

**LOCAL GOVERNMENT PECUNIARY  
INTEREST TRIBUNAL**

PIT No. 1/2001

DIRECTOR GENERAL, DEPARTMENT OF LOCAL  
GOVERNMENT

RE: COUNCILLOR CARMEL DEL DUCA, CITY OF  
CANADA BAY COUNCIL

***STATEMENT OF DECISION***

Dated: 5 September 2003

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**INTRODUCTION**

1. The former Drummoyne and Concord Councils amalgamated to form the City of Canada Bay Council and was proclaimed a new Council from 1 December 2000.
2. Councillor Del Duca was elected on 8 December 2000 as a councillor of the City of Canada Bay Council. She had not been a councillor of the former merged Councils of Drummoyne and Concord, although she had been a Concord councillor prior to 1995.
3. Pursuant to the provisions of s.449 of the *Local Government Act 1993* Councillor Del Duca was a councillor who "must complete and lodge with the general manager, within 3

months after becoming a councillor ..., a return in the form prescribed by the Regulations".

4. By s.450A the general manager was required to keep a register of returns that were required to be lodged with the general manager under s.449 and those returns must be tabled at a meeting of the Council being the first meeting held after the last day for lodgment of the returns under s.449(1).
5. Accordingly Councillor Del Duca was required by the said section to lodge by 8 March 2001 a primary return under s.449(1) and annual returns were required to be lodged by 30 September 2001. By letter dated 18 June 2001 the general manager, Lea Rosser, of the City of Canada Bay Council advised the Director-General that Councillor Del Duca had failed to lodge a s.449(1) primary return, notwithstanding that the acting general manager by memorandum of 13 February 2001 had reminded councillors of their said obligation to lodge the primary pecuniary interest declarations within 3 months of the election and notwithstanding that Jill Lawson (PA to the Mayor) had sent a reminder memorandum of 26 February 2001 to the councillors.
6. Following a preliminary investigation, on 14 September 2001 the Director-General made a complaint pursuant to s.460(1) of the Act that contrary to Chapter 14, Part 2 of the *Local Government Act 1993* Councillor Del Duca did not complete and lodge with the general manager within 3 months of becoming a councillor a return in the form as prescribed by Part 1 of Schedule 3.
7. In May 2002 a report from the Director-General was referred to this Tribunal, following which the Tribunal determined to conduct proceedings. While in one sense the issue could be shortly stated, the evidence was not as brief and nor was the hearing which took place over a number of days in March and May 2003. While some of the evidence may more properly be said to have been directed to the question of what penalty, if any, ought to follow in the event that the Tribunal was satisfied that a breach had taken place it is, in the Tribunal's opinion, convenient to refer to at least some of that evidence in this Statement of Decision.

## THE DIRECTOR-GENERAL'S INVESTIGATION AND REPORT

8. The Tribunal shall refer expressly to some only aspects of these matters.
9. Councillor Del Duca has always maintained that she had filed the return. The Tribunal will return to the detail a little later in this statement. The first response by Councillor Del Duca to the allegations, which were referred to her, was her letter of 31 July 2001 to the Acting Director-General. In that letter she said "I note that I have filed a return to which you refer (copy enclosed)". Councillor Del Duca in the said letter went on to complain that such returns had not been tabled as required by s.450A of the *Local Government Act 1993* and that there was accordingly nothing to put her on notice that the form had not been received.
10. The second response in writing from Councillor Del Duca was by letter dated 17 August 2001. In that letter she said that her recollection was that she had lodged the return with the general manager although could not recall the precise date although it was prior to the date upon which Mr Cantalli (a fellow councillor) lodged his return. She recalls that when he handed his return to the general manager she recalled thinking that she had already done that. She could not assist any further as to precisely when she handed in her return.
11. In response to an interview conducted by officers of the Department Councillor Del Duca maintained that the return in question was "lodged" by her at a Council meeting by her placing it on top of the general manager's "files and things". She maintained that she did not actually give it to anyone but placed it on top of these files in a white envelope which was not addressed to anyone. She did not talk to anyone at the time about lodging it and she could not recall when the meeting was.

12. Mr Russell Lloyd was the first acting general manager of the City of Canada Bay Council from 12 December 2000 to 12 January 2001. He initiated the process of advising councillors of their requirement to lodge the returns and he instigated the memorandum of 13 February 2001 as referred to above. He said he had no knowledge of the actual lodgment of any of the returns. He said that the first time he was aware of the allegation against Councillor Del Duca was in July 2001 when the then general manager, Ms Lea Rosser, asked him to complete a statutory declaration about the matter and his knowledge of it.
13. He swore a statutory declaration on 16 August 2001. He was interviewed by Departmental investigators on 18 October 2001. At the interview he was shown a copy of Councillor Del Duca's primary return that she had sent to the Department with her letter of 31 July 2001. He was shown a reduced photocopy and he said he recalled seeing a larger version of the document in Lea Rosser's office the day he signed the statutory declaration. He recalls she showed him the document, that he had not seen it before and that he didn't particularly recall her saying anything about it.
14. The second acting general manager was Mr Les Hullick from about 12 January 2001 until Ms Rosser took up her appointment as general manager on 28 May 2001. Mr Hullick, when interviewed, referred to the memorandum of 13 February (referred to above) and to the follow-up memorandum of 26 February. He also said that councillors were advised orally at, at least, one Council meeting in February that the returns were due. Following a meeting on about 15 May 2001 Councillor Cantalli produced a return which Mr Hullick received the next morning and placed in the Register. It was then that he double-checked the Register and discovered that Councillor Del Duca had not completed and handed in her return.
15. Mr Hullick confirmed to the Departmental investigators that Councillor Del Duca did not lodge her return with him and as far as he is aware, it was never lodged while he was the acting general manager; "she certainly didn't give it to me".
16. There was no system in place for registering the returns or for issuing receipts for them.

There was no record in the minutes of the Council of the returns ever being tabled under s.450A of the Act.

17. Ms Lawson said to those investigators that she checked the Pecuniary Interest Register in late April and noticed that Councillor Del Duca's return was not there.
18. Ms Rosser signed the Council's letter of 18 June 2001 to the Department advising the Director-General of the allegations. Councillor Del Duca's return was not in the Register on that date. It could not be located during a thorough search of her office.
19. In her interview with the said investigators on 18 October 2001 Ms Rosser referred to a pecuniary interest return which she had endorsed "Received, 27.9.01" and appended her initials, which was the Pecuniary Interest Return completed by Councillor Del Duca in respect of the year to 30 June 2001. In respect of that return (not the primary return here in question) Ms Rosser said that she gave Councillor Del Duca assistance in completing the return because the Councillor was unsure as to how to go about filling out the details, given the complexities of the business dealings that she had had with her husband. She gave details, by reference to that form, as to what was added when she was present and the assistance which she gave. The difficulty that the Councillor had was to do with her husband keeping most of the details of the business dealings, of which the Councillor was unaware. On the same occasion the Councillor gave to Ms Rosser a copy of the primary return, which Ms Rosser endorsed "Copy of undated return provided on 27.10[sic].01" and which she then initialled.

## **THE HEARING**

20. Mr Hullick gave evidence and was cross-examined by Councillor Del Duca. It is not necessary for present purposes to repeat this evidence, save perhaps to indicate that the reminders to the councillors of 13 February and 26 February were confirmed. He confirmed that he checked the Register after the meeting of about 15 or 16 May and that there was no return in it from Councillor Del Duca. He recalls that Councillor Cantalli's return was discovered by him on his desk following a Council meeting and when he

made enquiries as to how it got there he was advised that it had been handed to the Mayor after a Council meeting. He confirmed that people could enter his office, albeit past his secretary. He confirmed that prior to Council meetings councillors stood around in the chamber and it was not unusual for notices and other matters to be placed on people's desks. Mr Hullick has no recollection of Councillor Cantalli handing his return to him. He acknowledges that like any organisation from time to time documents go astray in Councils.

21. Mr Gary Bevan, an investigator appointed by the Director-General of the Department of Local Government to investigate the affairs leading to the subject proceedings, was cross-examined by Councillor Del Duca. He was asked about the differing versions of how Councillor Cantalli handed in his pecuniary interest return. Mr Bevan was cross-examined about whether there had been any suggestion that the complaint against Councillor Del Duca was a "set up". He has a vague recollection that Ms Sleeman may have investigated that matter before he became involved. He was cross-examined about the manner in which he asked certain witnesses questions, the suggestion being that the form of questioning was inappropriate and designed to elicit certain responses, inimical to Councillor Del Duca.
22. Ms Lea Rosser gave evidence of a discussion with Councillor Del Duca some time before the end of September in Councillor Del Duca's office. It was evidently 27 September 2001. She had some documents on her desk which appeared to relate to divorce proceedings or some sort of business proceeding between herself and her husband and as she was helping Councillor Del Duca fill out the pecuniary interest annual return, Councillor Del Duca said words to the effect "Now you can see why I couldn't fill out the other form". Lea Rosser understood that to be a reference to the primary return and a reference to Councillor Del Duca not having a knowledge of the business and the properties to fill the form out with.
23. Ms Rosser repeated that she had been handed a copy of what was said to be the primary return. The fuller information contained in the second return was obtained from the divorce papers. Councillor Del Duca had partially completed the form on her desk. The

difficulty arose because Councillor Del Duca indicated to Ms Rosser that the former's husband handled all of the business matters. Ms Rosser, when advised that Councillor Del Duca's return had not been submitted, spoke to the staff and looked in Council's records and the Pecuniary Interest Register and could find no record of the return. She was also asked questions about the transference of documents from Council meetings back to the Council offices and from Drummoyne and Concord.

24. Ms Rosser gave evidence about a conversation with Ms Lawson concerning whether it was a "set up". She took it to be an off-the-cuff remark and was advised by Ms Lawson that there was no evidence to support it. Further, she would be a reluctant or hostile witness because a person of her seniority on staff is reluctant to become involved in what was seen as some disagreement involving some of the councillors.
25. Ms Drinan, the former manager Investigations and Review Branch of Local Government, gave evidence and was cross-examined. She explained the process as to how the report in question was drafted and put together. The allegation of a set up was not that the complaint was a set up in relation to Councillor Del Duca but that the matter was a set up against Ms Rosser as the newly appointed general manager.
26. Ms Lawson also gave evidence and was cross-examined. She described the memos to councillors reminding them of their obligations. From time to time the acting general manager handed her pecuniary interest forms and they were inserted in the Pecuniary Interest Register which is held in the general manager's office. She had also made a list of councillors and ticked off their names when their returns were lodged. Councillor Del Duca's name was not ticked off. She understood the councillors generally gave their pecuniary interest forms to the general manager at a Council meeting and he kept them and then arranged for them to be filed in the Register. To the best of her recollection Councillor Del Duca's form was the one remaining one which did not come in.



27. Anthony Del Duca, architect and former husband of Councillor Del Duca, gave evidence as to the separation of him and his wife in about March 2001 and the property and dissolution proceedings thereafter. He attended a number of Council meetings in 2001. He recalls Councillor Del Duca trying to fill out a form in early January/February 2001 at the former matrimonial home and him being asked to help her fill it in. A few weeks later he attended a Council meeting and had a conversation with his wife who said words to the effect that she was happy because she had finally got her financial interest form and finally handed it in. Mr Del Duca had a building application before the Council that night and so recalls the incident. Mr Del Duca was cross-examined about, amongst other matters, the circumstances in which he ultimately came to make a statement to the Tribunal (he not having done so in the course of the Department's investigation, nor it having been suggested he may have some relevant evidence).
28. Councillor Del Duca gave evidence and was cross-examined. She gave evidence concerning her meeting with Ms Rosser on 27 September, the matter of Mr Lloyd having seen as at 16 August 2001 a copy of the primary return of Councillor Del Duca in the general manager's office with Lea Rosser. Councillor Del Duca says that she was not warned that the return had not been lodged until she received the letter from the Department of 23 July 2001. Councillor Del Duca gave evidence of documents going astray from time to time and that the relevant period at the City of Canada Bay Council was a period of upheaval, turmoil and confusion. Other matters were deposed to by Councillor Del Duca relating to the conflicting accounts of how Councillor Cantalli's report came to be lodged, the unsatisfactory nature in Councillor Del Duca's opinion of the investigation, the fact that she did not vote in breach of any pecuniary interest which she may have had and other matters which in some respects were more in the nature of submissions. In cross-examination she reiterated that she could not remember when she lodged the form and that she had difficulty in getting from her husband information to put on the form initially. She denied saying to Ms Rosser words to the effect "Now can you see why I couldn't fill out the other form" and she says that she would not have said that because it was not true. Councillor Del Duca's evidence concerning precisely what she knew at the time she allegedly filled out the first return and whether or not she was having difficulties filling out the second return is, in the Tribunal's opinion, far from

satisfactory. Many of her answers appear to be evasive.

29. In this context Exhibit S comprises two letters from Broun Abrahams Solicitors, one of 23 September 2002 and one of 27 May 2003, which solicitors acted for Mrs Del Duca in relation to her financial settlement with her husband. There can be no doubt that Mrs Del Duca was having difficulties in February and March obtaining the required information as to the financial position of herself and her husband and indeed as late as 5 June 2002, when consent orders were made, Mr Broun QC apparently advised the Court that he was unable to advise his client as to whether the settlement was satisfactory as there had been no sufficient financial disclosure by Mr Del Duca to enable this advice to be given. This evidence may not sit comfortably with Mr Del Duca's evidence as to his assistance of his wife in filling out the form in their home in about January 2001, although if the latter occurred it is not necessarily inconsistent with senior counsel not being so satisfied with the disclosure as to be comfortable advising the appropriateness of a settlement.

#### **A PRELIMINARY ISSUE**

30. By notice dated 10 February 2003 Councillor Del Duca raised a preliminary issue concerning whether or not the Tribunal had jurisdiction and whether or not to that end there was a valid complaint following upon the letter from the general manager of the City of Canada Bay Council dated 18 June 2001. In substance it was submitted that if this letter was a complaint then query whether or not the subsequent Director-General's complaint of 14 September 2001 was valid so as to establish jurisdiction.
31. Notwithstanding the terms of the Department's letter to Councillor Del Duca of 23 July 2001 and its subsequent letter of 7 August, in the Tribunal's opinion it is clear that the letter of 18 June was not a complaint within the meaning of s.460 of the *Local Government Act 1993*. It did not comply with subsection (2) of that section which requires complaints under the section to be verified. The correspondence which ensued made it clear that the Department, prior to the Director-General's complaint of 14 September 2001, was only conducting preliminary enquiries into the allegations and that the Council's letter did not satisfy the requirements of a formal complaint. Having said

that the Tribunal would suggest greater care be taken in the future to avoid any suggestion at all to the contrary.

32. In any event there is nothing in the legislation, either express or implied, which would preclude the Director-General from subsequently making a formal complaint, which he did on 14 September 2001 and for that complaint to found the jurisdiction of a subsequent formal investigation and report to this Tribunal. In the Tribunal's opinion on any view of it there was a valid complaint by the Director-General within the meaning of s.460 of the *Local Government Act 1993* which authorised the subsequent report and the jurisdiction of this Tribunal.
33. The preliminary issue is determined accordingly.

**WAS THE PURPORTED PRELIMINARY RETURN "DELIVERED" IN THE MANNER ALLEGED BY COUNCILLOR DEL DUCA?**

34. Unfortunately, and not without considerable hesitation, the Tribunal is simply not able to be satisfied one way or another as to whether Councillor Del Duca placed the preliminary return in an unaddressed envelope on the general manager's "things" at some Council meeting.
35. There are, of course, two steps in considering this question. The first step is that dealing with the completion of the primary return; and the second step is its alleged placement on the general manager's "things" at some Council meeting.
36. In saying that the Tribunal cannot be satisfied one way or another, the Tribunal wishes to make it perfectly clear that no adverse finding or inference ought to be drawn in relation to the evidence of Councillor Del Duca, nor indeed any of the other witnesses. It is a case where, considering the whole of the evidence and the cross-examination, this Tribunal is not able to determine, on the balance of probabilities what in fact occurred.

37. There can be no doubt in the Tribunal's opinion that in the first part of 2001 Councillor Del Duca was having difficulty in obtaining from her husband satisfactory details of his financial position in relation to the property settlement (see for example Exhibit S). On the other hand, Mr Del Duca's evidence is that he assisted his wife in late January or early February in completing the form. The cross-examination does not assist the Tribunal as to the nature or extent of the assistance so offered. Looking at the form, one could only speculate as to the nature or extent of any such assistance. The form of the disclosure, at the bottom of page 2, would certainly indicate that Councillor Del Duca placed little faith in the extent or accuracy of the information in the form.
38. On the other hand, Ms Rosser's evidence is that as at 27 September 2001 Councillor Del Duca said to her words to the effect "Now you can see why I could not complete the earlier form". While Councillor Del Duca denied making such a statement to Ms Rosser, there was no cross-examination of Ms Rosser which would enable this Tribunal to disbelieve her evidence. In the Tribunal's opinion, Ms Rosser was an honest witness, attempting, as best she could, to disclose what occurred. The Tribunal is unable, from the evidence, to determine precisely what was meant by such a statement. The phrase "could not complete" may carry with it a connotation of 'more fully than I did'. If, on the other hand, the phrase is accepted with its full implications then it casts serious doubt on whether the original return was ever "completed" and handed in, as Councillor Del Duca asserts.
39. Councillor Del Duca says that she placed the preliminary return on the general manager's "things" at some Council meeting. There is no evidence that anyone saw her do so. There is no evidence, and indeed her evidence is to the contrary, that she spoke to anyone at the time about doing so. Councillor Del Duca does not suggest that she told the general manager at the time what she had done.
40. The general manager says that he was never handed the return, or became aware of it. The Tribunal is satisfied that it was never placed in the Pecuniary Interest Register. It has never been located. Councillor Del Duca's name was never ticked off the list that Ms Lawson maintained. If it were so placed on the general manager's "things" it is pure

speculation as to what happened to it. Councillor Del Duca would have the Tribunal speculate that it was probably mislaid in circumstances where matters at the Council were, particularly in the early part of 2001, in a state of some confusion, upheaval and turmoil. The Tribunal is not prepared to so speculate.

41. Councillor Del Duca does not recall when she so placed the form on the general manager's "things" although she does recall at or shortly after a meeting on 15 May 2001 when she saw Councillor Cantalli deliver his return to the general manager that she was pleased that she had already filed hers. Of course, if Mr Del Duca's evidence be correct, then the implication would be that the return had been put in by Councillor Del Duca some time before early March. If this be correct, then the evidence is rather unsatisfactory that Councillor Del Duca can recall being pleased, on or about 15 May 2001 but that she cannot recall, and never has been able to recall, anything about the time when she says the return was placed on the general manager's "things".
42. Mr Del Duca's evidence related to what Councillor Del Duca told her former husband apparently early March 2001. That of course does not establish that she in fact handed it in or when. While the Tribunal accepts that Mr Del Duca was an honest witness, it bears in mind that he may not be regarded as totally impartial or objective, that he had no file note or record of any relevant incident or conversation and that he came forth for the first time for the Tribunal to give evidence in support of his former wife's case, it not being suggested at any time previously in the investigation by anyone that he had any evidence which may assist in the resolution of the matter. The answer to some of these suggested criticisms may lie in the estranged relationship between him and his former wife in or about the middle of 2001.
43. The evidence of Mr Lloyd also creates further difficulties. His evidence that on 16 August 2001 he saw Councillor Del Duca's primary return in the offices of Ms Rosser, who showed him the document, raises more questions than it answers. No-one sought to call Mr Lloyd to give evidence, perhaps because the full implication of what he may have been saying may not have been readily apparent. As has been said, Councillor Del Duca did not seek to call him to elucidate precisely what it was he saw, or the circumstances in

which he saw it. She did not seek to cross-examine Ms Rosser about the subject matter, or how it came to be in the General Manager's office, or what became of it since. Likewise, the counsel for the Department did not seek to either challenge, or to cross-examine, Mr Lloyd.

44. In the circumstances this Tribunal is not in a position to make a finding one way or the other as to whether the primary return was put on top of the general manager's "things" and if so, when.

#### **COMPLETED/LODGED?**

45. The obligation on Councillor Del Duca under s.449, subsection (1), was to "complete" and "lodge with the general manager" the return in the form prescribed by the Regulations.
46. The form prescribed by the Regulations made provision not only for the Councillor's signature but for the date and made provision for the return date of the return to be inserted. Even assuming for present purposes that the original of the copy primary return was placed on the general manager's things, it could not be said in this Tribunal's opinion that it was completed as required. The "return date" obviously has an important role to play in determining the validity of disclosures made in the return. Likewise, the date upon which a declaration was made may well have some similar significance. In addition it assists in a determination of when the return was prepared.
47. In the Tribunal's opinion the document said to be a copy of the primary return was not "completed" as required by s.449.

48. Further, even if one accepted that the document was placed in an unsealed envelope on top of the general manager's "things" in circumstances where there was no communication to the general manager of that fact, this in the Tribunal's opinion cannot be said to be a lodgment of the return with the general manager. The phrase according to its ordinary meaning has some degree of formality of action about it. It is not the same concept of informality as is embraced in the phrase "to send". In the Tribunal's opinion, whether one adopts the shorter Oxford Dictionary definition of "to deposit ... with an official" or the Macquarie Concise Dictionary meaning of "to put or deposit as in a place, for storage or keeping" the degree of formality involves, in the Tribunal's opinion, the concept of actual receipt by the general manager. To merely send such a return to him by post or in the present case, to place it amongst his other work papers, does not of itself constitute evidence that the document was lodged with the general manager in the sense of physically deposited with him. See *Angus Fire Armour (Australia) Pty Ltd v Collector of Customs* (1888) 19 FCR 477, *Furlan v Wakool Shire Council* (1990) 69 LGRA 394 and *Hong Ye v Minister for Immigration and Multi-Cultural Affairs* (1998) 82 FCR 468.
49. Even accepting Councillor Del Duca's evidence as to what she did with the return, the Tribunal is satisfied that she did not complete it and did not lodge it as required by the Act.

#### **FURTHER CONDUCT OF PROCEEDINGS**

50. The Tribunal intends to give the parties an opportunity to make submissions as to what consequences, if any, ought to flow from the above findings. To that end (and bearing in mind that the Tribunal will be out of Sydney for at least the next 4 weeks) the Tribunal would invite, at least in the first instance, written submissions by the Department within 21 days from the date of this decision and 21 days thereafter for written submissions from Councillor Del Duca. If any party wished to orally address those written submissions, then that question will be addressed after receipt of the written submissions.
51. The Tribunal invites both parties to include in their addresses a consideration of the lack of procedures in place at the relevant time at the City of Canada Bay Council to receive

and monitor the completion and receipt of pecuniary interest returns and the question of what weight, if any, that ought to bear in a consideration of what consequences, if any, ought to flow in the present case.

DATED:

5<sup>th</sup> September 2003

