LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 7/1996

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

REPORT OF INVESTIGATION UNDER SECTION 462(1) LOCAL GOVERNMENT ACT, 1993

RE: MR LEIGH ROBINS, DIRECTOR OF TECHNICAL SERVICES, OBERON COUNCIL

STATEMENT OF DECISION

Dated: 23 October 1997

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INTRODUCTION

On 2 October 1997, the Tribunal received from the Director-General, Department of Local Government, a Report pursuant to section 482(1) of the Local Government Act, 1993 of an investigation into a complaint against Mr Leigh Robins, Director of Technical Services, Oberon Council.

The complaint was that Mr Robins, being a designated person within the meaning of the Act, had committed a breach of section 459(1) of the Act by failing to disclose in writing to the General Manager of the Council his pecuniary interest in a Council matter with which he was dealing in 1993.

The matter in question was the provision by the Council of a sewage system to which properties on the eastern side of Blenheim Avenue, Oberon, could be connected. In his capacity as Director of Technical Services, Mr Robins was dealing with that matter for the Council in the course of performing his duties.

Section 459 of the Act provides as follows:

> **"459. (1) A designated person must disclose in writing to the general manager (or if the person is the general manager, to the council) any pecuniary interest the person has in any council matter with which the person is dealing.**
>
> **(2) The general manager must, on receiving a disclosure from a designated person, deal with the matter to which the disclosure relates or refer it to another person to deal with.**
>
> **(3) A disclosure by the general manager must, as soon as practicable after the disclosure is made, be laid on the table at a meeting of the council and the council must deal with the matter to which the disclosure relates or refer it to another person to deal with."**

A "pecuniary interest" is described in section 442 of the Act. The provisions of that section which are relevant to the present case are:

> **"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 a 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 allegation that Mr Robins had a pecuniary interest in the matter was based on the fact that, prior to the Council deciding to proceed with the provision of the sewerage system, Mr Robins and his wife had purchased a block of land on the eastern side of Blenheim Avenue for the purpose of erecting a residence thereon. At the relevant time there was no sewerage service to which a residence on that block could be connected; but the size of the block was sufficiently large to permit the installation of a septic system. However, if a sewerage line was installed to service the block, the value of the land would be appreciably increased, firstly, by the availability of sewerage connection instead of having to install a septic system and, secondly, by the ability to subdivide and sell part of the land. The reason that a subdivision would then be possible was that residential building blocks were permitted by the Council to be smaller if there was sewerage connected than if a septic system was necessary. It was alleged that, consequently, Mr Robins had a pecuniary interest in the matter with which he was dealing

because there was a reasonable likelihood or expectation of appreciable financial gain to Mr Robins if the Council decided to approve and carry out the installation of a sewerage system to the eastern side of Blenheim Avenue.

It was alleged that the requirements of section 459 were not complied with in that, notwithstanding Mr Robins pecuniary interest in the matter, he failed to make a written disclosure to the General Manager in contravention of subsection (1) of that section and, contrary to subsection (2), was permitted to go on dealing with it himself by furnishing estimates of costs and advice to the Council prior to the Council deciding on 13 December 1993 to proceed with the work.

HISTORY OF THE COMPLAINT

It appears from the Director-General's Report that the complaint was originated by the Oberon Ratepayers' Association, the Secretary of which wrote to the General Manager of the Oberon Council on 25 October 1994 giving notice of the Association's intent to refer the matter to the Ombudsman. This letter referred to a general meeting of the Association on 6 September 1994 which had requested the Executive of the Association to ask the Council to provide details regarding the connection of the sewerage to Blenheim Avenue and to have an open discussion with representatives of the Association not with a view to suggesting impropriety by any Council officer but for the purpose of "discounting speculative rumours concerning the matter." The letter stated that this request had been dealt with at the Council's meeting held on 26 September 1994 and the Association's request was denied. According to the letter, copies were circulated to the Mayor, all Councillors and "Mr M Clough."

On 13 April 1995 the Ombudsman's Office notified the Oberon Ratepayers' Association that that office had decided to decline an investigation of the Association's complaint because the information available did not contain evidence of wrong conduct in terms of the Ombudsman Act, 1974, that would warrant the commencement of an investigation.

In relation to the complaint, the Ombudsman's Office had received from the Oberon Council a letter dated 16 February 1995 signed by the Mayor, Marjorie Armstrong, and the General Manager, Bruce Fitzpatrick, setting out the circumstances and the sequence of events which, according to that letter, had led to the Council's decision to install a sewage system which could service land on the eastern side of Blenheim Avenue. The Ombudsman's letter to the Oberon Ratepayers' Association advised that it had been decided to forward a copy of the Association's complaint and the Council's response to the Ombudsman's inquiries to the Director-General of the Department of Local Government for his information as the Director-General was able to review complaints about failures to disclose pecuniary interests and decide what type of action, if any was required in response to such complaints.

On 13 April 1995 the Ombudsman's Office wrote to the Director-General forwarding the Association's complaint and the Council's response to the Ombudsman's inquiries, requesting that if the Director-General considered any action to be warranted he advise the relevant parties directly.

On 4 September 1995 the Oberon Ratepayers' Association by its Secretary forwarded to the Honourable R J Clough, MP, Member for Bathurst in the New South Wales Parliament, a copy of a letter which the Committee of the Association was proposing to forward to the Ombudsman's Office and the Department of Local Government. This letter expressed dissatisfaction with the information that had been given to the Ombudsman's Office by the letter on behalf of the Council signed by the Mayor and the General Manager mentioned above and the outcome of the Association's complaint to the Ombudsman. The Association requested Mr Clough to pass the information contained in the Association's letter "directly to the investigator as soon as possible in order to assist in a correct and fair decision being made." On 5 September 1995 Mr Clough forwarded a copy of the Association's letter to the Ombudsman and to the Honourable E T Page, MP, Minister for Local Government, seeking the Minister's consideration and advice in relation to the matter.

On 27 October 1995 the Minister replied to Mr Clough informing him that the Department of Local Government had conducted inquiries which had disclosed that the Council's Director of Technical Services had declared his pecuniary interest in the matter at the meeting of the Council on 13 December 1993 at which the Council had decided to proceed with the sewage installation and had not taken part in the decision making process but the declaration of pecuniary interest had not been formally recorded. The letter informed Mr Clough that the Council had acknowledged that the pecuniary interest declaration should have been formally recorded and had undertaken to the Ombudsman that they would be recorded in the future. The letter said that no further action was proposed.

On 6 November 1995 Mr Clough again wrote to the Minister for Local Government stating that he did not believe the advice furnished to the Minister by the Department that the Director of Technical Services had declared a pecuniary interest which was not formally recorded because he refused to believe that the administration at Oberon could be "so slack that such an important item would not be recorded." Mr Clough's letter requested that the matter be further investigated. On 9 December 1996 the Director-General informed Mr Robins, the Council's General Manager, the Ombudsman and the Tribunal that he had decided that the matter should be the subject of an investigation pursuant to section 462 of the Local Government Act, 1993 in relation to alleged breaches of section 459 of the Act.

THE DIRECTOR-GENERAL'S REPORT

The Director-General's Report to the Tribunal contains a full account of the Department's investigation of the complaint and the information obtained by its Investigating Officers. The Report recounts the sequence of events that led up to the Council's decision of 13 December 1993 which resulted in the installation of the sewage system in question.

As well as obtaining copies of the Council's written records, the Department's Investigators conducted taped interviews with Mr Robins, the

General Manager and other relevant members of the Council's senior staff, transcripts of which are contained in the Report. The Investigators also interviewed or obtained written statements from other Council staff who had participated in or had information on the progress of the matter through the Council. The Councillors who had attended the meeting of 13 December 1993 were all interviewed on the question whether Mr Robins had informed the meeting of his pecuniary interest in the matter before the Council made its decision to approve the sewage works. These Councillors, who included some former and some present members of the Council, all provided signed statements of their individual recollections.

DECISION BY THE TRIBUNAL

By section 469 of the Act, the Tribunal may, after considering a Report presented to it, conduct a hearing into the complaint concerned. By section 470, 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. The Tribunal's written statement must include its reasons for the decision.

It is to be borne in mind that the Director-General's complaint in the present case is directed against Mr Robins as an employee of the Council. Section 482(2) of the Act provides that the 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." The Act does not provide any other sanction or course of action against a Council employee if a complaint is proved.

The Tribunal, after giving careful consideration to all of the information contained in the Director-General's Report, has decided not to conduct a hearing into the complaint and will now proceed to state its reasons for that decision.

REASONS

The Report contains material which would prove beyond argument that Mr Robins, in fact, failed to comply with the provisions of section 459(1) of the Act which has been set out above. The evidence in the Report leaves no doubt that Mr Robins had a pecuniary interest, within the meaning of the Act, in the question whether the Council should approve and authorise expenditure on the installation of a sewage system which included an extension to that part of Blenheim Avenue where his and his wife's own land was situated. Nor is there any doubt that, as the Director of Technical Services, he was senior staff and, therefore, under section 441 of the Act, a designated person for the purposes of section 459 and, as such, was dealing with the matter. He was involved in preparing the estimate of costs for the Council to consider and it was he who put forward to the Council at its special meeting on 13 December 1993 which was called to consider the estimates for the six months to 30 June 1994 an "Estimate Request" form requesting that the sewerage works be included in the estimates to be approved by the Council. As well as an estimate of the capital expenditure at $68,0000, this Estimate Request form contained advice to the Council as to the advantages to the Council or the community if the request was adopted and the consequences if it was not adopted. The form also contained a statement of the opinion of the Council's Executive Management as to the priority which ought to be given to the work. Mr Robins had participated in the decision of the Executive Management which was that "high" priority be recommended to the Council for the proposed sewerage works.

The intention of the legislature in section 459 is perfectly clear. First of all, a Council officer in Mr Robins' position must make a written disclosure to the Council's General Manager of his or her pecuniary interest in the matter with which he or she is dealing. Secondly, the General Manager, on receiving such a disclosure, has a statutory obligation to take the matter out of that officer's hands and either personally deal with the matter or refer it to another person to deal with. The section does not give any option or discretion to either the officer in question or the General Manager. The

section is imperative, the officer and the General Manager "must" act in accordance with the section and if they do not do so there is a contravention of the Act. In terms of the section, the General Manager is only required to intervene on receiving a disclosure from the officer concerned and it may be argued that the General Manager could not be found guilty of a contravention of subsection (2) unless he had received a written disclosure made to him in pursuance of subsection (1) of section 459. Be that as it may, there was a clear contravention by Mr Robins against whom the Director-General's complaint has been made.

Both Mr Robins and the General Manager have assisted the Investigators in their inquiries into the circumstances of the matter and have not disputed the facts which demonstrate that a breach of section 459 did occur. They agree that the section was not complied with but both have stated that this was due entirely to the fact that at the time they were ignorant of the provisions of section 459 and believed that their obligations had been satisfied by a disclosure of his pecuniary interest made orally by Mr Robins to the Council meeting of 13 December 1993, a disclosure which had been discounted by the Council because every member of the Council was already aware of Mr Robins' interest in the matter and had no objection to his dealing with it notwithstanding his interest.

As the breach alleged is not disputed, the Tribunal, in considering whether to conduct a hearing, directed its attention to the circumstances in which the breach occurred. It is a consideration of those circumstances as explained by the information in the Report together with a consideration of the sanctions available to the Tribunal in the case of a breach by a Council employee that has led the Tribunal to decide not to conduct a hearing in the present case.

The Circumstances of the Breach

By reason of the office held, experience, expertise or delegated powers, a senior member of Council staff may be in a position to exert influence on Council decisions or use a delegation of power for the staff

member's own personal advantage or the advantage of some associate. An obvious concern of section 459 is to prevent this happening or even appearing to happen in the conduct of Council business. The section is also designed to ensure that the Council will receive impartial and objective advice from its staff. Therefore, a question for consideration here is whether the proposal to sewer Blenheim Avenue originated with Mr Robins or whether, having otherwise originated, it was promoted in any way by Mr Robins for his own ends.

In the opinion of the Tribunal, the evidence in the Report clears Mr Robins on both counts and there is no reason for doubting the truth of the evidence.

How Did The Proposal To Sewer Blenheim Avenue Come About?

The Local Government Act, 1993 came into force on 1 July 1993. Its provisions required the advertising of staff vacancies and the appointment of staff on merit. Mr Robins was appointed under these provisions to the position of Director of Technical Services on 20 September 1993. The General Manager, Mr Bruce Fitzgerald, had been appointed to his position only two months earlier. They had both previously been employed by adjoining Councils in the Riverina, Mr Fitzpatrick was the General Manager of the Wakool Shire Council and Mr Robins was employed as an engineer by the Murray Shire Council. They lived 100 kilometres apart, saw each other occasionally at local government affairs but knew each other only by sight. Although, technically, the appointment of Mr Robins was made by Mr Fitzpatrick the decision to appoint him was made through Mr Fitzpatrick, an outside consultant and all of the members of the Council at that time by means of "On merit" interviews in which all of the Councillors were involved.

At the time of their appointments, a serious problem already confronted the Council in relation to sewerage disposal. The problem related to a number of residential building lots in a subdivision with frontages to Hampton Road in the vicinity of residential lots with frontages to Blenheim Avenue. Blenheim Avenue made a more or less right angled intersection with

Hampton Road adjacent to the series of lots in Hampton Road where the problem existed.

As early as January and February 1993 Council's then Shire Health and Building Surveyor was reporting on the problem to Council and the Shire Engineer. He pointed out that the building lots fronting Hampton Road in the vicinity of Blenheim Avenue were not sewerable by gravity with the result that the Council had not provided a sewer connection for those lots. He had inspected the lots and found that those which were not yet built on were unsuitable for residential development because on site waste water disposal was not possible, hence building consent could not be given. He had consulted the Regional Environmental Health Officer who inspected the sites and recommended that waste water should be pumped to the sewer. The Council officer agreed and expressed the belief that that was the only viable option. His report mentioned two lots on which residences had been erected with the installation of a septic tank and absorption trench to dispose of waste. His inspection revealed that this system had failed on one of the lots and the waste was surcharging. He considered that those existing occupancies would be likely to be polluting contrary to the provisions of the Clean Waters Act and should be sewered.

Another lot presented a more critical problem. A dwelling was currently under construction on that lot pursuant to a building consent which the Council had granted. The Health Department would not recommend approval of the installation of a septic tank on that lot for on site disposal and he could not grant such an approval under his delegation. The site was not large enough for septic tank on site disposal and was a potential embarrassment to the Council because of the fact that the Council had already granted both development and building consent for a dwelling on the site. This situation posed a possibility of litigation against the Council by the lot owner who was currently building.

The Health and Building Surveyor reported that the installation of a sewerage system to solve the problems in Hampton Road would involve a pump well and rising main to connect with an existing sewer line for which the

Shire Engineer had been requested to provide a cost estimate. He recommended that the Council provide a sewer service to the nine lots in Hampton Road that were affected. He also asked the Shire Engineer to investigate the feasibility of providing sewer to the lots on the eastern side of Blenheim Avenue concurrently, observing that several owners of those lots would look to subdivision should the lots be sewered.

In March 1993 the residents of Blenheim Avenue were informed by letter that the Council was going to conduct a feasibility study of providing sewerage to lots in the area.

In July, August and September 1993, prior to Mr Robins commencing his duties, further consideration was given by Council staff to the problem. On 3 September 1993 a member of the staff prepared an estimate of the cost of providing sewerage to lots in Hampton Road and Blenheim Avenue. The costs well exceeded $30,000 which was all that the Council then had available from its current budget for sewerage works and on 27 September 1993 the General Manager reported that it had been decided to defer the problem until consideration of the estimates for 1994.

The General Manager was questioned by the Investigators as to why, if the initial sewerage disposal problem arose with respect to building lots on Hampton Road, the sewerage system proposed to the Council for approval came to be extended to Blenheim Avenue. In the course of answering this question, the General Manager referred to additional costs in relation to Hampton Road that would be caused by the necessity of installing a pumping station because a gravity fed system was impossible by reason of the low lying location of the lots in Hampton Road. He said:

> **"So one of the suggestions ... ... was to - in order to recover some costs that would justify putting in a sewerage pumping station, why don't we run the line up Blenheim Avenue to the top of the hill where we could then command some other blocks that were already connected to sewer and some vacant blocks that had not yet been developed in order to maximise our rating return to pay for the cost of the sewerage pumping station. That seemed like a pretty logical arrangement to myself and the**

other senior officers on the Council and when we went to the Council with our budget document we had as a MANEX Group given it a number one priority, a very high priority, so the reason for running it up Blenheim Avenue was to generate more income and minimise the amount of other septic systems that would be developing within that area. Because I think (the Council's former Shire Health and Building Surveyor) also said ... ... that the proliferation of septics that could occur in that area and the type of soil and the wet climate we had with people not cleaning their septic systems out every five years or so could generate a continuing health problem. There's a variety of reasons why it was a good idea to do it at the time."

It is apparent from the material in the report that the idea of establishing the sewerage installation with a pump station and extending it to serve the lots on the eastern side of Blenheim Avenue neither originated with nor was generated by Mr Robins. It was driven by the physical problems associated with the lie of the land, private and public health considerations, high risk of litigation by a home builder whose development and building approval by the Council could be nullified by his inability to provide for sewerage disposal in the absence of a sewer line provided by the Council and by the economic wisdom of multiplying the revenue obtainable by sewerage rates to offset the cost of installation, all of which driving factors pre-dated Mr Robins appointment to the Council and his acquisition of a building lot on the eastern side of Blenheim Avenue. The advice proffered to the Council in the Estimate Request put forward by Mr Robins did no more than summarise pre-existing considerations which were not the product of his invention or input. They read as follows:

"Advantages to Council or community if adopted:

Allows building to proceed on lots which currently do not have a sewer connection.

Allows habitation of an almost completed dwelling.

Eliminates the current problem of overflowing septic tanks.

Provides more Sewerage fund rate income.

Consequences if not adopted:

> No building can be undertaken on several lots as they are too small for septic tanks.
>
> Existing septic tanks will continue to overflow into Hampton Road and ultimately into the Fish River.**"**

According to the Council staff who were interviewed by the Investigators the "High" MANEX priority specified in the Estimate Request was the unanimous view of the Council's senior staff all of whom participated in the decision to allocate that level of priority to the proposed works.

Was there Connivance or Covert Action?

It appears from the Report that in conducting their investigation the Department's officers were alert to the possibility of connivance between the General Manager and Mr Robins steering Mr Robins towards the purchase of a lot in Blenheim Avenue or covert action on the part of Mr Robins for the purpose of gaining a financial benefit from a Council decision to install a sewer line to his lot.

The Investigators ascertained from the General Manager that in order to encourage newly appointed senior staff to move to Oberon and establish a place of residence in the town the Council had offered all of them a loan to assist them in buying a house. The General Manager, who had taken up his appointment before Mr Robins arrived, said that he had had great difficulty in finding a house that suited him and ended up selecting a house that was not on the market but was offered to him after he had looked at everything and was beginning to get desperate. He told them that Mr Robins found himself in exactly the same boat. When he arrived to take up his appointment Mr Robins rented a property for three months which the General Manager had found for him. He had then looked around with his wife and was unable to find anything suitable. The General Manager said that there wasn't much suitable at that time and although there were blocks in Oberon capable of being sold for housing none were for sale at that time because land prices were low. As the period of Mr Robins' three month lease was coming up, Mr Robins decided that he would have to buy a block of land and build taking advantage of the Council's offer of a loan to enable him to do so. Mr Robins

told the Investigators that he had purchased the block in Blenheim Avenue because he considered it to be the best available block there was at the time that suited their budget. He said that he and his wife had looked around the town to buy a house but no suitable house was available. They decided they would build rather than buy because there seemed to be no connection between the standard of the house and the price they would have to pay to buy an existing house.

On 22 October 1993 Mr and Mrs Robins applied to the Council for a housing loan to purchase and build a house on Lot 8, Blenheim Avenue, Oberon. At the meeting of the Council held on 1 November 1993 the Council's Director of Corporate Services recommended that the Council grant Mr and Mrs Robins an initial land/housing loan of $40,000, with an additional facility of $120,000 being made available for the erection of a building at a later date, under similar terms and conditions as applied to other senior staff housing loans. The Council resolved at that meeting to accept the recommendation and grant the loan.

On 11 November 1993 Mr and Mrs Robins purchased Lot 8, Blenheim Avenue, Oberon and under the Council's terms and conditions executed a mortgage of the property in favour of the Council to secure the repayment of the loan.

The Council's Management Executive team met to discuss the draft Estimates for the first six months of 1994 on 24 November 1993 by which time all of the Council's senior staff and every Councillor was aware of the fact that Mr Robins had been granted by the Council a loan to purchase and build a house on a block in Blenheim Avenue which would be advantaged by the installation of the proposed sewerage system, the necessity for which had already been fully acknowledged and accepted by the Council's senior staff if not at that stage by Council itself.

In the Tribunal's opinion, the material in the Director-General's Report provides no basis for supposing that there had been any connivance between the General Manager and Mr Robins or any covert action on the part of Mr Robins to acquire a block of land in Blenheim Avenue for the purpose or with

the intent of profiting from an anticipated decision by the Council to establish a sewerage system that extended along Blenheim Avenue.

Did Mr Robins Disclose His Pecuniary Interest to the Council?

When the Ombudsman called on the Council to provide an explanation for the conduct complained of by the Oberon Ratepayer's Association, the General Manager, Mr Robins and, apparently, the Council, in their ignorance of the provisions of section 459 of the Act, obviously considered that it was sufficient answer to the complaint and an exoneration of their conduct in the matter to point out that Mr Robins had made a declaration of his pecuniary interest in the matter at the Council's meeting on 13 December 1993 and that the only fault to be acknowledged was the Council's failure to make a formal record of Mr Robins' disclosure.

As the Tribunal has mentioned earlier, Mr Clough, in writing to the Minister on 6 November 1995 in support of the Oberon Ratepayers' Association's complaint, proceeded on the same lines, that is, without reference to the requirements of section 459 of the Act, in stating that he refused to believe the administration of Oberon Council could be so slack and disbelieved the advice furnished to the Minister by the Department that Mr Robins had made a declaration of a pecuniary interest which was not recorded. It was on this basis that he requested that the matter be further investigated.

The Director-General's Report shows that the Investigators interrogated Council staff and all of the then Councillors who were present at the meeting on 13 December 1993. Each of them showed no hesitation in recalling that, in connection with the question of installing a sewer which would serve Blenheim Avenue, Mr Robins advised the meeting that he had a pecuniary interest in the matter because he had recently purchased land in Blenheim Avenue on a loan from the Council.

Council Condoned Mr Robins' Participation

All of the Councillors told the Investigators, in one form or another, that, whilst they were aware or made aware at the meeting that Mr Robins

had a pecuniary interest in the matter, they all desired him to remain at the meeting to give the Council the benefit of his expertise on the subject and to continue thereafter to deal with the matter and told Mr Robins that they believed that, as the Senior Council Officer responsible in that area, it was his duty to do so.

Whether right or wrong, the Council's attitude was understandable in the circumstances because the fact was, as the Investigators ascertained, Oberon Council had never previously been faced with having to install a pump station in order to operate a sewerage line and there was no-one on the Council staff apart from Mr Robins qualified to advise the Council or supervise and control the work. The General Manager added a further factor when he told the Investigators that, although the Council might be open to criticism for not obtaining an outside consultant to take over from Mr Robins, this particular sewerage problem was considered to be so urgent that it had to be included in the Estimates for the first six months of 1994 that were then being considered by the Council and could not wait for the next round of Estimates, so there was insufficient time to retain any outside consultant to deal with the matter in order for it to be included in the current Estimates.

Mr Robins' Subdivision of His Land

One of the reasons put forward by the Oberon Ratepayers' Association for questioning the conduct and integrity of Mr Robins and the conduct of the Council in the matter was an allegation that soon after the Council had approved the work Mr Robins profited from that approval by subdividing his lot in Blenheim Avenue so as to be able to sell part of his land as a sewered block. The Department's Investigators explored the facts in relation to that allegation.

The Tribunal has already referred to the prospects of enhancement of the value of large size lots such as Mr and Mr Robins' purchased when a sewerage connection becomes available to replace the need to provide for sewerage waste by the installation of a septic system with absorption trenches. The responses obtained by the Investigators to their inquiries were

unanimous that the value of the lots would be increased substantially by the installation of the sewerage system, most particularly in rendering large lots previously required for the installation of a septic system available for subdivision and sale.

The Investigators ascertained that after Council had approved the works in December 1993 Mr Robins organised and supervised the carrying out of the works. The works were undertaken by the Council from 16 May 1994 and were completed on 24 June 1994.

The investigators established that Mr Robins, in the course of attending to the works, had authorised the purchase of the required pumping station on 14 April 1994 and on 20 April 1994 Mr and Mrs Robins had made a written application to the Council requesting Council's approval to a subdivision of their land. This application was dealt with by the Council's then Director of Development and Environmental Services. He told the Investigators that Mr Robins had mentioned their intention to subdivide just prior to lodging their application and had explained their reasons. Mr Robins told him that the cost of building their residence had escalated and the mortgage loan from the Council did not cover the escalation and left him short of funds to complete the building. Mr Robins also told him that they were having difficulty in selling their previous home and were experiencing financial difficulty in meeting their loan commitments. Mr Robins explained to him that excising a parcel from his block and selling it was an obvious way to reduce his liabilities. The officer told the Investigators that he did not think that it was Mr Robins' intention in the first place to subdivide and sell part of his land but circumstances and finances had overtaken him and forced him to find additional funds.

The formal development application for approval of the subdivision was submitted to the Council on 31 May 1994. The officer told the investigators that he gave consent (presumably under delegated authority) on 9 June 1994 and the Council approval was issued to Mr and Mrs Robins on 13 June 1994.

The Investigators ascertained that the parcel of land subdivided off was approximately 1.5 hectares with a land value of $22,500 and the land retained by Mr and Mrs Robins had a present land value for rating purposes of $36,500.

Mr Robins told the Investigators that the reason why they subdivided the land was that they had a tight budget for building their house which had blown out and they needed money to complete the fitting out of the house. Mr Robins denied to the Investigators that the prospect of having sewerage connected to the land in Blenheim Avenue influenced his decision to purchase it. He told them that at the time of the purchase he considered it to be the best block available within their budget and it did not concern him whether the sewer would be connected to the land or not because, being 6,000 square metres in size, the block was large enough to dispose of effluent on site via a septic tank. Mr Robins' explanations to the Investigators were consistent with the information given to the Investigators by the Council's Director of Development and Environmental Services when they interviewed him concerning his approval of their subsequent application to subdivide the land.

Ignorance of the Law

As mentioned, the only excuse put forward by Mr Robins and the General Manager for the contravention of section 459 was that they were unaware of the section. That kind of excuse coming from senior Council staff, particularly the General Manager, must ring hollow to the public when the ignorance pleaded relates to the statutory obligations of Council staff. It certainly cannot impress this Tribunal. It is not unreasonable to suggest that the General Manager, as the Chief of Staff, has a duty to make himself aware of the statutory duties and obligations of the staff under his control and to ensure that the staff are aware, and if not aware instruct them in their responsibilities. The General Manager does not bear the entire responsibility because individual members of senior staff who accept appointment to their respective positions can also be expected to make it their business to find out

for themselves their statutory responsibilities and having done so to respect them.

In the present case there were circumstances that make the plea of ignorance believable if not excusable. The Local Government Act, 1993 was reform legislation which brought about numerous changes of local government law and procedures including a complete revision of the provisions dealing with pecuniary interests of Councillors, Committee members, Council staff and others. Section 459 was new in that its provisions applied generally to any Council matter with which senior staff and other designated persons were dealing. Under the previous Act, the Local Government Act, 1919, section 46E, written disclosure of a pecuniary interest had to be given only by staff acting under a delegation of power by the Council in dealing with applications for building, subdivision or development approval. The only other case affecting an employee of a Council was where the employee was required to prepare a recommendation report or advice in writing, in which case an employee having a pecuniary interest was required to attach a written disclosure of that interest to the recommendation report or advice.

The new Act with its wider operation had only come into force on 1 July 1994 not long before the events here in question occurred, but long enough for senior staff to have made themselves aware of the provisions that applied to them and their duties. However, at this time Councils were undergoing staff transitions and Oberon Council was no exception. The General Manager was appointed on 21 July 1993 and there were other senior staff appointed monthly after that, the Director of Corporate Services on 18 August, Mr Robins on 20 September and the Director Development and Environment on 11 October 1993.

The General Manager told the Investigators that throughout this period he was occupied with settling in the new staff and learning his new Council's affairs. Evidently he did not make time to look at the new Act to ascertain how its pecuniary interest provisions affected himself and his staff. The General Manager told the Investigators that he had not given Mr Robins any

instructions as to the operation of the new pecuniary interest provisions of the law because he himself did not know what they were. Mr Robins was in a similar position with respect to his transition from his previous Council. In the result, the Tribunal would have to say that there are circumstances which would support a finding that, as a matter of fact, neither the General Manager nor Mr Robins were aware of their statutory obligations at the time the breach of section 459 was committed. The Tribunal should point out that ignorance of the kind put forward in the present case does not excuse the breach although it may be relevant on the question of the exercise of the Tribunal's powers under section 482 of the Act.

ACTION UNDER SECTION 482

The Tribunal may exercise its powers under section 482(2) if it finds that a complaint against an employee of the Council is proved. As in the present case the relevant facts are not disputed and the breach is admitted, it may be assumed that the Tribunal, if it conducted a hearing, would be bound to make a finding that the complaint against Mr Robins had been proved. The only remaining question to be determined would be whether the Tribunal should take any, and if so, what action under section 482(2). It is to be observed that this section does not give the Tribunal any power to take action directly against the employee. The Tribunal's power is limited to recommending action by the Council against the employee. The Tribunal may recommend that the Council “take specified disciplinary action” against the Council or recommend that the employee be dismissed. The Tribunal will consider the second of these alternatives first.

Dismissal by a Council of a senior employee is obviously a serious matter and would require very careful consideration of the circumstances before such a recommendation would be made by the Tribunal. In the Tribunal's view, the circumstances in which Mr Robins’ contravention occurred would not warrant a recommendation that he be dismissed. There was no covert or conspiratorial conduct on his part and no concealment of his ownership of the land in Blenheim Avenue or of his financial interest in a

sewerage line being provided to service the land. The material in the report shows that all concerned within the Council, staff and Councillors, were fully aware of the facts and not just generally but specifically. Mr Robins had applied to the Council and had been granted by the Council prior to its deciding to approve the Estimates for the sewerage system a loan to purchase a block of land in Blenheim Avenue and had in fact purchased Lot 8 which was on the eastern side where the sewerage installation was to be made. Council had taken a mortgage over that very lot to secure the loan.

When the question of Council approval of the works came before the Council for decision in December 1993, Mr Robins made a point of declaring his pecuniary interest in the matter even though he could have rightly assumed that the staff and Councillors present would have been aware of it. It was the Council itself that put aside his declaration of interest and insisted that Mr Robins should continue to deal with the matter notwithstanding the benefits that were obviously liable to flow to him from a decision approving the installation of a sewerage system extended to Blenheim Avenue. Thus the Council fully condoned the conduct by Mr Robins which constituted his contravention of the Act. In these circumstances, it seems to the Tribunal that it would be hardly just to Mr Robins for the Tribunal to recommend that the Council which had condoned and encouraged his breach of the Act should dismiss him for his conduct. Independently of that consideration, however, the Tribunal considers that the circumstances which explain Mr Robins' conduct demonstrate that dismissal would not be warranted in any event.

The first alternative offered to the Tribunal by section 482(2) is somewhat obscure. It is not clear whether the legislature had in contemplation some forms of disciplinary action, short of dismissal, under the provisions of some Act or Regulation, Contract of Employment or Award that a Council was entitled to take against an employee for misconduct or that the Tribunal itself, by its Order, would specify some form of disciplinary action which it would recommend the Council to take. If the latter, there could be problems if the Tribunal recommended as disciplinary action something which

may not be legally possible for a Council to do. For example, if the Tribunal were to recommend that the Council suspend an employee without pay for a period, that may be contrary to the employee's contract of service or otherwise in breach of some law or award governing terms and conditions of employment. In the case of a complaint proved against a Councillor, member of a Council Committee or adviser to a Council, the Tribunal may, amongst other things, counsel or reprimand the person. It may be that the legislature contemplated that the Tribunal could recommend to a Council that the employee be counselled or reprimanded by the Council; but one would suppose that if this was the legislative intention it would have been expressed in the Act.

The General Manager and Mr Robins have both been counselled by officers of the Department as to their duties under the pecuniary interest provisions of the Act since the events occurred which gave rise to the present complaint. Thus further counselling would be otiose. In the Tribunal's view, both Mr Robins and the General Manager deserve to be reprimanded for their failure properly to inform themselves of their statutory obligations and carry them out; but it would seem to the Tribunal somewhat farcical for the Tribunal to recommend that the Council take that form of disciplinary action against Mr Robins, namely, to reprimand him, when the Council itself, knowing all facts, condoned and encouraged Mr Robins' conduct. Of course, there is no complaint against the General Manager before the Tribunal and, consequently, no recommendation of disciplinary action by the Council against the General Manager would be possible.

In considering the question whether or not to conduct a hearing into the complaint against Mr Robins, the Tribunal finds itself in the position that a hearing into the question whether the complaint against Mr Robins is proved is unnecessary because the facts are not in dispute and the contravention is admitted, leaving only the question of action under section 482 to be considered. All of the material and information relevant to the question of action by the Tribunal appears to have been ascertained by the Investigators and included in the Report and, in the opinion of the Tribunal, would lead at a

hearing to an inevitable outcome, namely, for the reasons just given, a decision by the Tribunal that no appropriate action by way of recommendation to the Council was available to the Tribunal. In these circumstances, the Tribunal does not consider that the public interest or justice to the parties requires the parties to be put to the trouble and expense of a public hearing. The Tribunal has therefore decided not to conduct a hearing.

ACCOUNTABILITY

These days “accountability” is a much espoused principle and a much used word in government and public service circles at all levels. It is a strong theme in Chapter 14, the “Honesty and Disclosure of Interests” provisions of the Local Government Act, 1993. The object of these provisions is obviously to promote public confidence in the integrity of the members and staff of Councils in the exercise of local government powers and functions. An essential element of the system enacted by the Parliament to achieve that object is the complaints mechanism set up by Part 3 of the Act.

Any person who complies with those provisions may lodge a complaint. The Director-General may be the complainant and often does become the complainant when the information on which the complaint is based was furnished by way of an informal complaint or came to the Director-General’s notice by some other means.

The Director-General has a statutory duty to investigate a complaint unless the matter falls into specified categories in which case he may decide not to investigate.

As pointed out earlier, the complaint in this case originated with the Oberon Ratepayers' Association and went first to the Ombudsman. Material in the Director-General's Report to the Tribunal shows that the General Manager, supported by the signature of the Mayor, sought to discredit the Association to the Ombudsman, criticising it as unrepresentative and acting on ulterior motives.

When being interrogated by the Department's Investigators the General Manager took it upon himself to express “disappointment” that so much of the Department's resources had to be employed to satisfy what he believed to be a “vexatious” complaint. He said that he believed that the investigation of the complaint in this case was “a complete waste of time.”

It is not the Tribunal's concern to defend the reputation of the Oberon Ratepayers' Association, its members or executive; but the General Manager's attitude to the Department's investigation of the complaint under Part 3 of Chapter 14 of the Act should not be allowed to pass without comment.

The Oberon Ratepayers' Association had expressed concern that, apparently, a Council officer could purchase a block of land shortly prior to a decision being made by the Council which the officer himself had recommended to the Council and which if adopted and carried out would inevitably increase the value of his land by making it subdividable and that, not long after a favourable decision was made by the Council, the officer in fact subdivided the land thereby to profit from his own recommendation.

In the Tribunal's view, that scenario, on the face of it, was a legitimate matter of citizen concern and a complaint about it, with a view to ascertaining the facts and circumstances, could clearly not be considered “vexatious.” Of course circumstances alter cases, but how are they to be ascertained without an independent investigation. Chapter 14 provides the means and was intended to operate in just such a case. In the interests of accountability in public office which underlies this section of the Act, the co-operation of Councillors, Council staff and other persons to whom the provisions apply is to be expected as a matter of public duty.

In the view of the Tribunal, the Director-General's decision to investigate this matter was more than justified and could not properly be regarded as a “waste of time.” Even if the outcome in some cases is that the Tribunal takes no action, the investigation of these sorts of complaints may set at rest public unease, rumour and speculation and thus do justice to the

individual against whom a complaint is made as well as serve the general public good as the Act intended.

DATED: 23 October 1997

K J HOLLAND Q.C.

Pecuniary Interest Tribunal