

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 1/1996

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL
GOVERNMENT

RE: COUNCILLOR JOHN NORMAN FRANK FISK - FORMER
COUNCILLOR BURWOOD COUNCIL.

STATEMENT OF DECISION ON QUESTION OF JURISDICTION

INTRODUCTION

On 15 August 1996 the Tribunal conducted a preliminary hearing into a complaint by the Director-General, Department of Local Government, that John Norman Frank Fisk, then being a Councillor of Burwood Council, contravened Division 9A of Part 4 of the Local Government Act, 1919 in relation to his involvement in certain matters before the Council concerning Chama Motors Pty Limited and Mr Michael Chama. The contravention was alleged to have occurred in 1992. The complaint was made pursuant to Regulation 29 of the Local Government Act (Savings and Transitional) Regulation, 1993 by which the complaint is required to proceed as a complaint under section 460 of the Local Government Act 1993.

After considering a report of an investigation into the complaint by the Director-General received on 28 May 1996, the Tribunal had decided to conduct a hearing into the complaint. On 6 June 1996 the Tribunal gave notice of its decision to the parties, setting out the apparent issues, inviting the parties to propose any further issues for determination and informing them that there would be a preliminary hearing. The Director-General proposed that in addition to the issues specified in the Notice, the Tribunal should consider and decide the question whether the Tribunal had jurisdiction

under the Local Government Act 1993 to conduct hearings into and determine allegations of contraventions by Councillors where the person against whom a complaint was made had ceased to be a Councillor.

This question arose because, although Mr Fisk was an elected member of the Council at the date of the alleged contravention, he had ceased to be a Councillor on 18 May 1994 (when all civic offices in relation to Burwood Council were declared by the Governor to be vacant under sections 255 and 256 of the Act) and had failed to be re-elected at the Council elections held on 9 September 1995. The Director-General's complaint was not made until 5 February 1996. Thus Mr Fisk did not hold the office of Councillor when the Director-General's complaint was made or when the Tribunal made its decision to conduct a hearing, nor would he be holding that office when the Tribunal came to determine the complaint after the proposed hearing.

The Tribunal decided to consider and decide the question of jurisdiction at the preliminary hearing and invited both parties to furnish submissions before and at that hearing. Counsel appeared for the Director-General. Mr Fisk appeared in person. Both made oral submissions, counsel having previously furnished written submissions to the Tribunal a copy of which had been supplied to Mr Fisk.

DECISION

After hearing the submissions the Tribunal decided that under the legislation it had jurisdiction to hear and determine the complaint and would proceed to do so at a further hearing then appointed for a later date. Brief reasons for the decision were stated at the preliminary hearing. This statement of decision is made pursuant to section 484 of the Act but without prejudice to the question whether it could have been delayed till after deciding the complaint at the further hearing.

REASONS FOR THE DECISION

On a literal construction of the legislation the Tribunal's jurisdiction to entertain the complaint would appear to be clearly established.

The Tribunal's authority is invoked by the presentation of a report by the Director-General of an investigation into a complaint of a contravention or possible contravention of the legislation: Sections 460, 464, 468(1). It may also be invoked by a report of an authority who has investigated an allegation that a person has or may have been guilty of a contravention: Sections 467, 468(2); but this avenue contributes nothing further to the argument except that it too is directed to the matter of contravention. It is the issue of contravention with which the legislation is concerned and in respect of which the right to make a complaint is given, powers and duties are vested in authorities and procedures laid down for dealing with the complaint. A contravention is complete when the facts that constitute it occur and it does not cease to be a contravention if afterwards one or more of the constituent facts change or cease to exist. A complaint against a person, being a complaint of a contravention by the person, necessarily refers to the person's status at the time of the contravention because that status is an ingredient of the contravention.

Sections 460, 464(1) and 467 refer to persons contravening Part 2. The possible contraventions of that part consist of breaches of the obligations imposed by sections 444 to 447 on four classes of persons. Councillors must comply with sections 449 and 451, designated persons with sections 449 and 459, members of council committees with section 451 and council advisers with section 456. Non-compliance with the sections mentioned by a person answering the description of the relevant class constitutes a contravention of Part 2 upon which a complaint under section 460 may be made without more.

The provisions of the Act laying down the powers and duties of the Director-General and the Tribunal and the procedures then to be followed in dealing with a complaint of a contravention are not expressed to be conditional upon the alleged contravener continuing to hold the office or

status which had imposed upon the contravener the obligation of compliance at the time of the alleged contravention. As counsel for the Director-General pointed out, a council adviser's status may cease immediately after a non-compliance because, having completed the advice, the role of adviser has terminated, or it may be intermittent, reviving from time to time when the same person is called upon for further advice or advice on other matters. There is nothing in the provision in question to suggest that the cessation of a council adviser's status after a contravention by the adviser was to exempt the person from the procedures and sanctions applicable to a complaint and, therefore, no reason for suggesting otherwise in the case of councillors and the other classes of person required to comply with the provisions relating to them.

As mentioned above, the contravention alleged in the present case was of Division 9A of Part 4 of the Local Government Act, 1919 which contained section 46C. That section required a "member of a council" who had any pecuniary interest, direct or indirect, in any matter with which the Council was concerned to disclose the interest to the meeting and refrain from participating or voting on the matter. The contravention alleged against Mr Fisk is that, being then a member of the Council, he had a pecuniary interest in the matter in question but failed to comply with the requirements of the section. If the facts alleged are proved there would have been a contravention. Regulation 29 enables a complaint of that contravention to be made but requires that it be dealt with as if it was a complaint under the 1993 Act. Thus, if a complaint of a contravention of the 1993 Act remains within the jurisdiction of the Tribunal after the person against whom the complaint is made ceases to be a Councillor it would be the same with respect to the 1919 Act if the person had ceased to be a member of the council after the time of the alleged contravention because in all relevant respects the two cases are indistinguishable.

Section 469 provides that the Tribunal may conduct a hearing into "the complaint" concerned. As mentioned earlier, the reference to "the complaint"

in this context necessarily looks back to the status of the person complained of at the date of the alleged contravention, not at the date of the Tribunal's decision to conduct a hearing. The same applies to section 478(2) which provides that if, during any proceedings, it appears to the Tribunal that, having regard to any matters that have arisen, "another complaint could have been made against the person concerned", the Tribunal may take that complaint to have been referred to it and may deal with it in the same proceedings. The expression "complaint could have been made" relates back to the status of the person at the time of the contravention.

The only provision giving ground for questioning the Tribunal's jurisdiction to deal with a complaint against a person who has ceased to hold the described office or position is section 482 which 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.*

(2) The Pecuniary Interest Tribunal may, if it finds a complaint against an employee of the council is proved, recommend that the council take specified disciplinary action against the employee or recommend dismissal of the employee.

(3) The Pecuniary Interest Tribunal may, if it finds a complaint against a member of a council committee is proved;

- (a) counsel the member; or*
- (b) reprimand the member; or*
- (c) suspend the member from office as member of the committee for a period not exceeding 2 months; or*
- (d) disqualify the member from holding office as a member of any committee of that council for a period not exceeding 5 years.*

(4) The Pecuniary Interest Tribunal may, if it finds a complaint against an adviser to a council is proved:

- (a) counsel the adviser; or*
- (b) reprimand the adviser; or*
- (c) suspend the adviser from office as adviser for a period not exceeding 2 months; or*

- (d) *disqualify the adviser from holding office as an adviser to that council for a period not exceeding 5 years*

There is no difficulty in construing the words “a councillor” in the expression “a complaint against a councillor” in the introductory clause of subsection (1) as meaning “a person who was a councillor at the time of the alleged contravention” because the word “councillor” is tied to the word “complaint” which must refer to that time. The same applies to the corresponding expressions in the introductory clauses in the other subsections. The question is whether the use of the word “councillor” in the succeeding paragraphs of subsection (1) must be construed as meaning a person who was a councillor at both the time of the contravention and the time the Tribunal came to deal with the complaint. A similar question arises in relation to the other subsections of section 482.

As to subsection (2), the fact that the only action the Tribunal may take if a complaint against an employee is proved is to recommend disciplinary action or dismissal, supports an argument that only persons who were still employed were subject to the jurisdiction of the Tribunal to take such action but it does not rule out jurisdiction to conduct a hearing into the complaint for the purpose of ascertaining its truth even though it is too late for the specified action to be taken against the contravener. In establishing the Tribunal, the legislature described its functions in section 489(1) which provides that it is “to hold hearings into and decide allegations of contraventions” of the pecuniary interest provisions of the Act. This does not necessarily mean that there cannot be a hearing into a complaint unless one of the forms of disciplinary action described in section 482 will or can be imposed upon the person against whom the complaint was made. The language of section 482 is enabling. By use of the word “may” in each of its subsections it confers power on the Tribunal to take a range of actions but leaves a discretion to take no action even if the complaint is proved. Section 486 empowers the Tribunal to refer a matter before it to another authority if it considers that it is more appropriate that the authority deal with the matter. This contemplates, for example, that in hearing a pecuniary interest complaint the Tribunal may

find evidence of corruption or criminality in which case it may consider the matter more appropriate to be dealt with by the Independent Commission Against Corruption, the Commissioner of Police or the Director of Public Prosecutions. It would not matter in such a case that the person complained of had ceased to hold the office or position in respect of which the complaint had been made, so it could not have been the intention that the holding of the office or position at the time of the hearing or the ability of the Tribunal to take the specified disciplinary action was essential to its jurisdiction to conduct a hearing into the complaint.

As to subsection (3), the committee, a member of which is the subject of a complaint, may have ceased to exist at the time of the hearing so that the person complained of could no longer be described as a member of that committee. As to subsection (4), the ephemeral nature of the office of adviser to the Council has already been mentioned. It would often be the case that persons who had held the positions described in these subsections at the time of an alleged contravention would not be holding them when the complaint was heard by the Tribunal.

Another aspect of section 482 remains to be considered. The range of actions open to the Tribunal under subsections (1), (3) and (4) is limited to counselling, reprimanding, suspending from office or disqualification from holding office in each case. Suspension from office is not possible if the person is not holding the office. Counselling or reprimanding the person would still be possible in such a case but could be of little or no effect or significance. Disqualification from holding office would remain possible and could be of considerable significance both for the person concerned and the achievement of the purposes of the legislation. However the question is whether the fact that the range of actions by the Tribunal is reduced and some of the forms of action would or could lose effect or significance is reason to conclude that the Tribunal was not intended to have jurisdiction to conduct a hearing into a complaint if the person concerned no longer held the relevant office or position at the time of the hearing.

In the Tribunal's opinion, the considerations on the wording and operation of section 482 to which I have referred are not sufficient to conclude that the intention of the legislation was that the Tribunal's jurisdiction to deal with a complaint was to depend upon the person against whom the complaint was made continuing to hold the office or position in question at the time of dealing with the complaint. Those considerations do not compel such a conclusion. For example, the words "the councillor" in paragraphs (a) to (d) of subsection (1) must be taken to refer to the same person identified as "a councillor" in the introductory words and, as the latter means a councillor at the time of the alleged contravention, the words "the councillor" in the succeeding paragraphs should be understood as merely describing the person's office at the time of the contravention and not intended to stipulate that the office must continue to be held when the Tribunal is dealing with the complaint. The same applies to the other subsections of section 482.

As already pointed out, the Tribunal has a discretion whether or not to conduct a hearing into a complaint and, if a hearing is conducted and the complaint is proved, whether or not to take any disciplinary action. Moreover there may be reason to conduct a hearing into a complaint when the outcome may be action other than disciplinary action by the Tribunal. Therefore, it does not follow from the fact that there are limitations on the actions open to the Tribunal under section 482 when the person in question has ceased to hold the relevant office or position that the Tribunal was not intended to have jurisdiction to deal with a complaint of a contravention by that person. Matters going to the question of jurisdiction are to be distinguished from matters relevant to the exercise of discretion. Cessation of office may well be relevant to a decision by the Tribunal whether or not to conduct a hearing or take disciplinary action but not, in the Tribunal's opinion, to its jurisdiction to deal with a complaint of a contravention by a person who was holding the office at the time of the alleged contravention.

Policy considerations evident in the Act favour the foregoing conclusion. The Introduction to Chapter 14 contains the following:

“The Chapter enables any person to make a complaint concerning a failure to disclose a pecuniary interest and provides for the investigation of complaints.

The Chapter also establishes the Local Government Pecuniary Interest Tribunal.

The Tribunal is empowered to conduct hearings into complaints and to take disciplinary action against a person if a complaint against the person is proved.”

The provisions of Chapter 14 are directed to procuring honesty and integrity in the performance of local government duties and powers by councillors and the other persons described by requiring them to disclose their pecuniary interests and refrain from participating in decisions on council matters in which they have a pecuniary interest. The provisions are also directed to the promotion of public confidence in the conduct of local government as any person is entitled to make a complaint of a contravention and there is an independent Tribunal to deal with it after it has been investigated as required by the Act.

The objects of the legislation would be easily defeated if cessation of office by resigning, declining to stand for re-election or not being re-elected deprived the Tribunal of jurisdiction to deal with a complaint. What is being complained of is breach of a statutory duty in the performance of an office and the public interest in having such complaints properly investigated and dealt with extends beyond the continuation in office of the person against whom a complaint is made. However, the Tribunal's interpretation of the legislation on the present question is based on the provisions of the Act. The policy considerations here mentioned are referred to because they tend to confirm that interpretation: see **Interpretation Act 1987, section 34.**

Statement of Decision on Question of Jurisdiction
Director-General, Department of Local Government
Re: John Norman Frank Fisk, former Councillor Burwood Council

Pursuant to section 484 of the Act this Statement of Decision will be forwarded to the Director-General and Mr Fisk.

DATED: 22 August 1996



K J HOLLAND Q.C.
Pecuniary Interest Tribunal