

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO. 1/1998

DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT

RE: COUNCILLOR SYLVIA PHYLLIS HALE,
MARRICKVILLE COUNCIL

STATEMENT OF DECISION

Dated: 6 April 1999

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THE COMPLAINTS

On 24 August 1998 the Tribunal received from the Director-General, Department of Local Government, his Report of investigations that had been carried out into complaints made by the Director-General pursuant to section 460 of the Local Government Act, 1993.

These complaints alleged that there had been a failure by Councillor Sylvia Phyllis Hale of Marrickville Council to comply with section 451 of the Act in relation to a Council meeting and numerous failures on her part to comply with the requirements of section 449 of the Act which requires certain written returns of financial and other interests to be lodged by Councillors.

As to all but two of the allegations in respect of written returns the Tribunal decided not to conduct a hearing and, on 25 November 1998, furnished to the Director-General a written statement of its decision as required by section 470 of the Act. Copies were provided to Councillor Hale and Marrickville Council.

On 25 November 1998 the Tribunal gave notice to the Director-General and Councillor Hale that pursuant to section 469 of the Act the

Tribunal had decided to conduct a hearing into the remaining allegations, particulars of which were set out in the Notice.

Problems with respect to the availability of a hearing room and of counsel for the parties unavoidably delayed the hearing until 3 March 1999.

HEARING

The Director-General was represented at the hearing by Mr Michael Lawler of counsel instructed by Ms Jean Wallace, a legal officer of the Department of Local Government. Councillor Hale was represented by Ms Sandra Duggan of counsel instructed by Hill, Thomson & Sullivan, solicitors for Councillor Hale.

The Director-General's Report of the investigation became Exhibit A before the Tribunal, the Tribunal's Notice of Decision to Conduct a Hearing became Exhibit B. Other documents received by the Tribunal in the course of the hearing and identified as Exhibits will be mentioned in due course.

As well as tendering written statements by Councillor Hale and other witnesses, Ms Duggan adduced oral evidence from Mr Dominic Kwok Wah Li, Chartered Accountant and partner in the firm B P Woodward & Associates, Councillor Hale's accountant and tax adviser. Councillor Hale also gave oral evidence to the Tribunal. Both were cross-examined by counsel for the Director-General.

The proceedings were recorded and a transcript produced. The references to the transcript will be identified by the letter "T" followed by page and line numbers.

The Tribunal will deal with the three matters of complaint that remain for determination under separate headings.

ALLEGED CONTRAVENTION OF SECTION 451

The complaint alleged that Councillor Hale had a pecuniary interest in a matter with which the Council was concerned at a meeting of the Council on 17 June 1997 and, being present at the meeting, failed to declare her pecuniary interest, took part in the debate and voted on a question relating to the matter contrary to the provisions of section 451 of the Act.

Background

The background to this allegation is not in dispute. At an Extraordinary Meeting of the Council held on 22 April 1997 the Council had before it for consideration a draft of its budget for 1997/1998, one item of which, “Community Services Division – Library Services Program”, consisted of a proposal for the expenditure of \$12,000 for the reprinting of a publication described as “Vol.1 of the History of Marrickville.” The Council’s Minutes of the Meeting recorded that Councillor Hale had declared to the meeting that she had a pecuniary interest in the matter of “1997/98 Draft Resources Plan Reprint Marrickville Vol.1 in the Business Paper” and that the nature of her interest was “Director of company which prints the document”. The Minutes of the Meeting also recorded that when the Council resolved to move into Committee of the Whole to consider the report on the draft budget Councillor Hale left the meeting.

Meeting of 17 June 1997

The draft budget came before the Council to be considered for its adoption at the Council’s meeting of 17 June 1997. It included the same item in respect of which Councillor Hale had declared a pecuniary interest at the meeting of 22 April 1997. The Business Paper contained a report to the meeting by Council officers recommending that the draft be confirmed as Council’s budget for 1997/98. The Minutes of the Meeting record that there was a motion before the Council that this recommendation be adopted. The Minutes also record that when put to the vote the motion was carried and that Councillor Hale was present and voted against the motion. However she did not disclose to this meeting that she had a pecuniary interest in the budget item relating to reprinting of Marrickville Vol.1.

On 10 July 1997 a member of the public sent a letter to the Mayor of Marrickville Council, Mr Barry Cotter, complaining of what he called, “Councillor Hale’s apparent failure to declare an interest in the matter of the publication.” The letter stated that the basis of his complaint was that Councillor Hale was a director of the company that published and the company that printed the book. Mayor Cotter passed the complaint over to

the Council's Acting General Manager who notified the Department of Local Government and the Department's preliminary inquiries led to the present complaint by the Director-General.

The Facts Relevant to Pecuniary Interest

The material in the Director-General's Report (Exhibit A) showed that the publication "Marrickville Vol.1" was a book entitled "Marrickville: Rural Outpost to Inner City" which was first published in 1990 by a company called Hale & Iremonger Pty Ltd and printed by Southwood Press Pty Ltd. Councillor Hale was a beneficial shareholder and director of both of those companies prior to and at the times of the Council meetings of 22 April and 17 June 1997.

Councillor Hale had been extensively involved in the original publication of the book. However, she told the Tribunal that she had ceased actively participating in the day to day affairs of Hale & Iremonger Pty Ltd in about 1994 when Rhonda Black became the company's publisher. It was then Rhonda Black's responsibility to determine which books were to be published, who was to print them and the relevant financial arrangements. The book was out of print from about 1993/94 to 1997. Councillor Hale told the Tribunal that in March 1997 she saw in the Business Papers supplied to Councillors prior to its meeting of 22 April 1997 a reference to a proposed grant to the Marrickville Council Library to purchase copies of Marrickville Vol.1. She realised that Hale & Iremonger Pty Ltd must have been involved in negotiations with Council officers about the proposed reprint although she had no prior knowledge of nor any involvement in such negotiations. She told the Tribunal that she had declared a pecuniary interest in the library grant at the meeting of the Council on 22 April 1997 on the basis of presumptions by her that Hale & Iremonger Pty Ltd would republish the book and engage Southwood Press Pty Ltd to do the reprint and that, thereafter, she gave no further thought to the matter. She did not consult with Rhonda Black or anyone else about it until after she was notified in July 1997 that a complaint had been made against her: Exhibit 1.

Statements of Evidence by Rhonda Black, Publishing Consultant for Hale & Iremonger Pty Ltd and B R Welch, Acting Manager of Southwood Press Pty Ltd describing the circumstances relating to the reprint were tendered at the hearing (Exhibits 2 and 3).

Rhonda Black stated that she was the publisher at Hale & Iremonger Pty Ltd at the relevant time and that in her role as publisher she had a free hand in making the publishing decisions. She explained that the decision to consider reprinting Marrickville Vol.1 was made by her after it had been out of print for some time. The decision had been made after the publication of Marrickville Vol.2, which contained a different subject matter, when sales of Vol.2 proved to be slow. Her statement explained in detail the factors behind her decision and which led her to make a proposal to the Council officer who was the Manager of Marrickville Library. She faxed a written proposal to the Manager on 25 June 1996: Exhibit A, Attachment 23. The proposal, after acknowledging that the Council had "budget constraints" put forward a scheme by which Hale & Iremonger Pty Ltd would be prepared to undertake the reprint of Vol.1. The scheme proposed that the Council make a bulk purchase of 500 copies at a discount off the retail price in bookshops which would enable the Council to "on-sell" at the higher price thereby recouping its investment and making a profit. The proposal also offered to sell Marrickville Vol.2 at a discount to the Council which would allow the Council to sell at a price cheaper than bookshops and pass on that discount or part of it to purchasers of the two volumes together. The print run of Vol.1 would be 1,000 copies of which the 500 remaining after the Council's purchase would be held in stock and sold by Hale & Iremonger Pty Ltd. The proposal listed quantities and selling prices to demonstrate the profits that could be made by the Council if it were to purchase 500 copies at \$22.50 each, a total cost to the Council of \$11,250.

On 28 November 1996 Rhonda Black followed up her earlier proposal. She faxed a letter to the Manager of the Council's Library specifying a price increase in the unit costs to the Council of purchasing the reprint of Marrickville Vol.1. The letter stated that the price increase was based upon the assumption that the Council might want to proceed in the second half of

1997, in which case there would be a price increase of \$400 for 500 copies: Exhibit A, Attachments 34, 35. This cost increase brought the cost to the Council of purchasing 500 copies to the sum of \$11,650. The Tribunal infers that the sum of \$12,000 proposed by the Council's budget to be spent on the reprint was designed to cover the price proposed by Hale & Iremonger Pty Ltd to the Council for the purchase of 500 copies.

Rhonda Black's statement (Exhibit 2) attached an itemisation of costs and income to Hale & Iremonger Pty Ltd from the reprint of Marrickville Vol.1. She stated that she believed these costings accurately reflected the potential profit projections for the book. The figures showed that the total potential net income from the disposal of all 1,000 copies, including the 500 copies sold to the Council, was \$4,430.43. The itemisation points out that this figure reflects income, not profit, because overheads had not been deducted from it. Also attached to the statement was a list of costings of the reprint without Council's bulk purchase of 500 copies. On the figures listed, the result would have been a loss of \$1,962.50.

Rhonda Black's statement (Exhibit 2) contained the following explanation:

“Without the sales to Council underpinning the print run it would have been unviable to reprint the book as sales by publishers to bookshops are at a high discount, and on a sale-or-return rather than a firm sale basis. Because H & I was unsure of sales beyond those to Council (the book having been out of print for some time), the quantity printed for sale by H & I was very small, just enough to sell to local bookshops and keep the book officially in print. Over the years the company had had a commitment for publishing local histories. Although these were not necessarily commercial publications in any publishing sense, I felt it important to maintain the company's position in the community as a publisher of local history. The decision to reprint was based on costings which excluded normal company overheads.”

The Statement also contained an explanation of the decision by Hale & Iremonger Pty Ltd to employ Southwood Press Pty Ltd to carry out the reprint:

“The decision to reprint the book with the original printer is common publishing practice, based on the fact that printers holding the original printing film for a book usually provide the cheapest price. In this instance, as well, I wanted the original printer of the book, those who understood the

importance of producing the old photographs in the book as clearly as possible, and who were based in Marrickville itself, to do the printing.”

Rhonda Black’s Statement concluded:

“I had no discussions with Sylvia Hale about the reprinting of Vol.1, neither the fact of it, nor who was to print it. That decision was taken by me, after consulting sales reports and, in this case, talking with Council about possible sales.”

The Statement by B R Welch for Southwood Press Pty Ltd (Exhibit 3) explained that the company prepared a quotation for the reprint at a reduced price of \$8,300 for 1,000 copies by eliminating the company’s profit margin for the following reasons:

- “1. Ms Black had stressed that Hale & Iremonger would be lucky itself to break even on the project but nevertheless felt under considerable pressure from individuals and from members of the local Heritage Society to return the book to print.**
- 2. Hale & Iremonger has been a long and valued client of Southwood Press. It is company practice to view the requests of such clients sympathetically if we are in a position to do so.**
- 3. Southwood Press has operated from premises in Chapel Street, Marrickville for more than 20 years and feels an obligation to the local community.”**

The Statement concluded by stating that no aspect of the quotation or the job was discussed with Sylvia Hale and, although she was Chairman of the company, she was not involved in the day to day running of the company.

Relevant Pecuniary Interest Provisions

Section 442(1) of the Local Government Act, 1993 provides that, for the -relevant purposes, 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 or another person with whom the person is associated as provided in section 443.

So far as relevant to the present case, section 443 provides, in effect, that a person is taken to have a pecuniary interest in a matter if the person is a beneficial shareholder of a company that has a pecuniary interest in the matter unless the person is unaware of that pecuniary interest.

Section 442(2) provides that 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 complaint alleged that at the time of the Council meeting of 17 June 1997 there was a reasonable likelihood or expectation of appreciable financial gain to Hale & Iremonger Pty Ltd and/or Southwood Press Pty Ltd, within the meaning of section 442 of the Act, if the Council were to approve the proposed budget with the inclusion of the item for the reprinting of Marrickville Vol.1. It was also alleged that the interest of the two companies in that matter was not 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.

As Councillor Hale had a beneficial interest in the shares she held in both of these companies it was alleged that, by virtue of section 442(1) and the provisions of section 443 she was taken to have a pecuniary interest in the matter which required her to comply with the provisions of section 451 of the Act.

COUNCILLOR HALE'S RESPONSES TO THE ALLEGATIONS

Councillor Hale's responses to the allegations have varied between the date of the original complaint and the date of the hearing.

Her first reaction was to admit that she had committed a breach of the Act. In a letter of explanation to the Acting General Manager of Marrickville Council dated 12 July 1997 she said, "I did not declare, although I should have done so, that I had a pecuniary interest in the outcome of the Council's decision" on the adoption of the budget which included the library allocation at the meeting of 17 June 1997. The letter stated that it was a "genuine oversight" on her part, that she apologised unreservedly to the Council and the ratepayers and residents and had requested the Council to reconsider whether the library allocation should proceed. The letter also stated that she believed that the complaint about her non-disclosure was a legitimate one: Exhibit A, Attachment 13.

She repeated her admission and expressed sincere regret at her oversight in a letter of the same date to the Investigation Branch of the Department of Local Government but her letter also asserted that it was not a foregone conclusion that the book would have been reprinted by Southwood Press Pty Ltd although it was usual for the original printer to undertake the reprint, nor that the volume would actually be reprinted as Council's purchase would, at best, make the reprinting a break-even exercise for Hale & Iremonger Pty Ltd. She concluded the letter by acknowledging that she had breached the disclosure provisions of the Act and offering her sincere apologies: Exhibit A, Attachment 12.

On the same date she also wrote a letter to the Mayor expressing concern that there might be a public perception that the decision to adopt the 1997/1998 Budget was improperly made because of her having debated and voted on the matter. The letter invited the Mayor, if he believed that it was necessary to dispel any suggestion of impropriety, to propose to the Council that it remake its decision or alternatively "redetermine the allocation of \$12,000 to Library Services to purchase copies of Vol.1 of the history of the municipality.": Exhibit A, Attachment 14.

Her letter to the Acting General Manager (Attachment 13) indicated that she had circulated copies of that letter to all Marrickville Councillors, the Department of Local Government and the editors of the Glebe & Inner Western Weekly and the Inner Western Suburbs Courier.

On 16 July 1997 the Glebe & Inner Western Weekly published an article reporting that Councillor Hale had admitted breaching the Local Government Act by failing to declare "an interest in a company that received \$12,000 under Council's 1997/1998 Budget." It also reported her as conceding that she should not have taken part in the discussion or voted and that she had said, "I simply forgot." According to the article she also said that her failure was a "genuine oversight", that she "apologised unreservedly", that she acknowledged the Local Government Act required her to make a declaration of her interest at Council's June 17 meeting and that "I was wrong not to have done so.": Exhibit A, Attachment 20.

By 21 July 1997 Councillor Hale was having second thoughts about her admissions of guilt and sought to retract them. She wrote a letter of that date to the investigator in charge of the case at the Department of Local Government stating that since her letter of 12 July 1997 she had received advice that, contrary to her initial belief, she may not have contravened the requirements of section 451 of the Act. She stated that at the time of the April 1997 meeting of the Council when she declared a pecuniary interest she was unaware of the existence of any negotiations between Hale & Iremonger Pty Ltd and the Council and had "mistakenly assumed" that, subject to the allocation of funds, there existed a contractual obligation on the part of the Council to purchase copies of the book from Hale & Iremonger. The letter stated that she now knew this to be false and that there was no such agreement between the Council and the company nor was Hale & Iremonger Pty Ltd under any obligation to reprint the volume regardless of any decision by Council. She said the allocation of funds to purchase the book was not subject to any condition that they be purchased from a specified publisher and although the book was initially printed by Southwood Press Pty Ltd there was no necessity nor certainty that it would be reprinted by that company. The letter put forward a further ground for suggesting that she had not been in breach at the Council's June meeting in that, whilst the April meeting dealt primarily with individual items, the June meeting was concerned with the overall impact of the budget and the setting of the rate. She then referred to section 457 of the Local Government Act which provides that a Councillor is not in breach of section 451 if the Councillor 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 the Councillor had a pecuniary interest. The letter went on later to suggest that, even if she were deemed to have a pecuniary interest, it was doubtful whether she was wrong in failing to declare it at the June meeting "because of my misapprehension of the nature of the meeting."

The letter concluded by stating that she now felt that she should retract the admission that she had failed to declare a pecuniary interest; but she added, "This is not to say that it would not have been preferable for me to

have refrained from debating or voting on any aspect of the budget, thus avoiding any suggestion of impropriety. I sincerely regret my failure to do so.”: Exhibit A, Attachment 24.

In a letter dated 27 November 1997 Councillor Hale took another line on whether she had committed a breach of the Act in relation to the reprint of Marrickville Vol.1. She said in the letter that she had received legal advice to the effect that for a pecuniary interest to exist there must be a reasonable expectation of **appreciable** loss or gain. She said she believed that neither Southwood Press Pty Ltd nor Hale & Iremonger Pty Ltd nor herself stood to benefit to any appreciable extent from the book’s reprinting. The letter stated that Southwood Press was one of Sydney’s largest specialist book printers and printed for a variety of publishers and government departments between 400 and 500 titles each year with an average print run of 3,000 copies and that Hale & Iremonger published some 20 to 25 titles each year with an average print run of 2,500 – 3,000 copies. She asserted that the economics of the publishing industry usually made a smaller print run unviable and pointed out that the size of the reprint for Marrickville Vol.1 was 1,000 copies. The letter stated that it became a financially feasible proposition to reprint only when Council considered purchasing 500 copies at a discount price. She claimed that the whole point of the Council’s purchase was to permit the reprint to break-even rather than to generate appreciable gains. The letter concluded on this matter as follows:

“Although I no longer believe I had a pecuniary interest in the matter, I did declare an interest when it came up for discussion in April 1997. I would certainly have done so again in June 1997 when the overall budget returned to Council had I remembered that the allocation to the library was a component of the budget. As it stands, I voted against the budget and therefore against the library allocation.” Exhibit A, Attachment 42.

By the time the matter came to hearing, Councillor Hale had reverted to her original position, admitting that she had contravened section 451 of the Act at the Council’s meeting of 17 June 1997.

In the Tribunal’s Notice of Decision to Conduct a hearing (Exhibit B) it was stated that on the basis of the information contained in the Director-

General's report of the investigation of the complaint the issues for determination by the Tribunal in relation to the alleged breach of section 451 of the Act would appear to be:

1. Whether Councillor Hale had a pecuniary interest within the meaning of the Act to which section 451 of the Act applied in relation to the matter before the Council at its meeting on 17 June 1997.
2. Whether Councillor Hale contravened section 451 of the Act in relation to that matter.
3. Whether, within the meaning of section 457 of the Act, Councillor Hale 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 she had a pecuniary interest.

The Notice advised the parties that they were at liberty to submit to the Tribunal that the issues arising out of the allegations particularised in the Notice were different. The Notice also requested Councillor Hale to advise the Tribunal whether she desired to contest all or any of the allegations set forth in the Notice.

On 16 December 1998 Councillor Hale's solicitors advised the Tribunal that they were acting for her in the matter. Their letter stated:

"Our client does not desire to contest any of the allegations set forth in the Notice dated 25 November 1998 from the Tribunal."

In her statement of evidence tendered to the Tribunal at the hearing (Exhibit 1) Councillor Hale said:

"On 21 July and 27 November 1997 I wrote to the Department of Local Government to the effect that I might not have had a pecuniary interest in the library grant. My letters questioned whether a conflict of interest actually existed and not whether I should have disclosed my interest. I now accept that I did have a pecuniary interest in the grant to the library."

At the hearing, her counsel and, in the witness box, Councillor Hale herself affirmed that she did not contest any of the allegations in the Tribunal's Notice (Exhibit B) on the basis of which it was asserted that she had contravened section 451 of the Act. Councillor Hale repeated her admission that she had a pecuniary interest in the appropriation of funds to the library at the relevant times. She stated that she did not pursue her earlier claim that

there would have been no pecuniary interest within the meaning of section 442 of the Act because any gain to the companies would not have been an “appreciable” financial gain. (T3/35; T41/12-16)

FINDING

The Tribunal accepts Councillor Hale’s admissions but would add that, independently of her admissions, the Tribunal is satisfied on the evidence that by virtue of her interest in the publishing and printing companies she had, within the meaning of the relevant provisions of sections 442 and 443 referred to earlier, a pecuniary interest in the library appropriation in the budget.

The suggestion previously put forward by her, after receiving advice, that she would not have had a pecuniary interest because no contractual or other legal obligation for Hale & Iremonger Pty Ltd or Southwood Press Pty Ltd to be engaged for the proposed reprint had come into existence is, in the Tribunal's view, unsound in that it appears to assume that the reasonable likelihood or expectation referred to in section 442(1) must amount to a probability or certainty of financial gain or loss before there can be a pecuniary interest. In previous cases the Tribunal has decided and continues to adhere to the view that the section contemplates reasonable chances or possibilities of financial gain or loss as well as probabilities or certainties: see, for example, the Tribunal's Decision in the case of **Councillor Roberts, Hastings Council (PIT1/1995, 3 August 1995), pages 17 – 20, 53**. On the evidence here it must be said that the prospects were strong that Hale & Iremonger Pty Ltd would get the job and would engage Southwood Press Pty Ltd for the printing if the Council adopted the budget.

On the question whether the financial gain in prospect was “appreciable”, all the commercial considerations from the points of view of the two companies need to be taken into account. The evidence established that the two companies specialised in the kind of publication in question, were concerned about satisfying the needs and demands of their particular market, especially the heritage and historian element, and had an interest in fostering their reputation and goodwill with the Council and the public even if the

potential money profit on the reprint itself was low. Southwood Press Pty Ltd was interested in keeping a good customer like Hale & Iremonger Pty Ltd happy. The Council's bulk purchase would make the reprint financially viable and could aid the flagging sales of Marrickville Vol.2 as well. Put together, these considerations gave both companies an interest in the outcome of the budget vote the nature of which interest was financial gain.

In the Tribunal's view, it is not necessary to be able precisely to quantify the degree or amount of financial gain. It would be difficult to put a figure on the financial value of the reputation and goodwill factors in the reprint venture proposed by Rhonda Black to the Council. In the opinion of the Tribunal, it is enough to be able to conclude on the evidence that the financial gain in prospect was "appreciable" in the sense of being large enough to be noticed or worthy of being desired. (Compare the case of **Councillor Fisk, Burwood Council, PIT1/1996, 12 November 1996, page 45**).

The efforts of Rhonda Black to promote the reprint venture by offering inducements and pointing out benefits to the Council if the Council should adopt her proposal indicate that she regarded the prospective gain to Hale & Iremonger Pty Ltd to be worthy of pursuit. They provide a basis for concluding that although the potential money profit may have been of a low order the overall financial benefit to the company from engaging in the venture was regarded as appreciable.

Councillor Hale, whilst unaware of the communications that had taken place between Rhonda Black and Council and the nature or detail of the proposal which had been made on behalf of Hale & Iremonger Pty Ltd, made presumptions, based on her knowledge of the business of the company and her own involvement in the original publication of Marrickville Vol.1, that both Hale & Iremonger Pty Ltd and Southwood Press Pty Ltd would have a pecuniary interest in the library allocation such that she was obliged to declare her own pecuniary interest. It is relevant to observe that, in the opinion of the Tribunal, her presumptions were sound. It should also be observed that no defence under section 457 of the Act was advanced on her

behalf, that is to say, it was not asserted that she did not know and could not reasonably be expected to have known that the matter under consideration at the meeting in question was a matter in which she had a pecuniary interest. It is enough to say that, in the Tribunal's view, that defence could not have been maintained on the evidence before the Tribunal.

Councillor Hale has pointed out that although it was asserted against her that she had a pecuniary interest in the library budget item she did in fact vote against the adoption of the budget at the Council meeting of 17 June 1997. However, it should be mentioned that she has never contended and it is not contended on her behalf that by voting against a proposal in which there is a pecuniary interest a Councillor is exonerated from compliance with the requirements of section 451 of the Act. That section simply prohibits any participation by a Councillor for or against the matter in which the pecuniary interest exists.

On the evidence before the Tribunal relating to the complaint of contravention by Councillor Hale of section 451 of the Act at the meeting of the Council held on 17 June 1997, the Tribunal finds that the complaint has been proved and the question now to be determined is what action, if any, the Tribunal should take under the provisions of section 482(1) of the Act.

ACTION UNDER SECTION 482(1)

Section 482(1) of the Local Government Act, 1993 provides that the Pecuniary Interest Tribunal may, if it finds a complaint against the Councillor is proved:

- (a) counsel the Councillor; or
- (b) reprimand the Councillor; or
- (c) suspend the Councillor from civic office for a period not exceeding two months; or
- (d) disqualify the Councillor from holding civic office for a period not exceeding five years.

Each case must be considered on its merits taking into account the circumstances in which the breach occurred, any explanation offered by the

Councillor and the attitude of the Councillor towards the performance of their obligations under the legislation.

The only explanation offered by Councillor Hale for her failure to comply with section 451 at the June meeting of the Council was that she had forgotten that the allocation of funds to the library was a component of the budget: Exhibit A, Attachments 12, 17, 20; Exhibit 1, para.9. The reason she gave for this oversight was that at the June meeting the attention of Council was being focused on the larger aspects of the budget, such as setting the rate, without attention to detailed items. Her particular interest was in opposing the size of the rate which was the reason for her voting against the adoption of the budget.

Ms Duggan submitted that the Tribunal should accept her explanation and advanced a number of grounds upon which she submitted it would be reasonable to do so. Ms Duggan pointed out that Councillor Hale had not been involved in the negotiations for reprinting the publication, had disclosed her interest to the April meeting purely on the basis of assumptions she had made on noticing that particular item, nothing had occurred in those eight weeks between the two meetings to bring that item back to her notice and the proposal to reprint had not been discussed or mentioned to her by Rhonda Black, all of which was consistent with her claim that she had forgotten about it. It was also submitted that the fact that she disclosed her interest in April when the reprint proposal was present to her mind suggests that her failure to repeat the disclosure at the June meeting was due to the fact that was not then in her mind. It was pointed out that when her omission was brought to her notice her immediate reaction was one of surprise, regret and apology and an attempt through the Mayor to mitigate the consequences.

As to Councillor Hale's attitude towards the performance of her obligations, Ms Duggan relied upon her repeated unreserved apologies to the Council, the ratepayers and residents and to the Department of Local Government, her expressions of dismay and embarrassment at having failed to disclose her interest at the June meeting and her unsolicited expressions of recognition of the importance of the disclosure of pecuniary interest in promoting public confidence in local government: Exhibit A, Attachments 13,

14; Exhibit 1 (under “General Observations”, paras, 7-9); T42/36. In her letter to the Acting General Manager of the Council of 12 July 1997 (Exhibit A, Attachment 13) she said, “I believe the complaint about non-disclosure was a legitimate one. To attain the trust and respect of the community, no-one working in local government should have either a real or perceived interest in a Council decision.” In her evidence to the Tribunal she said:

“I was acutely embarrassed. I was extraordinarily sorry and I also regard my – I could not credit that I had failed to acknowledge my interest in this. I kicked myself for failing to acknowledge my interest in this publication when I had done so on the first occasion the matter had arisen.” T42/32-42

Councillor Hale assured the Tribunal that if she had remembered at the June meeting of the Council that the library allocation was a component of the budget she would have disclosed a pecuniary interest in that item: Exhibit 1, para. 9.

Ms Duggan submitted that the Tribunal should conclude Councillor Hale’s failure to disclose her interest at the June meeting was not an attempt to conceal her interest, she having demonstrated at the April meeting that she had no reason to conceal it, that her failure was unintentional and should be regarded simply as an oversight: T59/36-T60/24. Ms Duggan also relied upon character references submitted by Councillors Morris Hanna and Brad Robinson (Exhibits 5 and 6) which spoke highly of Councillor Hale’s honesty and conscientiousness particularly in declaring her interest in matters coming before the Council. They both accepted her explanation that her failure on this occasion was purely an oversight.

Mr Lawler in his submissions told the Tribunal that the Director-General did not submit that Councillor Hale’s failure to disclose her interest was deliberate: T69/6. However, he submitted that her failure should not be looked at simply as an oversight because, he submitted, any reasonable person having realised they had a pecuniary interest in relation to the budget to the extent of expressly declaring that interest and abstaining from participating from participation in the matter when it first arose should have realised that the same interest still existed when the budget came up for final adoption. He submitted that it should be concluded that her failure to

disclose her interest at the June meeting of the Council was due to carelessness or recklessness by Councillor Hale in attention to her statutory obligations of disclosure: T68-69.

Ms Duggan proposed that nothing more than counselling of Councillor Hale by the Tribunal was called for. Mr Lawler submitted that the disclosure requirements of the Act were important obligations not to be treated lightly by the Tribunal.

Conclusion

The Tribunal accepts that Councillor Hale's failure to disclose her interest was not deliberate or influenced by any desire or intention to conceal her interest but was an oversight on her part induced by her having forgotten about the budget item in question and being distracted by the focus of attention having shifted to the size of the rate and other large policy matters involved in the final adoption by the Council of its proposed budget. However, the Tribunal does not consider that merely counselling Councillor Hale would be the appropriate action for the Tribunal to take. Councillor Hale has demonstrated that she was fully aware of her disclosure obligations and understood their public importance. She does not need counselling in that respect. In the Tribunal's view, it behoves a Councillor in dealing with Council business to be ever vigilant towards the requirements of the legislation and the performance of their duty to disclose pecuniary interests in matters before the Council and to refrain from participation. Not only does the law require it but, as Councillor Hale herself recognised, the importance of promoting public confidence in the integrity of Councillors exercising local government powers must be considered. An "oversight" on her part it may have been, but her failure to disclose her interest and comply with the Act also indicates carelessness and a lack of due attention to her obligations on this occasion and, in the Tribunal's opinion, calls, at least, for a reprimand. The Tribunal will order accordingly.

FAILURE TO DISCLOSE SOURCE OF INCOME FROM A TRUST – SECTION 449(3)

Section 449(3) of the Local Government Act, 1993 provides that a Councillor holding that position at 30 June in any year must complete and lodge with the General Manager within three months after that date a return in the form in Part 1 of Schedule 3 of the Act.

The form in Part 1 of Schedule 3 and the provisions of clauses 2(2), 10(1)(b) and (2)(b) in Part 2 of that Schedule require a Councillor to disclose in the written return lodged pursuant to section 449(3) sources of income received from a trust during the return period by stating the name and address of the settlor and the trustee. Part 1 of Schedule 3 further requires that if there are no pecuniary interests or other matters of the kind required to be disclosed under a particular heading in the form, the word “NIL” is to be placed in an appropriate space under that heading.

Allegation

The complaint alleged that in her Return for the return period 1 July 1996 to 30 June 1997 Councillor Hale wrote the word “NIL” in section B2 of the Return wherein she was required to disclose sources of income received from a Trust in that Return period whereas in fact she had received income from a Trust during that period. It was alleged that the Trust in question was called the “Chapel Unit Trust” which owned the property 78 Chapel Street, Marrickville. The Settlor of the Trust was Dominic Li of Suite 501, 83 York Street, Sydney. The Trustee was a company called Carrion Comfort Pty Ltd of which Councillor Hale was herself a shareholder and director and the address of which was 19 Palace Street, Petersham which was her place of residence.

By reason of the foregoing, it was alleged that by failing to disclose the above Trust and the required particulars thereof as a source of income received from a Trust during the Return period she contravened section 449(3) of the Act.

Particulars of this complaint as outlined above were contained in the Tribunal's Notice to Councillor Hale of its decision to conduct a hearing: Exhibit B.

Councillor Hale's Admission and Explanation

As mentioned earlier, Councillor Hale's solicitors informed the Tribunal that she did not desire to contest any of the allegations in the Tribunal's Notice.

Councillor Hale relied upon her own evidence and the evidence of her accountant, Mr Li, to explain how the contravention came about. At the conclusion of the evidence, Ms Duggan conceded that it was apparent on the face of the Return that she had lodged that she had not disclosed the Chapel Unit Trust as a source of her income but submitted that, on the evidence, the Tribunal should accept that the non-disclosure was due to ignorance and misunderstanding on the part of Councillor Hale as to the source of the income in question, ignorance and confusion which she submitted was wholly understandable: T60/26-48. On the evidence, there was an issue as to her actual state of knowledge at the relevant time but not as to the state of facts.

Her return under section 449(3) related to the period 1 July 1996 to 30 June 1997. It was dated and lodged by her on 23 September 1997, the due date being 30 September 1997.

Australian Securities Commission records disclosed that the company Carrion Comfort Pty Ltd was originally incorporated on 20 May 1980 under another name. The current name was registered on 23 May 1996. Councillor Hale is recorded as having been a director since 20 May 1980 and, at the time relevant to the present complaint, beneficially held the only two shares that had been issued by the company. One share she held in her own right and the other as Executrix of the Estate of the Late Roger W Barnes. Thus, at all relevant times, Councillor Hale controlled this company.

In a letter dated 27 November 1997 which she wrote to the Department's Investigation Officer she stated, in relation to the requirement to disclose in Returns Councillors' interests and positions in corporations, that the company here in question had never traded since its incorporation in

1980 and that she had forgotten about its existence. She said, “My accountant, however, suggested reviving and renaming it Carrion Comfort Pty Ltd in May 1996 as a vehicle for a property purchase.” She stated that in her subsequent returns she had disclosed her interest in this company: Exhibit A, Attachment 42.

Mr Li told the Tribunal that the Chapel Unit Trust was set up as a Unit Trust in May or June 1996 with Carrion Comfort Pty Ltd the Trustee and Sylvia Phyllis Hale and Southwood Press Pty Ltd Superannuation Fund the unit holders and beneficiaries of the Trust in proportion to the number of units respectively held by them. The Trust came about as a result of Councillor Hale consulting him for advice about ways and means by which the property 76-78 Chapel Street, Marrickville, might be acquired. He had advised her to acquire the building by way of a trust structure consisting of a Unit Trust. The capital required by the Unit Trust to enable it to purchase the building would be provided by the two unit holders, Councillor Hale and Southwood Press Pty Ltd Superannuation Fund, with Councillor Hale borrowing funds personally from a bank to purchase her units and the Superannuation Fund injecting capital from that fund into the purchase of the Superannuation Fund’s units. By this means the Unit Trust would then have sufficient funds to purchase the building. Mr Li said that he explained to Councillor Hale the Trust structure and its purpose as he explained it to the Tribunal: T9/7-58. He told the Tribunal that the title to the property was acquired and held by Carrion Comfort Pty Ltd as legal owner for the purposes of the Trust and that, for legal and accounting purposes, Carrion Comfort Pty Ltd was responsible for the administration of the Trust: T10/4-48. The purchase of the property pursuant to the Trust was completed on 2 August 1996 but Mr Li said that the contract to purchase would have been entered into about six weeks prior to that date: T16/10-17.

The scheme of the Trust for accounting and tax purposes appears from copies of the Trust’s and Councillor Hale’s income tax returns which were tendered at the hearing: Exhibit G. Income by way of rents received from the tenant of the building was treated as income of the Trust and the net income was shown as distributed by the Trustee, Carrion Comfort Pty Ltd, to

the unit holders, Sylvia Phyllis Hale and Southwood Press Pty Ltd Superannuation Fund. The amount shown as distributed to Councillor Hale was shown in her income tax return as part of her taxable income and described as "Distribution from Trusts": Exhibit G. Though he prepared the tax returns, Mr Li had nothing to do with the management of the Trust or the building and no personal knowledge of the manner in which income from the building was received and dealt with or outgoings in relation to the building were paid. He relied entirely on information provided to him by Councillor Hale who would furnish him with a list of figures showing rents received and itemised outgoings. Copies of the information which was given to him for the years ended 30 June 1997 and 1998 were tendered at the hearing: Exhibit 8. The figures shown in these lists are reflected in the Trust's income tax returns.

Whilst the foregoing evidence established the setting up of the Chapel Unit Trust and the fact that the Trust became the channel, and thereby the source, of income to Councillor Hale derived from rent paid by the tenant of the building 76-78 Chapel Street, Marrickville, Councillor Hale told the court that at the time she lodged her Return of Interests for the period 1 July 1996 to 30 June 1997 she was not aware that she was entitled to receive or was receiving income from a trust. She acknowledged that Mr Li, in advising her to acquire the building by means of a trust, had given her an explanation of the structure and purpose of the proposed trust but she said that she had not understood that the end result would be that she would be receiving income from the Trust. In her statement of evidence (Exhibit 1) she told the Tribunal that she had had no prior involvement with any trust, was unfamiliar with the implications of establishing one, and laboured under the misapprehension that the sole purpose of the Trust was to enable the Superannuation Fund to participate in the property's purchase via Carrion Comfort Pty Ltd to which she was "lending" funds obtained by way of a bank loan to her. In giving evidence, she told the Tribunal that what she "most particularly" remembered about Mr Li's advice was that the purchase of the property could not be financed with funds from the Superannuation Fund unless it was an arms length transaction and the way to achieve that was via a trust: T31/2.

As to the fact that there would be rental income received from the building which would be distributed by the Trust to the beneficiaries of the Trust, she told the Tribunal that she knew that there would be rental income from the property because she had been the one who had undertaken all the negotiations with the real estate agent to purchase the building. She said that she knew that there was an existing tenant who was paying rent under a lease with two years to run and that the rent would almost equal the amount of the interest she would have to pay on the loan from the bank plus outgoings on the building. She also knew that when the existing lease expired Southwood Press Pty Ltd would move into the building and pay an amount of rent that would be sufficient to meet her interest and capital repayments on the loan for a five year period. With this scheme in mind she deliberately structured the loan which she obtained from the bank so that for the first two years of the loan it would be interest only and in the final five years it would be interest and capital repayments: T31/17-47.

Councillor Hale also told the Tribunal that, labouring under the misapprehension that Carrion Comfort Pty Ltd was purchasing the building and financing the purchase partly with money that she had borrowed from the bank and lent to the company to buy the building, she regard Carrion Comfort Pty Ltd as the source of any income that she would derive from the rent paid by the tenant of the building: T32/4-14. As to the handling of the rent money from the building, Councillor Hale told the Tribunal that it was arranged with the real estate agent, who had been managing the building for the previous owner, that the existing tenant would continue to pay the rent to the real estate agent and he would pay the amount received directly into her personal account with the bank which had lent her the money. She said that there was an arrangement with the bank to credit the same amount against her loan account with the bank with the result that the rent received went into her account and out again simultaneously on the first of the month. A consequence of this arrangement was that Councillor Hale never sighted rent cheques or rent receipts nominating the Trust as the recipient of the rental income and the bills received for rates and other outgoings, and

correspondence from the real estate agent, were always directed to Carrion Comfort Pty Ltd: T32/30-T33/3.

Councillor Hale told the Tribunal that she was aware that she was bound to disclose the source of the income which she expected to receive from the building. She did in fact include certain information in her return which she says was intended to make that disclosure: T32/16-28; Exhibit 1, "Income from Chapel Unit Trust", para. 4; but this information was incorrect in one place and unrevealing in another. The copy of the return is Attachment 60 to Exhibit A. Under the heading "B. Sources of Income", Item 3 provides for disclosure of sources of income received at any time during the return period. Her Return stated as a source of her income, "Director's Fees", followed by the names of a number of companies including Carrion Comfort Pty Ltd. In the course of the investigation she revealed that she had never received director's fees from Carrion Comfort Pty Ltd or any of the companies named of which she was a director. In another section of the same return, "E. Interests and Positions in Corporations", she named Carrion Comfort Pty Ltd, stated that her interest was as shareholder and her position was director, and then she added, in a column calling for a description of the principle objects of the corporation named, "Property Owner – 78 Chapel Street, Marrickville". Thus neither the building nor Carrion Comfort Pty Ltd were disclosed as the source of the rental income which was passing through her personal bank account and which she says it was her intention to disclose by the two entries just described. However, the fact that she included Carrion Comfort Pty Ltd at all as a source of income, albeit misdescribing the nature of the income, and stated that company to be the owner of 78 Chapel Street, Marrickville provides some support to her claim that at the time of lodging her return she believed Carrion Comfort Pty Ltd owned the building and was the entity from which she was deriving income, and that the Trust was not the source of that income.

When cross-examined, Councillor Hale conceded that Mr Li may well have and probably did explain to her that the property was to be purchased by a Trust but she said that all she was conscious of was that the Trust was there basically to allow money to be borrowed from the Superannuation Fund.

She pointed out that such information as she received in relation to the purchase of the property showed the name of Carrion Comfort Pty Ltd as the purchaser. She said, "I was not conscious that the Trust bore – had any relevance for me personally. I was not conscious I was going to be a beneficiary of the Trust. Look, in retrospect, that was extraordinarily foolish of me.": T36/31; 37/3.

Having regard to Mr Li's evidence as to the advice about the Trust which he gave to Councillor Hale at the outset and to the extent of Councillor Hale's business and property interests as shown in her returns since she was elected to the Council, there was cause to doubt the credibility of her claim to have been ignorant of the fact that the Trust set up to acquire the property was to be a source of income for her. However, there is evidence before the Tribunal which corroborates her claim of ignorance and persuades the Tribunal to accept it.

As mentioned earlier, it was the practice between Councillor Hale and Mr Li for Councillor Hale to provide him with the detail of the income and expenditure relating to 76-78 Chapel Street for the purpose of his preparing the income tax return. The copies of the information provided by Councillor Hale for this purpose, which are in Exhibit 8, show the original information as being typewritten. There is one sheet relating to the period 1 July 1996 to 30 June 1997 and a second sheet relating to the following financial year. The first sheet is headed "Carrion Comfort Pty Ltd" in typed script with no reference to the Chapel Unit Trust. The second sheet is headed "Carrion Comfort Pty Ltd ATF Chapel Unit Trust." On the first sheet there are notes in a very distinctive handwriting quite obviously not written by Councillor Hale but undoubtedly written by a person preparing an income tax return, most likely Mr Li. These handwritten notes include the words "Chapel Unit Trust". This first sheet is entirely consistent with its author or provider being unaware that the income and expenditure was that of a trust fund of which Carrion Comfort Pty Ltd was merely the Trustee. The second sheet is consistent with the author or provider having become better informed at the time for preparation of the income tax return for the following year.

Mr Li told the Tribunal that a day or two before 6 November 1997 Councillor Hale telephoned him and explained that she had to declare certain financial interests because of her position as a Councillor in the Marrickville Council and she requested him to confirm income she had received from some of her companies. He wrote her a letter dated 6 November 1997 confirming her position as to the income she had received in respect of the year ended 30 June 1996 from three named companies, which did not include Carrion Comfort Pty Ltd, and stating that he was currently working on the books for the financial year ended 30 June 1997 and upon completion would be in a position to confirm the exact amount of income paid to her by the three named companies. In his statement of evidence prepared for the hearing he referred to this letter and said that at the time of writing it he did not think that he was being requested to refer to Councillor Hale's interest in an income received by her from the Chapel Unit Trust but even if he had been requested to provide such information he could not have done so because he did not have it at that time. He said that the Trust's first set of financial accounts and income tax return was not completed until 27 February 1998: Exhibit 4. The copy of the income tax return for the Chapel Unit Trust which is in Exhibit G contains a signed tax agent's certificate dated 27 February 1998. Mr Li affirmed his statement of evidence when he was in the witness box: T7/30-57; and identified the signature on the tax return as his signature: T11/47-53; and said that the information from Councillor Hale would probably have been received by him one month or at most two months before the date on the return: T13/13. The copy of Councillor Hale's personal income tax return for the year ended 30 June 1997 is also signed by Mr Lee and bears the same date as the return for the Chapel Unit Trust. Councillor Hale told the Tribunal that it was her custom at the time to prepare lists of income and expenditure for Mr Li to prepare her tax returns and this occurred usually in December each year: T33/10. As her Return of Interests was dated and lodged on 23 September 1997, it is apparent that there was nothing in existence by way of accounting records or income tax returns relating to the income received from the building to bring to Councillor Hale's

notice or alert her to the fact that at the date of her Return she was the recipient of income from a trust.

Councillor Hale swore that she did not realise until July 1998, when she checked through her income tax returns as a result of having been notified by the Director-General that an investigation into her Returns under section 449 of the Act would be pursued, that she was a beneficiary of a trust. She had written a letter dated 27 November 1997 to the Department's Investigation Officer furnishing information in relation to her Returns for periods up to 30 June 1997. The letter did not refer to any Trust as a source of income. The letter offered to make available for inspection company and personal income tax returns for the relevant periods but stated that the returns for 1996/1997 were not yet finalised. The letter concluded by expressing regret for any omissions in her Returns and an offer to make supplementary Returns should the Department believe them to be warranted: Exhibit A, Attachment 42. Councillor Hale told the Tribunal that she was therefore very surprised to receive in July 1998, seven months later, a letter from the Department informing her of the proposed formal investigation. She said that when she discovered from her income tax return that she had received income from the Chapel Unit Trust and that the role of Carrion Comfort Pty Ltd was that of Trustee for the Trust she immediately advised the Department and the Council's Public Officer that her 1996/1997 Disclosure of Interests Return was incorrect. Her letter dated 23 July 1998 enclosed a copy of her completed Return for 1997/1998 and referred to the fact that she had provided additional information concerning income received by her from a trust. The letter said, "Because discussions with and correspondence from my accountant on 5 and 6 November 1997 had made no reference to the possibility of income from the Trust, I had not anticipated it being a possible source of income. I apologise for the omission.": Exhibit A, Attachment 43; Exhibit 1, paras. 7-10; T33/41-50.

Conclusion

After considering all of the evidence on the issue, the Tribunal concludes that Councillor Hale's omission to disclose the Chapel Unit Trust

as a source of income in her Return for 1996/1997 was due to a lack of awareness by her that the income coming from the building in question was accountable as income of the Chapel Unit Trust and that she was a beneficiary of that Trust, and a belief by her at the time of lodging her Return that any income received by her from the rent paid by the tenant of the building would be received by her from Carrion Comfort Pty Ltd as the owner of the building in her capacity as a shareholder in that company.

FINDING

The Tribunal finds that the complaint relating to Councillor Hale's failure to disclose her interest in the Chapel Unit Trust contrary to the provisions of section 449(3) of the Act has been proved. Consideration of the question of action by the Tribunal under section 482(1) of the Act will be deferred until the other alleged breach of section 449 has been dealt with.

FAILURE TO DISCLOSE DEBTS – SECTION 449(1) AND (3)

Section 449(1) of the Local Government Act, 1993 provides that a Councillor must complete and lodge with the General Manager within three months after becoming a Councillor a return in the form in Part 1 of Schedule 3. The provisions of section 449(3) have already been mentioned.

The Return Form in Part 1 of Schedule 3 and the provisions of clauses 2 and 11 of Part 2 of that Schedule require a Councillor to disclose, in Returns under section 449(1), the name and address of each person to whom the Councillor was liable to pay any debt on the Return date and, in relation to a Return under section 449(3) the name and address of each person to whom the person was liable to pay any debt at any time since that Councillor's last Return. Clause 11(3)(a) provides that a liability to pay a debt need not be disclosed if the amount to be paid did not exceed \$500 at the relevant time for the Return.

Allegation

The complaints against Councillor Hale alleged that in her Return under section 449(1) (Primary Return), return date 15 September 1995, lodged 14 December 1995, and in her Returns for 1995/1996 and 1996/1997

(Ordinary Returns) lodged on 30 August 1996 and 23 September 1997, respectively, Councillor Hale failed to disclose the existence of liabilities at the relevant times for those Returns to pay debts exceeding \$500 to the companies Southwood Press Pty Ltd and Sauron Pty Ltd. These failures are alleged to be contraventions of section 449 of the Act.

Background to Complaint regarding Non-disclosure of Debts

The background to this complaint begins with a letter dated 3 November 1997 from the Director-General to Councillor Hale drawing her attention to the fact that in perusing copies of the three Returns which she had lodged with the General Manager of the Council under section 449 it had been noted that each of them might not accurately and completely have disclosed all her interests in accordance with the requirements of the Return forms and the provisions of section 449 and Schedule 3 of the Act. The letter requested Councillor Hale to advise the Director-General whether or not there was any interest which had not been disclosed, or accurately or fully disclosed, in the Returns she had lodged in order that the Director-General might be in a position to determine what action should be taken: Exhibit A, Attachment 37.

Councillor Hale replied by her letter dated 27 November 1997 which has already been mentioned (Exhibit A, Attachment 42). In her letter she dealt with each of her three returns separately. She stated under the heading "G. DEBTS" that she had unsecured loans from Stanvala Pty Ltd and Hale & Iremonger Pty Ltd for amounts of less than \$200, and more substantial loans of many years duration from Sauron Pty Ltd and Southwood Press Pty Ltd, on which she paid commercial rates of interest: Exhibit A, Attachment 42.

After receiving the Director-General's letter of 8 July 1998 which gave her notice of the complaint and the intention to investigate it, Councillor Hale on 14 July 1998 telephoned an investigations officer of the Department to request an extension of time to respond indicating that she wanted to get some legal advice about the matter: Exhibit A, Attachments 36, 48.

On 23 July 1998 Councillor Hale wrote a letter to the Public Officer of Marrickville Council and another letter to the Department. The letter to the

Department enclosed a copy of her letter to the Council which she described as a letter amending her Disclosure of Interest Returns for 1995/1996 and 1996/1997. The letter stated that the "Amended Returns" reflected the information which she had set out in her letter to the Department of 27 November 1997: Exhibit A, Attachment 43. The enclosed letter to the Marrickville Council stated that the letter detailed amendments to the Disclosure of Interest Returns which Councillor Hale had lodged for 1995/1996 and 1996/1997. The letter dealt with each Return period separately. In relation to the first of these periods the letter stated that she was unsure whether debts to persons include debts to corporations but went on to state that if debts to corporations were included then she had not stated that she was liable to pay debts to Southwood Press Pty Ltd, Sauron Pty Ltd, Hale & Iremonger Pty Ltd and Stanvala Pty Ltd. In relation to the Return for the second of these two periods she stated: "If such is required, I did not state that I was liable to pay debts to" then she repeated the names of the four companies: Exhibit A, Attachment 51.

As mentioned earlier, with her letter to the Department of 23 July 1998 she enclosed a copy of her completed Disclosure of Interest Return for the period 1 July 1997 to 30 June 1998: Exhibit A, Attachment 43. That Return was dated 21 July 1998 and under the section "G. Debts" in the Return she listed the same four companies as creditors.

Reference has already been made to the fact that Councillor Hale's solicitors' letter dated 16 December 1998 to the Tribunal (Exhibit E) stated that Councillor Hale did not desire to contest any of the allegations set forth in the Tribunal's Notice of Decision to Conduct a Hearing dated 25 November 1998: Exhibit E.

In the light of this history it was somewhat disconcerting to find that when it came to the hearing Councillor Hale furnished a Statement of Evidence in which she stated "I do not owe money to Sauron Pty Ltd, Hale & Iremonger Pty Ltd or Stanvala Pty Ltd and have not done at any time that I have been a Councillor." In relation to Southwood Press Pty Ltd she stated that it did not occur to her to list that company amongst her creditors as the loan had taken place many years before and amounted to a book entry. "To

all intents and purposes I had borrowed the money from myself.”: Exhibit 1, “Loan”, paras. 2, 3.

The Statement of Mr Li dated 17 February 1999 which she obtained for the purpose of the hearing (Exhibit 4), stated under the heading “Debts Owing by Ms Hale”, the following:

“As Accountants for Sauron Pty Ltd, Stanvala Pty Ltd and Hale & Iremonger Pty Ltd we advise that for the financial years ended 30 June 1996, 30 June 1997 and 30 June 1998 there was no debt owing by Ms Hale to the abovenamed companies.

In respect of Southwood Press Pty Ltd approximately 10 years ago the company loaned moneys to both Ms Hale and her late husband for the purpose of purchasing an investment property to be occupied and used by Hale & Iremonger Pty Ltd. This loan account is unsecured and has been recorded in the company’s books as a loan to Ms Hale. As far as Ms Hale’s liability is concerned it is recognised that as she is the major shareholder/controller/director of the company this loan amount would be unlikely to be called up or repaid to the company as this course of action would require Ms Hale’s approval as the major shareholder/controller of the company.” (Exhibit 4)

COUNCILLOR HALE’S EXPLANATION FOR INCORRECT DISCLOSURES AND NON-DISCLOSURES OF DEBTS

When giving evidence to the Tribunal Councillor Hale was asked by her counsel to explain the inconsistencies in the statements she had made regarding the owing of a debt to the company Sauron Pty Ltd. Her explanation was as follows:

“When I first prepared the statements, my Primary Return and then my Returns thereafter, I had said I had listed every organisation to which I was conscious that I owed money I was not conscious at that time of owing money or being owed money from any of the companies because I am in some case the sole shareholder and in some other cases by far the majority shareholder in all of them and it was as though I was not conscious of my left hand owing money to my right, and so it just hadn’t occurred to me to declare them as loans. And after the deficiencies in my statements were pointed out to me by the Department I thought it best to err on the side of caution and I had briefly looked at the accounts and saw there was money owing and I had just

assumed I owed it to the companies rather than the reverse, so I wrote that down accordingly.”: T24/57-T25/18

She went on to say that it was only about a fortnight before she gave evidence that she spoke to Mr Li who told her that she did not owe money to Sauron Pty Ltd, it was the reverse: T25/20-32

She also told the Tribunal that because of her discussions with the Department and deficiencies in the Returns that she had already lodged, “I thought it was best to err on the side of overstatement rather than understatement of potential sources of income or potential debts, so it was really – and I couldn’t see that there was any reason, if there was any slightest possibility of me owing money to those companies. I wasn’t sure at that stage, I thought I did owe them money, so I thought I should declare it.”: T25/45.

The evidence clearly established an indebtedness of Councillor Hale to Southwood Press Pty Ltd. In the accounts attached to the tax return of Southwood Press Pty Ltd for the period 1 July 1996 to 30 June 1997, each page of which bears Councillor Hale’s signature (Part Exhibit G), debts owed to that company are listed in the balance sheet for the year end 30 June 1997 under “Current Assets” and they include loans at call, \$323,872.59 for that year and \$305,843.59 for the previous financial year. The supporting schedules to the balance sheet for the year ended 30 June 1997, also signed by Councillor Hale, show the break-up of the item “Loans at Call”. One of the loans listed is a loan from the company to S P Hale amounting to \$203,736.66 for the year ended 30 June 1997 and \$184,376.66 for the previous year, an increase of the indebtedness in the accounting year of \$19,360. The supporting schedules to the profit and loss statement for the year ended 30 June 1997, also signed by Councillor Hale, show the sum of \$19,360 as interest received from Councillor Hale. The same schedule showed that in the previous year Councillor Hale had paid the company \$19,230.36 for interest.

The fact that the amount of the increase in Councillor Hale’s indebtedness to Southwood Press Pty Ltd had increased in the financial year by exactly the same amount as the amount of interest she was shown in the

accounts as having paid to the company was explained by Mr Li as a notional advance by the company to Councillor Hale of an additional loan of the same amount as the amount of interest that was due on the loan thereby increasing her indebtedness to the company by that amount, while at the same time requiring the company to account for the amount as income by way of interest received from her: T13/22-57 Mr Li explained the transaction in these terms: “For accounting purposes the company advanced money to Ms Hale so we charged interest for income tax purposes. ... just book entries ... it is just capitalising the interest.”: T16/50-T17/9

Mr Li told the Tribunal that he could not explain from his knowledge of the books and accounts of the companies for which he was responsible and from the information which he provided in relation to Sauron Pty Ltd and Stanvala Pty Ltd how Councillor Hale could have come to claim that there were debts owing by her to those companies: T23/31

In giving her evidence she was asked to explain why she had not disclosed in her returns the ongoing debt to Southwood Press Pty Ltd which the financial returns demonstrated that she owed. She said:

“The debt originated I think in about 1989 or 1990. It was to purchase a building which was being occupied by – which was eventually occupied by Hale & Iremonger. All I can say is that it was a debt (sic) from Southwood Press to me. The debt would only be called in if I said it was to be called in and I was hardly likely to put myself in that position but I just did not – I was not even conscious of it being a debt. To all intents and purposes it was a book entry rather than a debt. If interest accumulated then it accumulated, and certainly my accountant advised me that it is desirable to do all that I can – he told me this in the last 12 months or so – to begin to reduce that debt. But I was not conscious of it as a debt.”

She added that prior to receiving that advice from her accountant she had not been making any repayments of the debt: T30/31-50

In the course of her submissions to the Tribunal after the close of evidence, Ms Duggan conceded that Councillor Hale’s debt to Southwood Press Pty Ltd should have been disclosed in her Returns: T64/33

Finding

On the evidence, the Tribunal finds that the complaint that Councillor Hale contravened section 449(1) and section 449(3) by failing to disclose in the Returns lodged by her pursuant to those sections her liability to pay to Southwood Press Ltd a debt exceeding \$500 was proved. The Tribunal further finds that the complaint that she also contravened those sections by failing to disclose a liability to pay such a debt to Sauron Pty Ltd was not proved because, notwithstanding her claim to the contrary, no such debt existed.

ACTION BY THE TRIBUNAL UNDER SECTION 482(1)

As to Councillor Hale's failure to disclose her interest in the Chapel Unit Trust, Ms Duggan submitted that, because the relationship between a trust and the trustee is a technical legal matter, Councillor Hale could not be expected to have known or understood it: T60/57-T61/14. She submitted that, there being no intention on Councillor Hale's part to deceive, her failure to disclose the trust should be put down to an innocent misunderstanding of the financing structure that pertained to the ownership of 76-78 Chapel Street, Marrickville: T62/35. It was further submitted that the fact that it was Councillor Hale herself who brought to the notice of the Department that she had omitted to disclose the trust should be taken into account in her favour: T63/6.

As to Councillor Hale's contraventions by failure to disclose liability for debt, Ms Duggan relied again on the fact that it was Councillor Hale herself who drew the Department's attention to the matter. With regard to her indebtedness to Southwood Press Pty Ltd, it was submitted, that because of the fact that she was the majority shareholder and a director of the company and able to control its affairs, her claim that she believed that it was not a debt "in the true sense" was understandable: T64/2-8; T64/23-41

Ms Duggan also submitted that on the basis of the evidence before the Tribunal as to the character and conduct of Councillor Hale, she should be considered as a person more likely to declare an interest than not if she believed that she had an interest or a possibility of an interest: T65/38-

T66/15. Ms Duggan submitted that the Tribunal should accept Councillor Hale's expressions of remorse for her contraventions and her assurances that she intended to change the accounting routine and practices which in the past had hindered her ability to provide accurate information in her Returns; T30/12; Exhibit 1, paras. 7, 9; T65/19-36; T66/4-15

As can be seen from the transcript, Ms Duggan elaborated the foregoing submissions. She concluded by urging the Tribunal to find that in all of the circumstances of the case it would appropriate and sufficient for the Tribunal to counsel Councillor Hale in relation to the contraventions in question.

For the Director-General, Mr Lawler submitted that the deficiencies in Councillor Hale's Returns under section 449 of the Act were not to be excused on the basis of ignorance, unawareness or unavailability of relevant information because the evidence showed that all of the information necessary to complete the form fully and accurately could have been available to Councillor Hale by the lodgement date in each of the relevant years. It was submitted, therefore, that the practice by which the accounting of Councillor Hale's and her company's business and financial affairs was delayed to permit "the possibility of retrospective accounting", which she put forward as a justification for being unable to accurately complete the Returns, ought to be rejected by the Tribunal: T69/11-34

Mr Lawler submitted that the evidence indicated a significant degree of careless and failure by Councillor Hale to turn her mind to the need to seek out the advice and information necessary to enable her to make the full and accurate disclosures required: T69/43-47

It was submitted for the Director-General that an appropriate response of the Tribunal to Councillor Hale's contraventions would be to impose a period of suspension to operate as a general deterrent against failure to comply with the disclosure obligations in the legislation: T70/39-T71/13

CONCLUSION

The Tribunal has taken into consideration all of the submissions of counsel for the parties the principal elements of which have been outlined above.

In approaching the question of appropriate action for the Tribunal to take, it is to be noted that new Councillors elected in September 1995 were, by Memorandum dated 25 September 1995, from the General Manager of the Council, advised of their obligations under the provisions of the Local Government Act, 1993 to submit Returns disclosing specified interests. A further Memorandum dated 17 November 1995 addressed to Councillor Hale from the General Manager reminded her of her legal obligations to lodge her Primary Return disclosing the interests required by the Act to be disclosed by the due date, 15 December 1995. This Memorandum contained the following statement:

“It is important that the Return is completed correctly and submitted by that date as the Act provides for investigation of complaints concerning non-disclosure and penalties for breach of the disclosure requirements.”

The Memorandum advised her to contact the Council's Senior Administration Officer if she had any inquiries to make about the matter: Exhibit A, Attachment 65.

The Tribunal has accepted that Councillor Hale's failure to disclose the Chapel Unit Trust was not an attempt to conceal her interest in the trust but was due to a lack of awareness that it was the Trust which was a source of her income. It stands in her favour that she included information in her Return which was intended by her to serve as a disclosure of her anticipated income from 76-78 Chapel Street, Marrickville; but her attempt was wholly inept and inaccurate. Information as to the correct position was available and readily ascertainable by her by inquiry from Mr Li. She admits that Mr Li had explained the scheme of the trust arrangement to her before the trust was established and the building purchased but she claims to have misunderstood the trust relationships. She claims she thought she was lending money to Carrion Comfort Pty Ltd to buy the building. This is difficult to reconcile with the fact that the form of the proposed trust, which, according

to Mr Li, was explained to her, was to be a Unit Trust in which she, as one of the beneficiaries, would purchase a block of units.

Whilst Ms Duggan submitted that a misunderstanding on the part of Councillor Hale was explicable because of the legal technical nature of the trust, the business arrangements by which Councillor Hale has for years conducted her financial affairs and the manner in which she gave her evidence left the Tribunal convinced that Councillor Hale did not lack the capacity to understand the trust arrangement and relationships if she had put her mind to it. The Tribunal draws the conclusion that her unawareness was due to a lack of attention to and interest in the detail of her business and accounting arrangements, preferring to leave such matters to others.

Her claim that she did not disclose her indebtedness to Southwood Press Pty Ltd because she was not “conscious” of it as a debt is not, in the opinion of the Tribunal, an acceptable excuse. She signed and adopted the annual accounts of Southwood Press Pty Ltd and that company’s and her own income tax returns in which her indebtedness and liability to pay interest to that company were clearly shown. She had the knowledge, the means of knowledge and the intelligence to recognise that her indebtedness to Southwood Press Pty Ltd gave her an interest in that company of the kind which the provisions of the legislation relating to disclosure of debts required a Councillor to disclose. Due attention to the requirements of the legislation would have led her, if in doubt, at least to obtain qualified advice on the matter. Such advice was always available to her.

Reference was made by Ms Duggan to the complexity of Councillor Hale’s financial affairs conducted as they were by a number of companies in which she was a shareholder and director. Councillor Hale referred to the accounting procedures and practices by which accounts and tax returns were delayed until well after the date for lodgement of the Disclosure of Interests Returns and which she had followed for some years and had seen no reason to change.

In the opinion of the Tribunal, a Councillor whose financial and accounting affairs are conducted as Councillor Hale’s were, and who is in a position, as she was, to exercise control over the time by which the

accounting necessary to provide the required information could be completed, may reasonably be expected to take such steps as are necessary to ensure that it will be possible for the Councillor to lodge within due time Returns which make the full and accurate disclosures required by the legislation. The Act allows a period of three months after the close of the financial year. The evidence before the Tribunal established that in the present case the accounts and tax returns for Councillor Hale and her companies could and would have been completed within that time if required by her: T22/49-T23/7

Councillor Hale agreed with her own counsel that, in the light of her past behaviour, it was "a fair criticism" of her that perhaps she had not paid a close amount of attention to her own financial and professional arrangements such that she could confidently disclose the interests that she was required to disclose under the Local Government Act. She also said that for the future she had taken steps to take a more controlled and interested role in her affairs in relation to completion of Pecuniary Interest Returns: T34/22-37

The Tribunal concludes that, whilst open to that criticism, Councillor Hale's contraventions and conduct in relation thereto do not in all the circumstances warrant a sanction as severe as suspension from civic office, as was suggested by counsel for the Director-General, but do call for more than counselling, as proposed by Ms Duggan. In the Tribunal's opinion it is appropriate that she be reprimanded for the breaches of section 449 of the Act which were proved in the present proceedings.

The Tribunal will publish Orders accordingly.

Pursuant to section 484 of the Act the Tribunal will provide this Statement of its Decision to Councillor Hale and the Director-General. A copy will be furnished to Marrickville Council for the information of Councillors and to such other persons as the Tribunal thinks fit.

DATED: 6 April 1999



K J HOLLAND Q.C.
Pecuniary Interest Tribunal