

# **LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL**

PIT NO 3/1994

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

RE: COUNCILLOR GRAEME LESLIE WILTON,  
WOLLONGONG CITY COUNCIL

## ***STATEMENT OF DECISION***

Dated: 28 September, 1995

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WOLLONGONG CITY COUNCIL.

## ***STATEMENT OF DECISION***

### **INTRODUCTION**

On 3 December 1993 the Department of Local Government & Co-operatives received a complaint from a member of the public to the effect that Councillor Graeme Leslie Wilton of Wollongong City Council may have contravened the Local Government Act 1993 at a meeting of the Council on 29 November 1993 by debating and voting on a proposal before the Council in which he had a pecuniary interest. The proposal was said to be an application by a body known as the Kembla Grange Recreation Trust for approval of the conduct of weekly markets at the Kembla Grange Racecourse. The pecuniary interest of Councillor Wilton was alleged to arise out of the fact that he was a member of the Trust and also a member and director of the Illawarra Turf Club.

The complaint as received was informal in that it had not been verified by statutory declaration as required by section 460(2)(d) of the Act. Having been notified of that fact, the complainant furnished a statutory declaration which was received by the Department on 7 March 1994, after which the complaint was treated as a complaint under section 460 of the Act.

Preliminary inquiries by the Director-General included inquiries by letter to Councillor Wilton to which no response was received. On a subsequent attempt to contact him by telephone the Department was advised

that he would be absent from the Council's area for the period 15 October to 3 December 1994. On 25 October 1994 an inquiry of an official of the Illawarra Turf Club elicited the information that Councillor Wilton was a Trust member of the Trust and a director of the Club in question.

On 27 October 1994 the Director-General, pursuant to section 462(1) of the Act decided to investigate the complaint and on the same day notified Councillor Wilton, the Council's General Manager and this Tribunal accordingly. In December 1994 investigation officers appointed by the Director-General to carry out the investigation began conducting interviews with Councillor Wilton and other relevant persons.

At the conclusion of the investigation a Report was prepared and, in accordance with section 468(1) of the Act, was presented by the Director-General to the Tribunal on 23 June 1995.

On 29 June 1995 the Tribunal requested the Director-General to make further inquiries with respect to the legal status and constitution of the Trust and the Club, the relationship, legal and financial, between those bodies and Councillor Wilton's position with respect to each of them at the relevant dates. A supplementary Report dealing with these matters was received by the Tribunal from the Director-General on 1 August 1995.

Having considered the original Report and the supplementary Report the Tribunal decided to conduct a hearing into the complaint and on 29 August 1995 gave notice of that decision to the Director-General and Councillor Wilton.

## **ISSUES**

The Notice of Decision to Conduct a Hearing set forth particulars of the contravention alleged against Councillor Wilton, listed meetings of the Council at which it was alleged that the contraventions occurred and then set out the issues which appeared to the Tribunal to arise from the material contained in the Reports of the Director-General's investigation. They were as follows:

"ISSUES

*The material in the Reports of the investigation of this complaint received by the Tribunal from the Director-General on 23 June 1995 and 1 August 1995 indicate that the relevant facts are unlikely to be in dispute in which case the issue for the Tribunal to determine would appear to be:*

*Whether, on those facts, Councillor Wilton, by virtue of sections 443 and 448 of the Act, had, in relation to the matters dealt with at the above meetings, a pecuniary interest within the meaning of the Act that he was required by s.451 of the Act to disclose to the meetings.*

*Ancillary or incidental issues would appear to be as follows:*

- 1. Whether, within the meaning of section 443(3)(b), the Trust is a "statutory body" of which Councillor Wilton was a member.*
- 2. Whether, within the meaning of section 448 (fourth item), the Club was a "club" of which Councillor Wilton was a member and in which he was the holder of an "office".*
- 3. If the Tribunal finds that one or more contraventions by Councillor Wilton have been proved, whether any and, if so, what action should be taken by the Tribunal.*

*NOTE: You are at liberty to submit that the issues arising out of the complaint are different or that there are other relevant issues not stated above, in which case, you should specify what those issues are."*

## **STATEMENT OF AGREED FACTS**

As it appeared to the Tribunal that it was unlikely that there would be any dispute about the relevant facts, the Tribunal proposed to both parties that they agree to proceed upon a Statement of Agreed Facts. A draft Statement prepared by the Tribunal based on the material in the Director-General's Reports was annexed to the Notice for consideration by the parties.

On 15 September 1995 the Tribunal received advice from the Department that the Director-General agreed to proceed by way of Statement of Agreed Facts and did not wish to make any variation to the Tribunal's draft.

On 20 September 1995 the Tribunal received a letter dated 15 September 1995 from Mr W. J Whitting, Solicitor, advising the Tribunal that he was acting for Councillor Wilton who had instructed him that he agreed to

proceed by way of a Statement of Agreed Facts and that, subject to one amendment, he confirmed the facts to be as set forth in the Tribunal's draft.

On the basis of the parties' agreement it is possible for the Tribunal, without conduct a hearing to prove them, to make findings as to the facts relevant to the complaint in this matter. Incorporating the amendment of the draft proposed by Mr Whitting, to which the Director-General has made no objection, the facts are as set out hereunder.

## **THE FACTS**

1. Graeme Leslie Wilton of 24 Binda Street, Keiraville was elected as a councillor to the Wollongong City Council in September 1991 and was serving as such councillor in November and December 1993.
2. On 27 October 1993 a development application was made to the Council for approval of a proposal to conduct retail markets weekly on Sundays at the Kembla Grange Racecourse situated on Crown Land, being Reserve 91607 for Public Recreation, on Princes Highway, Kembla Grange.
3. The application was made in the name of the Kembla Grange Recreation Trust by Peter Nolan as the honorary secretary of the Trust. (As originally lodged the application did not contain the consent of the Minister for Land and Water Conservation who was the responsible Minister. That consent was subsequently endorsed on the application on 19 January 1994 and was notified to the Council by the Department of Conservation and Land Management by letter dated 20 January 1994).
4. At an ordinary meeting of the Council held on 29 November 1993 it was moved that the above development application be refused. An

amendment was moved that the Council approve a three months trial for the proposed markets. Councillor Wilton spoke in favour of the amendment urging councillors to take into account that “Kembla Grange” was in financial difficulties. Another councillor, speaking in support of the original motion said words to the effect that possibly one of the councillors would have a pecuniary interest in the matter. The motion for the amendment was put to the vote and lost. The original motion to refuse the application was then put to the vote and carried. Councillor Wilton voted against this motion.

5. At an ordinary meeting of the Council on 13 December 1993 it was resolved on a motion moved by Councillor Wilton that Standing Orders be suspended and the proposed Kembla Grange Markets be considered in a Committee of the Whole Council. In the Committee of the Whole meeting which followed, Councillor Wilton initiated the discussion and spoke in favour of the proposal to conduct the markets. This Committee resolved to recommend to the Council that the development application for the operation of retail markets at Kembla Grange be approved for 12 days a year in any 12 month period. Councillor Wilton voted in favour of this recommendation.
6. At the ordinary meeting of the Council on 13 December 1993 that followed the above Committee of the Whole Meeting it was resolved that the recommendation of the Committee of the Whole be received and adopted. Councillor Wilton voted in favour of that resolution.
7. Councillor Wilton did not declare at any of the meetings any pecuniary interest in the matters dealt with by the motions and resolutions referred to in paragraphs 4, 5 and 6 above.

8. (a) The Crown land comprising Reserve 91607 was declared by the Minister for Lands to be reserved from sale for the purpose of public recreation in pursuance of section 28, Crown Lands Consolidation Act, 1913 on 26 October 1979 (NSW Government Gazette No. 145, p. 5390).
- (b) On the same date a number of persons were appointed by the Minister to be trustees of the Reserve pursuant to section 37o of the Act (same Gazette, p.5385)
- (c) On 30 May 1986, pursuant to section 37Q of the Act, the trustees of the Reserve were declared to be incorporated under the corporate name Kembla Grange Recreation Trust (hereinafter referred to as "the Trust") (Gazette No. 88, p.2507).
- (d) Councillor Wilton was appointed to be a trustee of the Trust for the term of 5 years from 1 May 1989 to 31 March 1994 (Gazette 16 June 1989, No. 73, p.3561) and was holding that position at the time of the meetings referred to in paragraphs 4, 5 and 6 above. At that time the trust consisted of seven trustees appointed by the Minister plus as an ex officio member the person for the time being holding the office of Director, Department of Sport Recreation and Racing.
- (e) The Trustees of the Trust are volunteers who receive no fees or other remuneration from their office of Trustee.
9. The Trust at all relevant times had the care, control and management of the Reserve in accordance with Part 5 and Schedules 3, 4 and 5 of the Crown Lands Act, 1989. The Trust's powers included the power to grant licences for the use and occupation of the Reserve for various purposes including the stabling of horses, sporting activities and markets.
10. (a) By Deed dated 1 July 1980 the Trustees with the consent of the then Minister granted to the Illawarra Turf Club Limited (hereinafter

referred to as “the Club”) a licence to use and occupy the Reserve for the term of twenty years from that date. By a further Deed dated 15 July 1988 the term was extended for a further twenty years from the date of expiry of the first term.

(b) Under the terms of the licence -

The Club is required to pay an annual licence fee to the Trustees and to conduct registered race meetings and associated activities using the race track and buildings situated on the Reserve. All fixtures and improvements remain the property of the Trustees but the Club is responsible for maintenance and all outgoings incurred as a result of the Club’s use and occupation. The Club is exclusively entitled to all receipts from activities conducted on the Reserve by the Club. The Club indemnifies the Trustees and the Minister against all actions, claims and liabilities arising out of the Club’s use and occupation of the Reserve.

(c) At the option of the Trustees the term of the licence may be terminated if, in the opinion of a Chartered Accountant nominated by the Trustees, the financial affairs and statements of the Club disclose that “it is unprofitable within the foreseeable future.”

11. (a) The Illawarra Turf Club Limited was incorporated under the Companies Act, 1961 on 6 May 1977 as a company limited by guarantee, its principal activity being designated as a “Horse Racing Club.” It is an unlisted non-profit company without share capital.
- (b) By its memorandum of association the liability of the members is limited. Every member undertakes to contribute to the assets in the event of a winding up for the payment of debts such amount as may be required not exceeding \$10. Distribution to members of any surplus upon the winding up or dissolution of the Club is prohibited. There is a proviso in the Memorandum that nothing therein contained shall prevent the payment in good faith of remuneration to any officers or

servants of the company or to any member thereof or other person in return for any service actually rendered to the company.

(c) The Articles of Association of the Club provide for the admission of Members by the Club's Board of Directors on payment of an entrance fee and annual subscriptions as determined by the Board.

(d) The Articles provide for a Board of 10 Directors. Directors are elected to the Board by the Members with power in the Board to fill casual vacancies. The management of the business of the Club is vested in the Board.

12. (a) Councillor Wilton was admitted to membership of the Club in June 1979.
  - (b) On 18 June 1992 the Board appointed him to be a director of the Club to fill a casual vacancy.
  - (c) On 29 October 1992 he was re-elected to the Board by an Annual General Meeting of Members.
13. At the time of the meetings referred to in paragraphs 4, 5 and 6 above, Councillor Wilton was both a member and a director of the Club.
14. As a director of the Club he received no fees or other remuneration.
15. At all times the object and purpose of the development application referred to in paragraphs 2 to 6 above, to the knowledge of the Trustees of the Trust and the Directors of the Club, including Councillor Wilton, was to enable the Club to conduct retail markets on the racecourse premises with a view to obtaining financial gain for the Club, an object and purpose that could not lawfully be achieved without approval by the Council of a development application.

16. Councillor Wilton took part in the consideration and discussion of and voted on the matters before the meetings referred to in paragraphs 4, 5 and 6 above knowing the object and purpose referred to in paragraph 15 above and with the intention of promoting the financial welfare of the Club.

## **COUNCILLOR WILTON'S SOLICITOR'S LETTER TO THE TRIBUNAL**

As well as advising his client's agreement with the facts as stated above. Mr Whitting's letter of 15 September 1995 contained the following:

*"2. My client agrees that in relation to the four meetings referred to on page two of the Notice of Decision to Conduct a Hearing he did not formally disclose at those meetings to the participants his interest as a Director in the Illawarra Turf Club Limited. My client does, however, state that he did not feel at the time that there was a need to do so as he was well aware that the parties present and participating at those meetings well knew of his directorship in the Illawarra Turf Club Limited, in fact, his directorship had been alluded to at many previous Council meetings and was also publicly well known throughout the Illawarra area through the media itself.*

*3. My client admits that he took part in the consideration and discussion of the matters referred to in the said meetings and also voted on questions relating to those matters.*

*4. My client is no longer a Councillor on Wollongong City Council as he did not stand for re-election at the recent Council elections.*

*My client requests that the tribunal in reaching its conclusions in regard to this matter concerning my client take all the above matters into consideration particularly the fact that my client had no pecuniary interest whatsoever in regard to any of the matters discussed at the said meetings referred to in the notice except so far as it might be considered that he had an interest simply because he was a director of the Illawarra Turf Club Limited."*

## **DIRECTOR GENERAL'S SUBMISSIONS**

The Tribunal furnished a copy of Mr Whitting's letter to the Director-General and invited his submissions as to what further action the Tribunal should take in this matter having regard, in particular, to the fact that Councillor Wilton had ceased to be a Councillor of the Wollongong City Council. On 27 September 1995 the Tribunal received a letter from the Director-General containing the following:

“The Pecuniary Interest Tribunal invited the Department to make submissions for consideration by the Tribunal. The Department proposes that the matter of former Councillor Wilton be reviewed by the Tribunal on the basis of changed circumstances.

Firstly, Councillor Wilton is no longer a Councillor within the meaning of the Local Government Act 1993. The definition of a councillor is “Councillor means a person elected or appointed to civic office, and includes a mayor”, therefore the question of jurisdiction of the Tribunal to deal with the matter may arise. The issue of jurisdiction after resignation is discussed by JRS Forbes in “Disciplinary Tribunals” at p 50.

Secondly, Councillor Wilton may have contravened s.451 of the Act, however the interest arose because of his position as a Trustee of the Kembla Grange Recreation Trust and as a Director of the Illawarra Turf Club Limited. Either or both would constitute a breach of the pecuniary interest provisions on the facts disclosed. However, Councillor Wilton did not benefit personally from the breach. The available facts indicate that the Club lost money pursuant to the decision made by the Club.

Thirdly, the penalties available to the Tribunal pursuant to section 482(1) are limited due to the fact that Councillor Wilton was not re-elected.

Fourthly, the issue of public interest, justice and costs must be considered.

While it is ultimately for the Tribunal to decide what further action should be taken, in view of the above circumstances the Department submits that the Tribunal give consideration to exercising the power under section 470(1) that it may decide not to proceed to conduct a hearing.”

## **DECISION OF THE TRIBUNAL AND REASONS**

In the light of Mr Whitting’s letter and the Director-General’s submissions the Tribunal has reconsidered its decision to conduct a hearing into this complaint, the essential factor, although not the only factor, being that Mr Wilton has ceased to be a Councillor. The Tribunal has decided that in all the circumstances a hearing into the complaint would not now be justified for the reasons which follow:

1. As pointed out in the Tribunal’s decision in the case of Councillor McNaughton (PIT2/1994, 11 May 1995), the Tribunal is not bound to conduct a hearing into a complaint. Section 469 gives the Tribunal a discretion, a discretion which is to be exercised not arbitrarily but judicially upon rational and relevant grounds that take account of the object and purpose of the legislation.

2. One of the objects of the legislation is to prevent the exercise of local government powers in the best interests of the public from being affected by the pursuit by a Councillor of some conflicting private or extraneous interest. One means adopted by the legislation to achieve that object is to require a Councillor who has a pecuniary interest (as defined by section 442 of the Act) in a matter before the Council to disclose the interest and refrain from participating in the debate and the vote on that matter: section 451. Another is to provide for disciplinary measures to be taken against a Councillor who contravenes that requirement.
3. The notion of “pecuniary interest” of a Councillor in a matter is extended by section 443 of the Act to include, in addition to the Councillor’s personal interests, the pecuniary interests of certain persons, companies and bodies with whom the Councillor is associated. These include a company or other body of which the Councillor is a member that has a pecuniary interest of which the Councillor is aware: section 443(2)(b); (3)(a). However, the Councillor is not to be taken to have a pecuniary interest in a matter “just because” that Councillor is a member of a “statutory body”: section 443(3)(b); or “just because” the Councillor is a member of the company or body if the Councillor has no beneficial interest in it: section 443(3)(c).
4. Section 448 of the Act exempts certain interests from the requirement to disclose. One interest exempted is a person’s interest as a member of a “Club” but this exemption does not apply if the person is the “holder of an office” in the Club, whether remunerated or not.
5. On the agreed facts, it is clear that the Trust was a “body” of which Councillor Wilton was a member. The relationship between the Trust

and the Club was, to the knowledge of Councillor Wilton as a member of the Trust and of the Club, such as to give the Trust a financial interest in promoting the financial welfare of the Club. It is also clear that the Trust was a “statutory body” within the meaning of section 443(3)(b) and that Councillor Wilton had no beneficial interest in the Trust within the meaning of section 443(3)(c). Therefore, he could not be taken to have a pecuniary interest “just because” he was a member of the Trust but this is not to say that he could not have a pecuniary interest in relation to his membership of the Trust for other reasons. It is arguable that there were other reasons here, namely, his dual membership of the Trust and the Club and the joint interests of the Trust and the Club in the Trust’s seeking Council approval of a proposal designed to promote financial gain for the Club and that these reasons gave Councillor Wilton an interest beyond his mere membership of the Trust and irrespective of his lack of a beneficial interest in the Trust. As the matter will not be proceeding to a hearing it is, perhaps, inappropriate to express a final conclusion on a debatable point but it is also unnecessary because, whatever Councillor Wilton’s position in relation to the Trust, he certainly had a pecuniary interest within the meaning of the legislation by virtue of his position in the Club.

6. The agreed facts establish that the Club is a company of which Councillor Wilton was a member at the relevant time and that the Club had a pecuniary interest in the matter before the Council. By virtue of section 443(1) and (2) of the Act, these facts gave Councillor Wilton a pecuniary interest in the matter and made him subject to the requirements of section 451 of the Act unless he was exonerated from those requirements by subsection (3)(a) or (c) of section 443 or section 448. He was not exonerated by section 443(3)(a) because he was aware of the Club’s pecuniary interest in the matter or by section

443(3)(c) because he was not just a member of the Club but was also a director. The application of section 448 to the matter depends upon whether the company Illawarra Turf Club Limited was a “Club” within the meaning of that section. Section 443(2)(b) and (3)(a) and (c) use the expression “a company or other body” and section 448 refers to the interest of a person as a member of “a Club or other organisation or association”. The word “Club” is not defined. It may be suggested that the intention was that the two expressions were mutually exclusive so that if the entity in question was a “company” it would not be included in section 448 by the word “Club” or, in other words, the word “Club” was not intended to include an incorporated Club. In the Tribunal's view, the word “Club” in section 448 should be construed in accordance with the common understanding in the community that a Club may be recognised by its objects and activities irrespective of whether it is incorporated or unincorporated. On that basis the Illawarra Turf Club Limited is, on the agreed facts, to be considered as a “Club” for the purposes of section 448 of the Act. However, Councillor Wilton was not exonerated by that section because, as a director, he was the holder of an office in the Club. Having regard to the agreed facts, it follows that Councillor Wilton's position as a director of the Club made him subject to the requirements of section 451 of the Act. His admitted failure to comply with those requirements constituted a contravention of the Act and made him subject to the powers of the Tribunal under section 482.

7. The Tribunal's powers under that section are limited in the case of a Councillor to (a) counselling by the Tribunal; (b) reprimand; (c) suspension from civic office for up to two months; or (d) disqualification from holding civic office for up to five years.

Councillor Wilton's contravention was not insignificant. The question whether any Councillor had a pecuniary interest in the proposal to conduct a market was raised at the Council's first meeting on the matter but evoked no response from Councillor Wilton. Despite Councillor Wilton's support for the proposal it was rejected at that meeting but he then made it his business to resurrect the proposal at the Council's next meetings at which he managed successfully to urge that the proposal be approved by the Council. On the face of it Councillor Wilton's conduct would have warranted, at least a severe reprimand or, perhaps, a period of suspension from civic office. Disqualification would not appear to have been called for in this case because no prospect of financial gain or loss to Councillor Wilton personally was involved and no illegality or impropriety other than failure to comply with section 451 was associated with his conduct.

As there will not be a hearing at which the parties would have the opportunity to make submissions on the matter, the Tribunal will refrain from expressing a final conclusion on the appropriate action for the Tribunal to have taken in consequence of Councillor Wilton's breach.

8. In the result, the Tribunal is faced with the case of a legitimate complaint of a contravention by a Councillor of section 451 of the Act which has been subsequently proved by agreed facts and admissions and which would appear to warrant reprimand or suspension if the person concerned was still serving as a Councillor. As the person has ceased to be a Councillor, suspension is pointless and a reprimand would have little public benefit except as an expression of disapproval. In the view of the Tribunal, the question whether to proceed further in this matter to a hearing, apart from the question of jurisdiction raised by the submissions of the Director-General, turns on considerations of the public interest.

The public undoubtedly have an interest in the requirements of the legislation being enforced in order to promote integrity in the performance of local government. However, in the opinion of the Tribunal, further action in the present matter would count little towards achieving that objective. The time, trouble and costs involved would be out of all proportion to the probable outcome, namely, an expression of disapproval of a former Councillor's conduct.

9. Having regard to the view just expressed, it is unnecessary to consider the question of the Tribunal's jurisdiction over former Councillors raised by the Director-General's submissions. Expiry of a term of office after a contravention of a statutory duty in the performance of that office is different from resignation to avoid disciplinary proceedings as discussed by JRS Ford in "Disciplinary Tribunals" and would require an interpretation of the statute as to whether there is an intention that the sanctions provided in the legislation were, so far as applicable, open to be imposed on the contravener notwithstanding the expiry of his or her office. For example, here, while suspension could not apply, disqualification from civic office if called for by the contravention would operate effectively by preventing a contravener who had ceased to be a Councillor from standing at a by-election or future general election to a Council during the period of disqualification.

The issue of the Tribunal's jurisdiction over former Councillors would be best considered after receiving from both sides legal submissions directed to that particular issue. As no further action by the Tribunal is contemplated in the present case for other reasons it need not be dealt with here.

Pursuant to section 470 of the Act this Statement of Decision will be furnished to the person who made the complaint and to the Director-General. Copies will be furnished to Mr G L Wilton and the Wollongong City Council.

DATED: 28 September 1995



**K J HOLLAND Q.C.**  
**Pecuniary Interest Tribunal**