was 30 September 1996. The Return lodged by Councillor Cotter was dated 5 August 1996 and lodged on 9 August 1996.

Councillor Cotter failed to disclose in this Return two real estate properties of which he was the owner, one in Glebe and one in Newtown. He gave the excuse that they were not disclosed because they were outside the Council's area and he believed that he was only required to disclose real property that was within the Council's boundaries. There was no basis in the legislation for that belief, as he later acknowledged. The Return form and the provisions of Schedule 3 relating to disclosure of interests in real property

leave no doubt that all interests in real property, wherever situated, must be disclosed. Clause 3(2) of the Schedule expressly provides that a reference to real property in which a Councillor has an interest includes a reference to “any real property situated in Australia”.

The Return failed to disclose that the Glebe property was a source of rental income which Councillor Cotter had received during the Return period. The Return form and Clause 10(2)(c) of the Schedule required a description to be given sufficient to identify the person from whom or the circumstances in which income was received. Councillor Cotter’s Return stated merely, “Rental Income”, without any description of the source. He told the Department’s investigators that he believed that his disclosure was sufficient compliance and that, for the sake of the person’s privacy, his tenant’s identity should not have to be disclosed; but, as his Returns for previous years testified, he could have identified the rental property as the source of the income without disclosing the name of the tenant. In his Returns for the two previous years he had described the Glebe property as a source of rental income received by him for the period of those Returns. However, he told the investigators that he did not believe that it was relevant to identify in the Return, as sources of his income, properties which he owned, that he had not had regard to the notes to the contrary of his belief that were printed on the form, and that, whatever these notes said, his state of mind was that he did not see it as relevant. (Report, Attachment 20, pp.66 – 68). He acknowledged to the Tribunal at the hearing that he was in error in failing to have disclosed the property as a source of income in his Return for 1995/1996.

The Return form and Clause 7 of Schedule 3 require the person making a Return to disclose the name and address of each corporation in which the person had an interest or held a position “whether remunerated or not”, the nature of the interest, or the position held, in each of the corporations and a description of their principal objects (except in the case of a public company). In his Return Councillor Cotter disclosed only one corporation as to which he described his interest as shareholder and his position as director. The Return also failed to disclose five other companies

in which Councillor Cotter held the position of director and two companies in which he was both shareholder and director.

As to one of the corporations, CERT Education & Welfare Australia Pty Limited, the non-disclosure should, in the view of the Tribunal, be disregarded for present purposes. The evidence before the Tribunal established that, although it was incorporated on 23 June 1992 with Councillor Cotter being designated as one of its directors, it never actually functioned. Councillor Cotter had agreed to become a director in anticipation of the company being set up to provide educational services to members of Unions in the building industry to be funded by income from the members' superannuation funds as a joint venture between the Unions and the Master Builders' Association representing the employers; but the plan never materialised because of a failure to reach agreement on the launching of the project. Although Councillor Cotter had agreed to be a director no meeting of directors ever took place and he was informed by those who had asked him to accept the appointment that the project would not be going ahead. This all happened in 1992 when a proposed inaugural meeting of the company, for which Councillor Cotter had made himself available, failed to take place, after which Councillor Cotter gave no further thought to the company, believing that it had not come into existence. Searches of Australian Securities Commission records carried out by the Director-General failed to discover any Memorandum or Articles of Association for the company but ascertained that it had been dissolved by the Commission on 7 July 1995 as a defunct company (not carrying on business or not in operation) pursuant to sections 572 and 574 of the Corporations Law. Counsel for the Director-General informed the Tribunal that, although Councillor Cotter was recorded as having held the position of director from 23 June 1992 to 7 July 1995, the Director-General would concede that the corporation may well have been exempted from disclosure under Clause 7(2) of Schedule 3 as a non-profit company promoting education and, in any event, did not wish, in the circumstances, to pursue the complaint in relation to that company. The Tribunal concurred in the view that Councillor Cotter's non-disclosure of this corporation should be disregarded for the purpose of the hearing and informed Councillor Cotter's

counsel accordingly, relieving him from making any further submissions to the Tribunal in relation to that non-disclosure.

As to the other six corporation in respect of which no interest or position had been disclosed in the Return, the excuse advanced by Councillor Cotter was that he did not believe that he was required to disclose his position in companies in which he held no financial interest and received no remuneration or companies which did not trade within the boundaries of the Council area. As already indicated, there is no foundation in the legislation for such a belief in regard to companies in which a Councillor or designated person holds the position of director or any other office.

In regard to shareholders, Clause 7(3) of Schedule 3 provides that an interest in a corporation need not be disclosed if the interest is a beneficial interest in shares in a company that does not exceed 10 per cent of the voting rights in the company.

In the two companies not disclosed in which Councillor Cotter was a shareholder, as well as holding the position of director, Bincoe Pty Limited and Jellyfish Productions Pty Limited, searches of the Australian Securities Commission records established that, at the relevant time, Councillor Cotter held one of two voting shares giving him 50 per cent of the voting rights in each of those companies. However, it was also recorded that the shares were not held by Councillor Cotter beneficially. In each company, the other issued share was shown to be held beneficially by Barbara Bridges. As mentioned earlier, Councillor Cotter had explained that he had been asked by Barbara Bridges, who was a friend, to take a share and become a director of these two companies to accommodate her by satisfying the then requirements of the Corporations Law for a company to have two directors, but on the basis that he would have no financial interest in or receive any remuneration from the companies and would exercise all voting rights as she requested or directed. In support of these assertions Councillor Cotter furnished the Department's investigators with a Statutory Declaration dated 24 April 1997 from Barbara Bridges in which she stated that Councillor Cotter held the shares that had been issued to him in these companies in trust for her. At the hearing an Affidavit by Barbara Bridges dated 9 September 1998

was tendered (Exhibit P) in which she confirmed, as the investigators had already ascertained, that no written declaration of trust of these shares had been made by Councillor Cotter. She stated in her Affidavit that it had been an error and omission on her part because it had always been her belief and Councillor Cotter had always led her to believe that he held the shares and his voting rights in trust for her on the basis of an undertaking that he had given her to exercise his voting rights in such manner as she would request.

In respect of the company Jellyfish Productions Pty Limited, Councillor Cotter had informed the investigators that he had understood the company to have been for a project which never actually eventuated. Barbara Bridges' Affidavit supported Councillor Cotter's explanation in that she explained that the company had been incorporated by her with a view to using it to promote a Comedy Festival and that she had asked Councillor Cotter to become a director in case she decided to proceed with the venture and that, although he executed the necessary documentation, she informed him at the time that the venture may not proceed and that in the event that it did she would advise him. She swore in the Affidavit that the documents appointing Councillor Cotter as a director and issuing a share to him were lodged but, owing to an oversight in her office, Councillor Cotter was never advised; but the company remained dormant.

Having regard to the position taken by Councillor Cotter with respect to the hearing, his counsel did not seek to argue that, as a matter of law, Councillor Cotter was not obliged to disclose an interest as shareholder in Bincoe Pty Limited or Jellyfish Productions Pty Limited because of the fact, as he had claimed, that he held his shares on trust for Barbara Bridges. That question would have involved consideration of certain provisions of Division 5 of Chapter 1, Part 1.2 of the Corporations Law which are imported by paragraph (b) of the definition of "interest" contained in Clause 1, Part 2 of Schedule 3 to the Local Government Act, which provides that, in relation to a corporation, the word "interest" means "a relevant interest (within the meaning of section 9 of the Corporations Law) in securities issued or made available by the corporation." The Tribunal takes the view that there is no purpose to be served in these proceedings by pursuing that question of law not only

because no submissions by the parties were addressed to the question but also because Councillor Cotter was under an obligation to disclose positions held in corporations as well as interests and he held the position of director in both Bincoe Pty Limited and Jellyfish Productions Pty Limited which should have been but was not disclosed in his 1995/1996 Return.

Another company of which Councillor Cotter was a director during the period of Return but which was not disclosed was Jowai Holdings Pty Limited. This was an active company operated by Barbara Bridges on the same basis as regards the relationship of Councillor Cotter to her and that company as existed with Bincoe Pty Limited and Jellyfish Productions Pty Limited. In her Statutory Declaration she stated that in November 1996 she requested Councillor Cotter to resign as director of Jowai Holdings Pty Limited due to the fact that the Corporations Law had changed to allow single director companies, and that as that company traded under her own name, it seemed to her appropriate that all business and legal requirements be effected by her sole signature. Councillor Cotter resigned as requested and the Australian Securities Commission's records record that he ceased to be a director on 22 November 1996. Barbara Bridges said in her Statutory Declaration that she had not made a similar request for Councillor Cotter to resign from Bincoe Pty Limited nor Jellyfish Productions Pty Limited because neither of those companies were actually trading.

The remaining three companies of which Councillor Cotter was a director at the relevant time for the Return which he failed to disclose in the Return were Commonwealth Funds Management Limited, Total Risk Management Pty Limited and CFM (ADF) Limited, the last two companies being subsidiaries of the first. The reason he gave to the investigators for failing to disclose his directorships of these three companies was that on the day on which he filled in his Return for 1995/1996 he had it in his mind that he only had to declare those properties and companies that existed in business within the Marrickville area. He told the Tribunal that Commonwealth Funds Management Limited was an investment company established by the Commonwealth Government charged with investing funds on behalf of the superannuation entitlements of Commonwealth public servants. Although he

was also a director of the other two companies he received remuneration only from Commonwealth Funds Management Limited. He held no shares in any of the companies. He said that none of the three companies ever did or was likely to do any business within the Marrickville Council area. As mentioned above, the requirements to disclose his position as director in all three companies was clearly expressed in the legislation and there was no basis for the belief which, according to what he told the investigators, caused his failure to make the required disclosures. However, it should be recorded that in the section of the Return which required him to state sources of income from an occupation, he describes himself as "Director" and his employer as "Commonwealth Funds Management, Canberra."

In the attachment to Mr Cotter's amended Return dated 8 April 1997 which he lodged with the General Manager of the Council he gave an incorrect name for Commonwealth Funds Management Limited and CFM (ADF) Limited and provided no address for any of the six companies which were listed.

As to the misnaming of the two companies, Councillor Cotter tendered evidence at the hearing of correspondence received from Commonwealth Funds Management Limited which was headed with the abbreviation "CFM" and which referred to CFM (ADF) Limited as "Commonwealth ADF". Councillor Cotter said that he had used these two abbreviations in the attachment to his supplementary Return because they were used by Commonwealth Funds Management Limited itself to identify the two companies. The problem for a reader in perusing the Return is that the reader cannot be expected to know abbreviations used by a corporation in the course of conducting its business. The legislation expects that a director will know the name by which the company of which he is a director is incorporated and requires it to be stated. The reader is not to be expected to have to make inquiries or conduct searches to identify or ascertain the registered name of a corporation in which the person lodging the Return is disclosing himself or herself to be a director or shareholder. The legislation clearly requires the Return to speak for itself in relation to interests in and positions held by Councillors and designated persons in corporations.

Returns for 1993/1994 and 1994/1995

In the Returns for these years the contraventions consisted in Councillor Cotter's failure to give an address for any of the corporations disclosed as corporations in which he held the position of director and in failing correctly to name some of them. One company which he named in both Returns was Addison Road Community Centre Limited which was a community purpose, non-profit, non-dividend corporation exempted from disclosure by Clause 7(2) of Schedule 3 of the Act. As it was exempt from disclosure, including it the Return was not a contravention; but its inclusion was indicative of a lack of knowledge of the provisions of the legislation relating to Returns.

As to the failure to state the addresses of corporations, which was afterwards repeated in the 1995/1996 Return, Councillor Cotter first told the investigators that the reason for the omission was that there was insufficient room on the form to write down the addresses; but when it was pointed out to him that the form itself directed that if any space was insufficient in the form for all the particulars required to complete it, an appendix was to be attached for that purpose properly identified and signed by the person making the return, Councillor Cotter told the investigators that it had never entered his head to put down the addresses of the corporations. This again leaves an interested reader to hunt for information which the legislation intended and expected to be stated in the Return by the person lodging it.

As the Director-General, by his counsel, conceded, the deficiencies in the Returns for these two periods may not constitute serious breaches of the legislation but they remain relevant as indicating a lack of attention on Councillor Cotter's part to the requirements of the legislation.

The deficiencies in his Returns as a whole also suggest an inadequate appreciation by Councillor Cotter of the purpose of the legislation, which is to require public disclosure in a Register of Returns accessible to Councillors and the general public of the pecuniary and other specified interests of Councillors and designated persons as an aid to the prevention of conflicts of interests arising on Council business and promoting in the public interest accountability and transparent decision making in local government.

COUNCILLOR COTTER'S KNOWLEDGE AND MEANS OF KNOWLEDGE OF LEGAL OBLIGATIONS IN RELATION TO RETURNS

Prior to completing his 1995/1996 Return, Councillor Cotter had received from the then Acting General Manager a memorandum dated 18 July 1996 which attached the prescribed Return form with an explanation that it was required to be completed under the provisions of the Local Government Act, 1993 and a general description of the nature of the Act's requirements. In addition to this general description, the memorandum stated, "The relevant sections of the Act are also attached for your information and to assist you to complete the form correctly."

A copy of Schedule 3 of the Act which sets forth in detail the individual disclosures of interests which were required for completion of the Return was attached to the Acting General Manager's memo. The memo then stated in bold print:

"It is important that the Return is completed correctly and submitted by (no later than 30 September 1996) as the Act provides for investigation of complaints concerning non-disclosure and penalties for breach of the disclosure requirement. A copy of these provisions is attached for your information."

A copy of all of the provisions of the Act setting forth the duties of disclosure and the procedures in respect of complaints of contravention were attached to this memorandum and they included a further copy of Schedule 3.

The memorandum concluded: "Please note that under section 12(1) of the Act, members of the public are entitled to inspect the Returns of Councillors, Designated Persons and Delegates, free of charge."

Councillor Cotter told the investigators that he had received the above memorandum. He actually produced a copy and showed it to the investigators. He also told them that he had received basically the same document and information for the purpose of his Return for the previous year.

With regard to the deficiencies in the amended Return for 1995/1996 which Councillor Cotter lodged after the question of non-disclosures in his original Return for that period had been raised, he had made no attempt to read the printed notes on the form containing instructions for its proper

completion but had merely relied on conversations he had with the General Manager of the Council.

WAS THERE ANY IMPROPER MOTIVE?

The errors and omissions in the Returns were consistent with ignorance, carelessness or indifference on the part of the person who had completed them; but a question to be considered was whether there had been a deliberate attempt at concealment of interests.

It is proper to say at this point that after a thorough investigation by the Director-General no evidence was found to suggest, and the Director-General did not submit to the Tribunal at the hearing that the deficiencies in Councillor Cotter's Returns were motivated by, a desire to conceal his interests. After reviewing the whole of the evidence, the Tribunal is satisfied that Councillor Cotter's failure to disclose interests that should have been disclosed in the Returns was not for the purpose of concealment or financial or other gain or any other improper purpose. A search of Council records conducted by the General Manager at the request of the Director-General established that no matter had come before the Council in respect of which it could be suggested that conflict of interest had or might have occurred in relation to the interests of Councillor Cotter that had not been disclosed in his Returns. The evidence satisfied the Tribunal that the explanation for Councillor Cotter's errors lay elsewhere. They were a result of a combination of misconception, voluntary ignorance of the statutory requirements and undue haste.

When he was interviewed, Councillor Cotter told the investigators that he had never seen the Return forms as being a very important document because he had never sought to hide anything, he just wrote down what he thought had to go on the form and sent it back. He repeated this view on more than one occasion during his interview and when asked whether he checked his previous Returns before filling out his current Return he said:

“Being frank I’ve never considered these Returns to be of great moment because I’ve always put down what I believed at the time was correct and I’ve always had a practice that if something came up during the year – despite the fact I wasn’t required to – I always told the Council.”

On another occasion he told the investigators that he considered filling in the Returns to be “a bit of bureaucratic nuisance” and “as just another thing you have to fill out.” He told them that he thought that every Councillor probably had the same approach. He also told them that, in retrospect, he realised that this was a “very foolish approach by me.” In his evidence at the hearing Councillor Cotter enlarged on this subject. He told the Tribunal that in his time as Councillor and Mayor of Marrickville a good deal of attention had been paid by the Council and its General Manager to the question of disclosure of pecuniary interests and the conclusion had been reached that it was obligatory on Councillors fairly and honestly to disclose their interests in matters of business that arose before the Council and this was their primary responsibility rather than the recording of their interests in written Returns placed in a Register which, according to Councillor Cotter’s belief, was seldom examined by anybody. As he expressed it in the course of his evidence:

“On our Council, the approach to pecuniary interests, erroneously, had been that when a matter arose that you had an obligation to fairly and honestly disclose your interests ... and, as Mayor, and in the context of the General Manager, we always did that and, therefore, we had erroneously formed a view that the primary responsibility was in the reality of a declaration, rather than the recording of the base material.”: Transcript p.21, lines 34 – 46.

When Councillor Cotter was asked to justify that approach in the face of the legislation, he replied, “I don’t believe I can. I am merely trying to state that was the view. On reflection, I now realise that was erroneous.”

He attributed the same error to all of Marrickville’s councillors when he told the Tribunal at the hearing:

“I have to keep coming back to the fact that I believe there was a general mindset, not just myself, within the elected councillors, as to these forms, and that I unequivocally state that that belief is clearly wrong, but that was the belief and that was the approach that had been adopted by councillors”: Transcript, page 24/39 – 45.

Influenced no doubt by the relative unimportance to which Councillor Cotter had come to regard making of disclosures of interests in written Returns, Councillor Cotter, as he admitted to the Tribunal, did not apply his

mind to the detail of the legislative requirements. Although he said that he considered that it was important to lodge Returns he appeared to the Tribunal to have taken upon himself to decide what information ought or needed to be disclosed in the Returns without giving due attention to the provisions of the legislation which were provided to him for his perusal and in which, in the Tribunal's opinion, the requirements for completing the Returns were clearly expressed.

Councillor Cotter told the Tribunal that he considered that the copies of the legislation that were provided to him with the Return form were inadequate assistance to Councillors. In relation to the material supplied, he told the Tribunal, "None of that was written in what I would describe as a convenient fashion, that is a summary, or a plain version of it and, therefore, it was an unfriendly document in terms of reading it." He did not admit that he had therefore disregarded the material but he said, "There is no question that I did not pay attention to the detail as required and relied principally on reading the form, and filling out the form in a manner that at the time I thought was satisfactory and, on reflection, I realise it was not." (Transcript p.22, lines 15 – 50).

The Tribunal concludes that wilful ignorance and careless inattention on the part of Councillor Cotter to the information and documents provided to him to assist Councillors correctly to complete their Returns in accordance with the legislation was a contributing factor in the errors he made in the Returns here in question.

The Tribunal is satisfied that a further factor was the undue haste in which Councillor Cotter completed his Returns, in particular, his Return for 1995/1996 and that this was in large part due to the heavy burden of work involved in performing his duties not only as a Councillor but also as the Mayor of Marrickville. The investigators asked him to tell them the basis on which he completed his Returns and he replied, "Usually I'd find it on my desk and I'd just scrawl it off as quickly as possible and get it downstairs."

As mentioned above, Councillor Cotter's Return for 1995/1996 was dated 5 August 1996 and lodged on 9 August 1996. Councillor Cotter's evidence to the Tribunal was that he had been absent from Australia on

Council business from 19 June until 27 July 1996 and a significant accumulation of work had arisen during his absence. He said that during the course of the week commencing 29 July 1996 he was involved in meetings with many officers, residents, developers and community representations on each day of that week and in addition he had travelled to Canberra on 31 July and to Melbourne on 1 August 1996. At the same time he was an active participant in issues relating to Sydney airport. Because of community concern about the expansion of the airport and the Commonwealth Government's proposal on 29 July 1996 of an alternative location for Sydney's second airport there was considerable media attention and community agitation which continued into August and with which he was concerned.

He told the Tribunal that the circumstances in which he completed his 1995/1996 Return were that the General Manager had come into his office in the early evening to report on some meetings and during the course of discussions the General Manager noticed on his desk his Return form and asked him whether he had completed it. He told the General Manager that he had not done so but would do it while they were having their discussion. He said that he had completed the form and handed it to the General Manager then and there whilst they were engaged in discussion about various matters and issues that had arisen (Councillor Cotter's Affidavit, Exhibit O, paras. 13, 14; Transcript page 11/9 – 12/13.)

Councillor Cotter had given a similar account when interviewed by the investigators whom he told, "I picked it up quickly, filled it out and gave it him, and that's where I came unstuck. I just did it in a hurry and ... it was sitting there and I thought if I don't fill this out now I'll forget it or it'll get buried and I just sat there, scrawled it out and gave it to him."

When cross-examined by counsel for the Director-General, Councillor Cotter said, "It is not under the Act an excuse that is valid, but the reality of it is I was grossly overworked. I had been overseas for six weeks. I filled out the form without checking and I gave it to the General Manager and there were no processes in place to alert me to the fact that I had omissions." (Transcript page 27/57 – 28/5)

The force of Councillor Cotter's plea that he was forced into error by haste induced by being overworked at the time he completed his 1995/1996 Return (5 August 1996) is diminished by the fact that he had until 30 September to lodge it, another eight weeks. This suggests that the reason he completed it in such a hurry had more to do with his attitude of attaching little importance to disclosures in written returns than to pressure of work.

Councillor Cotter explained that his reference to the absence of "processes in place" to alert him to his omissions was a reference to the fact that it had not been the practice of Council staff when providing Return forms to Councillors to provide them also with a copy of their previous Return to which they could refer to ensure that they were not overlooking interests previously disclosed.

Councillor Cotter said that he believed that the omissions from his 1995/1996 Return would not have occurred if he had had before him a copy of his 1994/1995 Return. He told the Tribunal that, in consequence of this, he had, in consultation with the General Manager, instituted a system for the future that all Councillors will be provided with their previous Return when supplied with a Return form for the current period.

THE TRIBUNAL'S FINDING ON THE COMPLAINT

The relevant contraventions alleged by the Director-General's complaint have been sufficiently detailed above. Councillor Cotter has not sought to dispute them, the evidence before the Tribunal supports the allegations and the Tribunal accepts the evidence. The Tribunal therefore finds that the complaint has been proved. It remains to consider what action the Tribunal ought to take in relation to the contraventions.

ACTION BY THE TRIBUNAL UNDER SECTION 482(1) OF THE ACT

Section 482(1) of the Act, as it applies to the present case, provides as follows:

- "482. (1) The Pecuniary Interest Tribunal may, if it finds a complaint against a councillor is proved:**
- (a) counsel the councillor; or**
 - (b) reprimand the councillor; or**
 - (c) suspend the councillor from civic office for a period not exceeding 2 months; or**

- (d) **disqualify the councillor from holding civic office for a period not exceeding 5 years.”**

There are number of factors which in the opinion of the Tribunal require consideration.

Although a number of the contraventions may be regarded as minor, none of the contraventions would have occurred if Councillor Cotter had given due care and attention to the statutory obligations relating to his Returns copies of which had been provided to him and were clearly expressed as to the requirements to be satisfied.

In the face of the clear terms of the legislation, Councillor Cotter's misconception that disclosures in written Returns for the public record could be regarded as relatively unimportant is not easy to comprehend. It is made more serious by the fact that Councillor Cotter is a long term serving Councillor and Mayor of a large and important Council (11 years a Councillor, 8 years as Mayor) and could reasonably be expected by the public to lead by example. It is a cause for concern to the Tribunal that, if the view that he expressed about the attitude of other Councillors is correct, the same misconception has been propagated in Marrickville Council to both the staff and the other Councillors. It is to be hoped that Councillor Cotter's view as to the attitude of other Councillors is not correct but the fact that he entertains the view is not encouraging. If the views expressed by Councillor Cotter had been persisted in by him the Tribunal would have been faced with a strong case for at least suspension from civic office. However, Councillor Cotter has given assurances to the Tribunal that must be taken into account.

Having told the investigators when interviewed that, in retrospect, his approach was foolish, that he should have been more attentive to his Returns and that he would take more care in the future, he considerably reinforced this apparent change of attitude by entering the witness box to give evidence on oath to the Tribunal and subjecting himself to cross-examination.

When asked by his own counsel how he now saw, in terms of its seriousness, the errors and omissions that he made in his return he told the Tribunal, "I could see unequivocally that I was in error. That I did not comply with the provisions of the Act and that I needed to take more care in relation

to the matter.”: Transcript page 15/31 – 49. He had said much the same thing in his Affidavit filed at the hearing (Exhibit O), and in the course of his evidence he also informed the Tribunal that as a result of the complaint against him and the emergence of issues which he believed showed a lack of clarity in the obligations of Councillors with regard to their written Returns and disclosure of pecuniary interests generally, he had promoted with the Council’s management the development of a comprehensive conflicts of interests policy and the holding of training courses for Councillors and senior staff which had been held in February 1998 and in the course of which the nature and importance of their statutory obligations to file correct Returns had been emphasised.

As to his misconception as to the importance of disclosure of interests in written returns, he told the Tribunal that he had come to realise that such disclosures were important because they provided a basis upon which a member of the public or a Councillor could verify whether or not a matter coming before the Council involved a pecuniary interest and he admitted in cross-examination this should have been obvious to him if he had reflected on the matter: Transcript page 17/8 – 24. As already mentioned, he told the Tribunal that he did not now believe that the attitude which he had formed towards disclosures in Returns could be justified.

On completion of the evidence, counsel for the Director-General, whilst submitting that the attitude of Councillor Cotter to his obligations which led to the errors and omissions which he made in his Return, particularly those lodged for 1995/1996, and the evidence that he gave that the same attitude was prevalent amongst his fellow Councillors on Marrickville Council was a matter for serious concern and might call for action by the Tribunal which would serve as a deterrent, he informed the Tribunal that the Director-General did not desire to make any submissions as to the specific penalty that ought to be imposed. Mr Lawler also told the Tribunal that the Director-General recognised that the matters of non-compliance in this case had not given rise to any actual conflict of interest.

Counsel for Councillor Cotter, after pointing out that a number of the admitted contraventions might be regarded as minor, submitted that it ought

to be taken into account in Councillor Cotter's favour that he had not attempted to conceal any of his interests, had freely and frankly admitted the errors in his interpretations of the requirements of the legislation and the facts that constituted his contraventions, that he had co-operated with the investigators and openly and frankly disclosed to the Tribunal the erroneous attitude to disclosures in Returns which he had prior to the complaint and that in the light of his experience in this case the Tribunal could be confident that it was "most unlikely, if not impossible," that there would be any further contravention by Councillor Cotter. Mr Rothman asked the Tribunal to accept that Councillor Cotter was sincere in his expressions of contrition for past failures and his intentions with respect to future returns. He submitted that in the light of these things, suspension or disqualification was not called for and the appropriate penalties which ought to be considered were counselling or a reprimand.

The Tribunal takes due account of the submissions of counsel in the matter.

There is one further consideration to be mentioned. Reference has been made above to the character references for Councillor Cotter which were tendered to the Tribunal. (Exhibit U). The persons who gave the references were each in a position to speak with knowledge of Councillor Cotter's activities and reputation and highly commended him for his good character and integrity and particularly for his dedication and hard work on the Marrickville Council in pursuit of the interests and welfare of the people of Marrickville. The views expressed were not challenged by the Director-General.

Conclusion

The Tribunal is the only instrument of the legislation for enforcing the law when the obligations under the Act with regard to disclosure of interests by Councillors and other persons to whom the disclosure provisions of the Act apply. The legislature has entrusted the Tribunal with wide powers and discretions to be exercised in promoting compliance with the legislation and achievement of its policy and objects.

The Tribunal is conscious of the value, as the Director-General submitted, of the use of the sanctions under section 482 as a deterrent. A period of suspension in the present case would no doubt serve that purpose and has been seriously considered by the Tribunal.

However, in the circumstances of a particular case, correction of error and, just as importantly, education of others to whom the legislation applies may be achieved by a lesser sanction and that also has to be considered.

After reviewing the whole of the evidence in the present case, the Tribunal is persuaded that Councillor Cotter has honestly accepted that he was in error and is resolute in his attitude towards future conformity with his legislative obligations.

Publication of the Tribunal's Decision to the parties and its circulation to Marrickville and other Councils so that it will be available to assist Councillors and others engaged in local government, hopefully, will serve to correct misconceptions of the legislative requirements in relation to Returns such as Councillor Cotter entertained and make Councillors and other concerned persons better informed as to their statutory obligations. For these reasons the Tribunal has decided that it is sufficient in Councillor Cotter's case to administer to him a severe reprimand. The Tribunal will publish an Order accordingly.

Pursuant to section 484 the Tribunal will provide this Statement of its Decision to Councillor Cotter and the Director-General. A copy will be furnished to Marrickville Council for the information of Councillors and to such other persons as the Tribunal thinks fit.

DATED: 3 December 1998



K J HOLLAND Q.C.
Pecuniary Interest Tribunal