LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO. 5/1997

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR RICHARD HAROLD HAMPARSUM, KEMPSEY SHIRE COUNCIL

STATEMENT OF DECISION

DATED: 24 March 1998

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ORIGIN OF THE COMPLAINT

The complaint in this matter was made pursuant to section 460(1) of the Local Government Act, 1993 by the Director-General, Department of Local Government.

The complaint followed upon information which was provided to the Director-General in July 1997 by Mr Bernard John Peters, General Manager, Kempsey Shire Council in accordance with the Department's guidelines to Councils in relation to the administration of the pecuniary interests provisions of the Act and pursuant to advice which had been given to Mr Peters by an officer of the Investigations Branch of the Department whom Mr Peters had earlier consulted.

The information was furnished to the Director-General by a letter dated 1 July 1997 in which the General Manager stated that he was drawing attention to "the possible pecuniary interest of Councillor Richard Hamparsum" in relation to matters before the Council at its meetings of 1 and 24 June 1997 concerning a claim by Councillor Hamparsum for reimbursement by the Council of certain expenses incurred by him. Councillor Hamparsum was said to have been in attendance at these meetings, to have failed to declare a pecuniary interest and to have discussed and voted on motions in relation to the matter.

The letter also stated that at the meeting on 24 June 1997, when asked by the Mayor whether he felt he needed to declare a pecuniary interest, Councillor

Hamparsum had replied that he had discussed the matter with the Independent Commission Against Corruption, an officer of which had informed him that he did not need to declare an interest.

On 18 August 1997 the Director-General wrote a letter to Councillor Hamparsum informing him of the information which had been received from the General Manager and inviting any comments which Councillor Hamparsum might wish to make before the Director-General decided what action he should take on the matter.

Councillor Hamparsum replied by letter dated 20 August 1997 as follows:

> **"I could not reasonably be expected to have known that the matter under consideration at the meetings was a matter in which I had a pecuniary interest as per section 457 of the Local Government Act 1993. This matter was never raised at any Council meetings by the General Manager to have advised me accordingly.**
>
> **When the matter was raised it was dealt with under the provision of section 452(e) on a "one off payment" and that all such payments be in accordance with Council Policy.**
>
> **There is no possibility of breaching section 442 as there is no reasonable likelihood or expectation of appreciable financial gain or loss to my person.**
>
> **I consider this complaint to be trivial and not made in good faith."**

On 17 September 1997 the Director-General formulated a complaint against Councillor Hamparsum in terms which included the following:

> **"PARTICULARS OF GROUNDS OF COMPLAINT**
>
> **It is alleged by the Director-General, Department of Local Government, that contrary to Chapter 14, Part 2 of the Local Government Act 1993, Councillor Hamparsum:**
>
> 1. **At a meeting of the Council on 3 June 1997, took part in the consideration and discussion of and voted on questions relating to certain matters relating to reimbursement to him of expenses incurred in obtaining legal advice and the purchase of answering machine equipment; and**
>
> 2. **At a meeting of the Council on 24 June 1997, took part in the consideration and discussion of and voted on questions relating to certain matters relating to reimbursement to him of expenses incurred in obtaining legal advice and the purchase of answering machine equipment."**

THE INVESTIGATION

On 18 September 1997 the Director-General notified Councillor Hamparsum that he had made the complaint, that it involved a possible contravention of section 451 of the Act and that he had decided to investigate the matter under section 462(1) of the Act.

On 23 September 1997 this Tribunal received, pursuant to section 465 of the Act, notice from the Director-General of his decision to investigate the complaint.

THE DIRECTOR-GENERAL'S REPORT

On 23 February 1998 the Director-General, pursuant to section 468(1) of the Act, presented to the Tribunal a Report of the investigation.

The Report contained an account of the course of the investigation and relevant Council records and other documents which had been gathered by the investigators. Recorded interviews with Councillor Hamparsum, the Mayor, Councillor John Bowell, and the General Manager, Mr Peters, had been conducted by the Department's Investigation Officers on 13 October 1997. Transcripts of those recordings were included with the Report as well as the original audio tapes. Written submissions dated 13 October 1997 by both Councillor Hamparsum and his wife Mrs Mary Hamparsum had been presented to the investigating officers at the time of Councillor Hamparsum's interview. These were also included in the Report.

DECISION OF THE TRIBUNAL

Section 469 of the Act provides that the Tribunal may, after considering a Report presented to it, conduct a hearing into the complaint concerned.

Section 470 provides that if the Tribunal decides not to conduct a hearing into a complaint, it must provide a written statement of its decision to the person who made the complaint, and, if the complaint was not made by the Director-General, to the Director-General. This section also provides that the written statement must include the reasons for the decision.

Having carefully considered the Director-General's Report of the investigation of the complaint the Tribunal has decided not to conduct a hearing. Before stating the Tribunal's reasons for its decision it is necessary to refer to some relevant provisions of the Act and give an outline of the background facts as they would appear from the material contained in the Director-General's Report.

RELEVANT PROVISIONS OF THE ACT

The complaint asserts that Councillor Hamparsum had a "Pecuniary Interest" in the matter before the Council meetings of 3 and 24 June 1997. A "Pecuniary Interest" is described in section 442 of the Act in terms which include the following:

> **"442 (1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person … …**
>
> **(2) A person does not have a pecuniary interest in the matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter … …"**

The complaint alleged that Councillor Hamparsum failed to comply with the provisions of section 451 of the Act which are as follows:

> **"451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.**
> **(2) The councillor or member must not take part in the consideration or discussion of the matter.**
> **(3) The councillor or member must not vote on any question relating to the matter."**

In his letter to the Director-General of 20 August 1997, quoted above, Councillor Hamparsum claimed the matter was dealt with by the Council "under the provision of section 452(e)." The relevant provisions of section 452 read as follows:

> **"452 Section 451 does not prevent a person from taking part in the consideration or discussion of, or from voting on, any of the following questions:**
>
> **… …**
>
> **(e) A question relating to:**
> **… …**
> - **The payment of fees and expenses and the provision of facilities to Councillors (including the Mayor)."**

In relation to Councillor Hamparsum's reference to section 452(e) it is convenient to mention briefly provisions in the Act dealing with the fees and expenses which may be paid and the facilities which may be provided to Councillors in respect of their performance of their duties and functions. Section 248 provides that a Council must pay each Councillor an annual fee which must conform with determinations of the Local Government Remuneration Tribunal. Section 252

provides that a Council must adopt a policy concerning the payment of expenses incurred or to be incurred by, and the provision of facilities to, the Mayor, the Deputy Mayor and the other Councillors in relation to discharging the functions of civic office. Sections 253 and 254 require Councils, before adopting such a policy, to give 28 days public notice of the proposal and to keep open to the public that part of the meeting at which such policy is adopted by the Council or at which any proposal concerning the payment of expenses or provision of facilities is discussed or considered. Section 428(2)(f) requires a Council to include in its annual report Council's policy on the payment of expenses and the provision of facilities to Councillors and the total amount of money expended during the year.

It will be necessary to refer to some other provisions of the legislation but, first, reference will be made briefly to the relevant background facts.

BACKGROUND FACTS

It is apparent from the Director-General's Report that the conduct of Councillor Hamparsum to which the complaint is directed occurred in a period of some turmoil within the Council as well as public controversy concerning the renewal of the General Manager's contract of service with the Council and the manner in which the Council was dealing with that question. There was division within the Council. The General Manager's supporters outside the Council called public meetings to support Mr Berry's retention as General Manager and to criticise the Council for the course it was taking in relation to the matter. There was heated discussion publicised by the news media. There were attempts, some unpleasant and some threatening, by certain persons to put pressure on some of the Councillors. However, in the view which the Tribunal takes on the question whether there ought to be a hearing into the complaint against Councillor Hamparsum, it will not be necessary to canvass all of the material on the surrounding facts contained in the Report or all of the allegations and submissions put forward by Councillor and Mrs Hamparsum to the Director-General and the Investigators in the course of the investigation of the complaint. All that is intended here is to give an outline of such of the facts and circumstances as are relevant to the complaint and serve to explain the conduct in question.

The first event directly related to the present complaint occurred at a meeting of the Council on 13 May 1997. In the previous March Council had discussed the question of the renewal of the General Manager's contract, some Councillors had

been subjected to adverse criticism and there had been a public meeting in support of Mr Peters followed by controversy in the press. However, it appears that prior to the Council meeting on 13 May 1997 the General Manager had learnt of the existence of what was called a "poison pen letter" received by a Miss Riggs who was a supporter of Mr Peters and had written articles published in the local press critical of some Councillors' behaviour and favouring Mr Peters' reappointment. One of Councillor Hamparsum's opponents in the Council was a Councillor Parkinson. Extracts from the "poison pen letter" later published in the press revealed that the letter warned Miss Riggs to tell Councillor Parkinson to behave himself in Council Chambers "lest the public put a barrel of bullets in his chest". Having learned of the letter the General Manager appears to have taken it upon himself to engage security staff and equipment to survey and conduct security checks on persons attending the Council meeting of 13 May 1997. The meeting was attended by members of the public who included some of the General Manager's active and vocal supporters. Apparently, in view of the public attendance and presence for the first time of security staff at a Council meeting, there was a degree of tension amongst the Councillors.

In the course of the meeting the Council conducted a confidential session by moving into a Committee of the Whole Council. It is alleged by Councillor Hamparsum that during a break in the proceedings Councillor Parkinson conveyed to persons who were present as members of the public remarks which Councillor Parkinson alleged Councillor Hamparsum had made during the meeting of the Committee of the Whole. It is alleged that one of these persons confronted Councillor Hamparsum with the alleged remarks attributing the source of her information to Councillor Parkinson. This resulted in Councillor Hamparsum complaining to the Mayor of a breach of confidentiality by Councillor Parkinson in respect of which Councillor Hamparsum sought some redress against Councillor Parkinson. The Mayor advised Councillor Hamparsum that if he wished to pursue this complaint he would have to put it in writing and submit it to the General Manager. It may be mentioned that, under section 664(1A) of the Local Government Act 1993, a person may, in the circumstances described in that section, commit a penal offence by disclosing information with respect to the discussion at, or the business of, a meeting or part of a meeting of a Council or a committee of a Council

which was closed to the public in accordance with section 10(2) of that Act (which confers on the Council or a committee of the Council of which all members are Councillors to close to the public a meeting or part of a meeting in certain circumstances).

On 16 May 1997 Councillor Hamparsum contacted Mr Peters indicating that he was still considering lodging a complaint for breach of confidentiality by Councillor Parkinson and wished to have an appointment with the Council's solicitors to obtain advice about the matter. The General Manager informed Councillor Hamparsum that he was not prepared to authorise an approach by Councillor Hamparsum to the Council's solicitors for legal advice on the matter and that Councillor Hamparsum should take it up with the Mayor if he was expecting the Council to meet his legal costs of obtaining advice about his proposed complaint. The General Manager also told Councillor Hamparsum that he would be doing some research and would later report to the Council on the question of Councillors obtaining legal advice from the Council's own solicitor. He also told Councillor Hamparsum that if he submitted a written complaint he would review it and that may result in the General Manager obtaining legal advice on the matter. According to the General Manager Councillor Hamparsum informed him that he would wait until the General Manager gave his report to the Council before taking any further action on his complaint. On the same date, 16 May 1997, the Macleay Argus, a local newspaper, published an article on the "poison pen letter" revealing that the police had discovered a fingerprint on the letter and urging that as a matter of moral obligation the Councillors should provide the police with their fingerprints. Councillor Hamparsum got the impression that it was being inferred that it was he who had written the poison pen letter. He was eager to provide the police with his own fingerprints to rebut the suggestion and subsequently did so on 24 May 1997.

On Sunday 18 May 1997 Councillor Hamparsum sought urgent legal advice from his own solicitor, Mr Simon Priestley of Garrett & Walmsley, Solicitors at Port Macquarie. Subsequently Garrett & Walmsley sent a bill dated 20 May 1997 to Councillor Hamparsum for $450.00. It was headed "Re: Poison Pen Letter to Councillor Parkinson". Particulars of the work done were stated in the bill as follows:

> **"To our professional costs for acting for you in relation to the above matter including lengthy telephone conferences (3), urgent proffering of advice on 18**

May 1997, letter of advice to you, draft letter to General Manager, time involved 1.8 hours."

On 19 May 1997 in the morning the Councillors met with the Kempsey Police to inspect and discuss the poison pen letter. In their written submissions given to the investigators on 13 October 1997, both Councillor Hamparsum and his wife state that when Councillor Hamparsum returned home in the afternoon after the meeting with the police he received two abusive telephone calls from two women, one whose voice he believed he recognised and the other who identified herself. Councillor Hamparsum says that he and his wife were so disturbed by these telephone calls that they reported them to the police. According to Mrs Hamparsum's account, Councillor Hamparsum telephoned the police following the first of the two telephone calls after which they both saw a Detective Sergeant who advised them to install a voice recording machine which could tape any further malicious phone calls and also to ask Telstra to organise a trace on their telephone line so that such calls could be traced to the caller. She says that when they returned home after seeing the Detective Sergeant the telephone rang and the second of the abusive calls occurred with the caller identifying herself and making references to the "poison pen letter'. On the same day, in consequence of the two telephone calls and the advice they had received from the Detective Sergeant, they purchased from a local store a Telstra answer machine and microcassette for which Councillor Hamparsum paid $117.50 using his grazier's tax exemption which saved the cost of having to pay sales tax. He obtained an invoice and receipt.

On 20 May 1997 the General Manager contacted Councillor Hamparsum to advise him that he could not take any action regarding Councillor Parkinson's alleged breach of confidentiality until he received a written complaint from Councillor Hamparsum. The General Manager also informed him that he had prepared a report for the Council on the issue of confidentiality and suggested that Councillor Hamparsum might wish to read that report before he took any action. Councillor Hamparsum told the General Manager that he would be talking to his own solicitor, Simon Priestley, that night and would then decide what to do.

On 23 May 1997 the General Manager received a letter dated 20 May 1997 signed by Councillor Hamparsum, addressed to the General Manager and marked "Private and Confidential". The contents of the letter were as follows:

"Re: Councillor Parkinson – Breach of Confidentiality

I refer to the confidential meeting of Council on 13 May 1997.

I confirm that immediately after that meeting I became aware that Councillor Parkinson had divulged to the public some of the events of that meeting relating directly to the topic under discussion. I note your advice that it is a "gray area". I do understand how this can be the case.

I formally request that you refer what I regard as Councillor Parkinson's serious breach of his obligations to the Department of Local Government. Should you fail to forward a complaint to the Department of Local Government, then I will do so together with a copy of this letter."

On that same day, 23 May 1997, Councillor Hamparsum signed a printed form headed "Councillors Fees Claim Form" which itemised one answering machine and cassette, $117.50, and a professional consultation with Garrett & Walmsley dated 20 May 1997, $450.00. The total of these two items is $567.50. He submitted the receipted invoice for the answer machine and cassette and the bill from Garrett & Walmsley which he had paid.

The Director-General's Report to the Tribunal contains a copy of a confidential report made by the General Manager for consideration by the Council at the Council meeting to be held on 3 June 1997. Because it related to a consideration of legal advice the General Manager had received, the report was submitted for consideration during that part of the Council's meeting which would be closed to the public. The report dealt with both Councillor Hamparsum's complaint alleging Councillor Parkinson's breach of confidentiality in respect of the Council's meeting on 13 May 1997 and Councillor Hamparsum's claim for reimbursement of expenses.

In relation to the alleged breach of confidentiality, the report recited the history of the matter and referred to Councillor Hamparsum's letter of complaint received on 23 May 1997 (quoted above). The report stated that the General Manager did not believe that the information contained in Councillor Hamparsum's letter was sufficient to constitute a proper complaint on which he and the Council could act. The report also stated, that as it was the responsibility of the Council or of some individual rather than that of the Department of Local Government to take any action with regard to a breach of confidentiality, the General Manager did not intend to refer the matter to the department but had no objection if Councillor Hamparsum decided to do so.

In relation to the claim for reimbursement of expenses, which the General Manager attached to his report, with respect to the cost of the legal advice obtained by Councillor Hamparsum, the General Manager declined to recommend reimbursement because he had advised Councillor Hamparsum before the legal advice was obtained that he could not authorise such action and that Councillor Hamparsum should seek such authority from the Mayor. As to the answering machine, the report stated that no prior authorisation was sought and no official Council order was placed. It also made the comment that if Council were to decide to make answering machines available to Councillors it would need to amend and advertise its policies in regard to such matters.

The report concluded by recommending that no action be taken in regard to Councillor Hamparsum's letter except that he be advised of the form required for such complaints and that the question of reimbursement of expenses be the subject of a determination by the Council.

At the Council meeting of 3 June 1997 the General Manager's report on both matters was discussed. Councillor Hamparsum participated in the debate and voted on the matter. The Council resolved by five votes to three that the matter of a potential breach of confidentiality be left in the hands of the General Manager to investigate and submit a report and that Councillor Hamparsum be "reimbursed for expenses incurred as a one-off payment and that all such future payments to Councillors be in accordance with Council policy." The Minutes of the meeting note that Councillor Parkinson recorded his vote against the resolution.

Following the meeting of 3 June 1997, Councillor Parkinson and two other Councillors gave notice of intention to move at the Council's meeting on 24 June 1997 that the Council's resolution for reimbursement of Councillor Hamparsum's expenses be rescinded.

On 24 June 1997 the rescission motion was put to the meeting and was lost, five votes to three, with Councillor Hamparsum expressly declining to declare a pecuniary interest, participating in the debate and voting against the motion.

On 20 October 1997 Councillor Hamparsum delivered to the Council the telephone recording machine for the cost of which he had been reimbursed. He stated in a covering letter that he wished to return the facility as he hoped that the

need to have one was no longer necessary and that he had never wished to have one for his private or business purposes.

DID COUNCILLOR HAMPARSUM HAVE A PECUNIARY INTEREST?

In the terms of section 451(1), the "matter with which the Council was concerned" was the same at both of the meetings on 3 and 24 June 1997, namely, whether the Council should reimburse Councillor Hamparsum for the two items of expenditure which he had already incurred on his own account and without any prior authority from the Council or its General Manager.

The question for the Tribunal posed by the complaint is whether Councillor Hamparsum had, within the meaning of the Act, a pecuniary interest in that matter.

By force of section 442 of the Act, he would have a pecuniary interest if there was a reasonable likelihood or expectation of appreciable financial gain or loss to him as a result of the Council's decision on the matter; unless that reasonable likelihood or expectation was so remote or insignificant that it could not reasonably be regarded as likely to influence any decision a person might make in relation to the matter.

On the undisputed facts established by the investigation of the complaint, a finding by the Tribunal that Councillor Hamparsum had a pecuniary interest in the matter within the meaning of section 442 would be inescapable. There is really no scope for argument about it. $567.50 is an appreciable sum of money. Councillor Hamparsum had incurred a personal liability to pay the shopkeeper and his lawyer and had paid them with his own money. He was out of pocket $567.50. If the Council decided to reject his claim for reimbursement he would stay out of pocket as a result of that decision and thus incur a financial loss. If the Council decided to reimburse him out of the Council funds the decision would make him richer by $567.50, he would make a financial gain. The result in either case would be a certainty and not just a reasonable likelihood or expectation. Whichever way the Council's decision went, the effect would be immediate and, therefore, Councillor Hamparsum's prospects of gain or loss could not be said to be remote within the meaning of subsection (2) of section 442, nor, in the opinion of the Tribunal, could it be said that his prospects of gain or loss were so insignificant as not reasonably to be regarded as likely to influence any decision on the matter.

It follows that, unless excused by some other provision of the Act, Councillor Hamparsum had a pecuniary interest in the matter before the Council which would require him to comply with the requirements laid down by section 451 of the Act. The next question is whether, despite his pecuniary interest, he was excused from compliance with that section by the provisions of section 452(e).

OPERATION OF SECTION 452(e)

Section 452(e), which has already been quoted, is to be contrasted with section 448. Section 448 lists and describes "Interests" which do not have to be disclosed for the purposes of this part of the Act. Section 451, on the other hand, appears under a heading "Participation in Meetings Despite Pecuniary Interests" and sets forth a whole series of questions as to which it provides that section 451 does not prevent a person from taking part in the consideration or discussion of, or from voting on, any of those stipulated questions.

The reference in section 452 to section 451 makes it clear that section 452 proceeds upon the footing that the person in question has a pecuniary interest in the matter with which the Council is concerned. If it were otherwise section 451 would have no application anyway and there would be no need for section 452 to excuse compliance with it.

The principal question that arises on the facts of the present case, again facts not in dispute, is whether the matter before the Council was a question relating to payment of "expenses and the provision of facilities to Councillors" within the meaning of paragraph (e) of section 452. That is purely a question of construction of the language used in the provision but the words have to be considered in the context of other relevant provisions of the legislation.

Reference has already been made to section 248 (annual fees for Councillors) and 252 (adoption by Councils of a policy concerning payment of expenses and the provision of facilities to Councillors). In this connection, it should be mentioned here that the preceding Council had adopted a policy pursuant to section 252 on 27 September 1993 which was reviewed by the present Council at a meeting on 20 February 1996 and, after public exhibition, was adopted by the present Council on 29 October 1996 at a meeting of the Council at which all of the Councillors were present and voted. In relation to the telephone, the policy stated that Councillors would be provided with a monthly allowance towards the cost of telephone calls fixed

at $8.00 per month to be reviewed each year when fixing fees payable to Councillors and that the Council would make available to Councillors a Facsimile Facility, and Consumables, for use on Council business. The policy made no provision for payment of a Councillor's legal expenses or the provision of telephone answering or recording equipment. The policy had not been altered at the time of the events now under review.

It would seem to the Tribunal that there are two possible views as to the meaning and intent of the words in paragraph (e) of section 452. One is a restricted view that the words relate only, in relation to the payment of fees, to the fees referred to in section 248 of the Act and, in relation to the payment of expenses and the provision of facilities to Councillors, to those fixed and described in the policy adopted by a Council under section 252 of the Act. The fact that sections 248 and 252 are found in the same division of Chapter 9 of the Act and the words of paragraph (e) of section 452 encompass both the payment of fees and the payment of expenses and provision of facilities lends support to the restricted view.

The other view that requires consideration is that the words of paragraph (e) are perfectly general and ought to be applied to any question being considered by a Council which would answer the description of those words considered at large.

In deciding which of the two views is a correct interpretation of paragraph (e), a relevant consideration would be whether the powers of the Council in relation to payment of expenses and the provision of facilities to Councillors are limited to expenses and facilities specified in a policy adopted under section 252 which is in force at the relevant time. If a Council's powers were so limited it would provide a strong argument for the view that paragraph (e) was not intended to operate in a wider sense than the policy adopted under section 252.

In the opinion of the Tribunal, considering for the moment only the question of powers of a Council, on a proper construction of the relevant provisions of the Local Government Act, 1993 the preferable view is that a Council's power to pass and implement resolutions for the payment of expenses or the provision of facilities to Councillors is not restricted to those contained in a policy adopted pursuant to section 252 of the Act.

It is sufficient for present purposes to consider a Council's power to pay for expenses of the particular kind incurred by Councillor Hamparsum. It is clear that

these were not covered by the Kempsey Shire Council's policy adopted under section 252.

Councillor Hamparsum claimed at the meetings that his expenditure arose out of and was occasioned to him by Council business and his performance as a Councillor of his civic functions and duties.

On the material contained in the Report, there was room for debate as to the validity and merit of this claim but the Tribunal takes the view that, having regard to the evidence contained in the Report, that issue would be one open to the Council to decide for itself if the Council had a general power to decide to pay those kinds of expense when incurred by a Councillor.

In the opinion of the Tribunal, the correct interpretation of the legislation is that a Council does have power to pay or reimburse a Councillor for expenses incurred by a Councillor which the Council considered were incurred for the purpose or in consequence of the performance by the Councillor of his or her functions and duties even though expenses of the kind incurred in the particular case were not covered by the Council's adopted policy on the payment of expenses to Councillors. In the Tribunal's view, a Council has this power by virtue of its corporate character and the general powers and functions vested in a Council and its Councillors by the Local Government Act 1993 and the general law.

By section 220 of the Act a Council is constituted as a body corporate. As such it may do all things that body corporates may do by law and that are necessary for or incidental to the exercise of its functions: **Interpretation Act, 1987, section 50(1)(e), (4)**. By sections 222 and 223 the elected Councillors comprise the governing body of the Council and have the role of directing and controlling the affairs of the Council in accordance with the Act. Section 21 provides that a Council has the functions conferred or imposed on it by or under the Act but, as well, section 22 provides, under the heading “Other Functions”, that a Council has the functions conferred or imposed on it by or under any other Act or law. The effect of these provisions was considered by Brownie J. in the Supreme Court of New South Wales in **Feiner v Domachuk** (1994) 35 NSWLR 485 at pp. 494 – 495.

In that case the Council had favoured and financed private litigation to which it was not a party but which sought to restrain a public nuisance in the Council's area about which the Council was concerned. It was contended by the defendants that

the only powers of a council to deal with a nuisance in its area were the specific powers in Part 2 of Chapter 7 of the Act (i.e. sections 124, 125 et. seq.). It was also contended that by not following the procedures contained in Division 2 of that Part (i.e. section 129 et seq.) the defendants were deprived of protections available to them under the provisions thereof. It was further contended that the only power of the Council to spend money was that contained in section 409(2) of the Act, that is, "towards any purpose allowed by this or any other Act" and that the purpose of the Council's action in financing the litigation was not to be found in that Act or any other Act. Brownie J. rejected these contentions and held that, in the light of its status as a body corporate and its general statutory powers, a Council was entitled to exercise in relation to its affairs such powers as, under the general law, all body corporates and individuals ordinarily have. In the Tribunal's opinion, this decision supports the Tribunal's view that a Council is not limited by section 252 and has a more general power in relation to the payment of expenses and provision of facilities to Councillors. (The decision was upheld by the New South Wales Court of Appeal: (**Domachuk v Feiner** (Court of Appeal) 40439/94, 28 November 1996, unreported; Butterworth's Unreported Judgments, BC9606851)

No doubt a Council will, in accordance with the purpose of section 252, generally restrict payment of expenses to Councillors to those which are specified in its policy but it would be another thing to say that the Council's power is totally spent by the adoption of a policy under that section unless and until it amends the policy. That would deny power to a Council to deal with extraordinary situations or unexpected contingencies where, in the Council's opinion, a Councillor was put out of pocket or needed to be provided with some facility in consequence of his position as Councillor and the performance of his civic duties and ought to be reimbursed with no general amendment of its policy being called for. It is apparent from the fact that the Council's resolution of 3 June 1997 stipulated that Councillor Hamparsum's reimbursement was made as a "one-off" payment with all such future payments to Councillors to be in accordance with Council policy, that the Council dealt with the matter as a special case, not to be considered as a precedent. In the Tribunal's opinion, the Council had the power to take that course. The Tribunal is not concerned with the merits of its having done so. That was the concern of the Council itself.

Returning to section 452(e), the result of the foregoing discussion is that, as a matter of construction, the words of paragraph (e) under consideration cannot be considered as relating solely to a question before the Council as to the adoption of a policy under section 252 or the application of an adopted policy with respect to a Councillor's claim for expenses or the provision of facilities to Councillors. In the Tribunal's opinion, the words are capable of application also to a question, such as the one which arose in this case, of a claim for reimbursement of expenditure incurred by a Councillor which was not covered by its existing policy and as to which the Council was entitled to act under its general powers.

Whilst the Tribunal has preferred the wider view as to the ambit of paragraph (e) of section 452, it recognises that it is a debatable issue. The Director-General has informed the Tribunal that it will be the subject of review under section 747 of the Act when the time comes for that review to be undertaken. Meanwhile in the absence of any authority directly on the point, the Tribunal must proceed on its own interpretation of the legislation as it stands.

Upon the basis that the Tribunal's interpretation is correct, Councillor Hamparsum was excused by section 452 from complying with the provisions of section 451 prohibiting him from participating in the debate or voting on the question before the meetings of 3 and 24 June 1997 even though he had a pecuniary interest in that question.

In the course of their interview with Councillor Hamparsum, the investigators made the point that section 452 did not excuse a Councillor from making a declaration disclosing his pecuniary interest to the meetings, a declaration which he had declined to make when the subject was raised.

The point made by the investigators is literally correct and is more than a formality when considered in relation to many of the questions listed in section 452. It is apparent from some of these questions that unless a Councillor's pecuniary interest in those particular questions were disclosed by a declaration of his interest at the meeting, the other Councillors would not or may not know that the Councillor in question was debating or voting on a matter in which he had a financial stake in the outcome. The clear policy of the section is that the other Councillors are entitled to know if any of their number has such an interest and the Councillor in question has a

legal obligation to inform them of its existence even if, by virtue of the section, the Councillor is not prevented from debating or voting on the matter.

Applying sections 451 and 452 literally, it may be said in this case that Councillor Hamparsum failed to comply with section 451(1) by not declaring his pecuniary interest in a question before the meetings. The question then posed for the Tribunal would be whether this failure would warrant a hearing by the Tribunal. In the Tribunal's view, it clearly would not. It happens that, in the case of this particular question under section 452, namely, reimbursement of expenses incurred by a Councillor, a Councillor's pecuniary interest is self-evident. The question itself discloses the Councillor's interest. A declaration would, therefore, be a mere formality and the failure of a Councillor to make it would occasion no advantage to the Councillor or disadvantage to the fellow Councillors. No penalty would be called for and consequently a hearing into the complaint would not be justified.

SECTION 457

In his letter to the Director-General of 20 August 1997 (quoted above) Councillor Hamparsum made an obscure reference to section 457 as being a justification for his conduct. That section provides that a person does not breach section 451 if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest. Councillor Hamparsum appears to be under a misconception as to the operation of the section. The section provides a defence only where a person is ignorant of and could not reasonably be expected to have known the facts which would constitute a pecuniary interest in the matter under consideration at a meeting. Here Councillor Hamparsum knew all the facts which gave him a pecuniary interest in the matter under consideration. There was no room for section 457 to be applied to him.

REASONS FOR THE DECISION

The principal reason for deciding not to conduct a hearing into the complaint in this case is that, in the opinion of the Tribunal, the information ascertained by the investigators which is contained in the Director-General's Report would establish that the question before the Council for consideration at its meetings on 3 and 24 June 1997 related to the payment of expenses and the provision of facilities to Councillors within the meaning of paragraph (e) of section 452 of the Local Government Act,

1993 and that, consequently, Councillor Hamparsum was not prevented by section 451 from taking part in the consideration or discussion of, or from voting on, that question. Assuming, without deciding, that, regardless of the circumstances, a Councillor remains obliged under sections 451 and 452 to make a disclosure of a pecuniary interest in a question, Councillor Hamparsum's failure to do so in the circumstances of this particular case would amount to only an informality because his pecuniary interest in the question was manifest in the question itself. For this further reason, a hearing into a complaint of non-compliance with section 451 only in this respect would not warrant a hearing.

COUNCILLOR HAMPARSUM'S NOTION OF A PECUNIARY INTEREST

As the Tribunal takes the view that it was for the Council to decide the merits of Councillor Hamparsum's claim for reimbursement of his expenses, the Tribunal does not propose to comment on the grounds upon which Councillor Hamparsum based his claim or the issues raised in the Council with respect to it. However, there is one aspect of Councillor Hamparsum's approach to the matter which calls for comment in his own interest. That is his persistent failure to accept that the question before the Council was one in which he had a pecuniary interest.

At the commencement of his interview and repeatedly throughout he emphatically declared that he was unable to accept that he had had a pecuniary interest in the matter "under any circumstances whatever" because, he said, it was a simple case of "an expense incurred by me for business that I had conducted with the Council." He also told the investigators that, in declining to declare a pecuniary interest, he had relied on section 452(e). Whether Councillor Hamparsum actually had the provisions of that section in his mind at the time of the meetings, is, on some of the material contained in the Director-General's Report, open to question. Assuming that he did so, he declined to acknowledge, when it was pointed out to him by the investigators, that the section on which he was relying presupposed that he had a pecuniary interest in the question.

The Tribunal acknowledges that the existence of a pecuniary interest in a matter is not always a simple question and in some circumstances may call for legal advice. The Tribunal has encountered cases of genuine confusion on the part of Councillors and Council's staff and has endeavoured by its decisions to assist those

who have to consider their own position or advise others on the subject of pecuniary interest. As already indicated, the Tribunal considers that this was a clear and simple case of a pecuniary interest. However, as Councillor Hamparsum has professed that, to him, it was a clear and simple case of no pecuniary interest, there is reason for the Tribunal to suggest an approach to the matter that may assist Councillors to make a correct assessment of their position. In considering whether or not they have a pecuniary interest in a matter it should assist a Councillor to relate his or her position to the possible outcomes of the question before the Council. A Councillor should consider, whether as a result of any of the decisions which the Council might make on the particular question, his financial position or financial prospects will or may be better or worse than they were before the decision was made. There may be other relevant questions to be considered also but at least this is a sound approach with which to begin. Councillor Hamparsum would appear to the Tribunal not to have made this approach to the question which confronted him. In the opinion of the Tribunal, had he done so, his pecuniary interest in the outcome of the question which the Council had to decide would have been clear and obvious. Of course, that would not have been the end of the matter because he was entitled to the benefit of section 452(e).

Pursuant to section 470(1) this Statement of Decision will be provided to the Director-General. Copies will also be provided to Councillor Hamparsum and the Kempsey Shire Council.

DATED: 24 March 1998

PECUNIARY INTEREST TRIBUNAL
ORTA RECENS QUAM PURA NITES
LOCAL GOVERNMENT NSW

K J HOLLAND Q.C.

Pecuniary Interest Tribunal