

**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: 25 November 1998

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STATEMENT OF DECISION

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.

The complaints related to a number of allegations of contraventions by Councillor Sylvia Phyllis Hale of Marrickville Council of provisions of the Local Government Act, 1993 including alleged failures to comply with the requirements of section 449 of the Act in relation to written returns required to be lodged by Councillors under that section.

Decision to be made by the Tribunal

Section 469 of the Act provides that the Tribunal may, after considering a Report presented to it, conduct a hearing into the complaint concerned. Section 470 provides that if the Tribunal decides not to conduct a hearing into a complaint, it must provide a written statement of its decision to the person who made the complaint, in this case, the Director-General, and that the written statement must include the reasons for the decision.

The Tribunal, after considering the Director-General's Report, has decided that, in respect of some of the allegations, it will conduct a hearing into the complaint. The Tribunal's decision in this respect is the subject of a separate Notice from the Tribunal to the parties.

The Tribunal has also decided that in relation to a number of other allegations it will not conduct a hearing into the complaints. What follows is the Tribunal's Statement of this decision, including its reasons, pursuant to the provisions of section 470 of the Act.

SECTION 449 – WRITTEN RETURNS BY COUNCILLORS

The Local Government Act, 1993 provides as follows:

“449. (1) A councillor or designated person must complete and lodge with the general manager, within 3 months after becoming a councillor or designated person, a return in the form in Part 1 of Schedule 3.

... ..

(3) A councillor or designated person holding that position at 30 June in any year must complete and lodge with the general manager within 3 months after that date a return in the form in Part 1 of Schedule 3.

... ..

(5) Nothing in this section prevents a councillor or designated person from lodging more than one return in any year.”

Reference to the relevant provisions of Schedule 3 will be made in relation to the particular allegations as they are dealt with below.

The following table indicates the relevant dates relating to the written returns here in question.

RETURNS	PERIOD OF RETURN	PRESCRIBED DATE OF LODGEMENT	ACTUAL DATE OF LODGEMENT
1995 (Primary Return – Section 449(1))	15.9.95	15.12.95	14.12.95
1995/1996 (Ordinary Return – Section 449(3))	1.7.95 – 30.6.96	30.9.96	30.8.96
1996/1997 (Ditto)	1.7.96 – 30.6.97	30.9.97	23.9.97
1997/1998 (Ditto)	1.7.97 – 30.6.98	30.9.98	27.7.98

ALLEGED BREACHES – DECISION AND REASONS

1. ALLEGATION

Failure to disclose in Councillor Hale's Primary return that she was a director and secretary of Carrion Comfort Pty Limited – Director General's Report, Appendix 1.

COMMENT

In relation to a Primary return, an interest or position in a corporation is required to be stated as it existed on the "return date", that is, the date on which the person became the holder of a position by which the person was required to make the return: Section 449(1), Schedule 3, Part 1 (Form E); Part 2, clauses 2(1), 7(1)(a).

In the present case, the "return date" was 15.9.95. The return was required to be lodged by 15 December 1995 and appears to have been lodged on 14 December 1995. At the return date the name of the company in question was Southwood Press (NSW) Pty Limited, not Carrion Comfort Pty Limited. The company was incorporated on 20 May 1980 by the name Aviato Pty Limited which was changed to Southwood Press (NSW) Pty Limited from 23 June 1980 to 22 May 1996 and to Carrion Comfort Pty Limited on 23 May 1996. Councillor Hale was appointed as both director and secretary of the company on 20 May 1980, the date of its original incorporation: Report, A.S.C. Search 31 July 1998, Attachment 69.

COUNCILLOR HALE'S EXPLANATION

Councillor Hale informed the Department's Investigator that the reason she had failed to declare in her Primary return that she was a director and secretary of Southwood Press (NSW) Pty Limited was that the company had never traded since its original incorporation and she had forgotten that the company existed. In May 1996, which was well after the return and lodgement dates for her Primary return, the company was, she said, "revived" and renamed Carrion Comfort Pty Limited as a vehicle for a property purchase at the suggestion of Councillor Hale's accountant: See her letter dated 27 November 1997, Report, Attachment 42.

CONCLUSION

Failure to disclose in her Primary return the positions Councillor Hale held in Southwood Press (NSW) Pty Limited was a breach of the requirements of the act. Her explanation for the breach is consistent with the information contained in the A.S.C. Search and her subsequent returns. It is to be noted that in every return since May 1996 Councillor Hale disclosed that she was a shareholder and director of Carrion Comfort Pty Limited and in her 1997/1998 return she also stated her position as Secretary of the company.

The report contains no apparent reason for doubting Councillor Hale's explanation that the company had been moribund for over 15 years and that she had overlooked its existence at the relevant time. As soon as it was re-activated she disclosed her interest in it. In these circumstances, a hearing into this particular complaint would not, in the Tribunal's view, be justified as a breach would not call for any action by the Tribunal.

2. ALLEGATION

Councillor Hale failed to disclose, in her Primary return and in her Ordinary returns for 1995/1996 and 1996/1997, that she held a position of Secretary in each of five companies named in those returns and, in her Ordinary return for 1995/1996 and 1996/1997, that she held the position of Secretary in a sixth company named in the returns: Report, Appendix 1.

COMMENT

As to the four companies first named in the returns, Councillor Hale disclosed in each of the returns in question that in relation to each one of the companies she had an interest as shareholder and held the position of Director. As to the fifth named company, she made a similar disclosure of interest and position in all of the returns in question except her Primary return. As to the sixth named company, she made the same disclosure of interest and position in all of the returns.

COUNCILLOR HALE'S EXPLANATION

Councillor Hale informed the Department's Investigator that, where the return forms required her to describe her "position" in companies in which she was a shareholder and director, she interpreted that to mean that it was sufficient to describe her position as Director without mentioning any other positions she may have held.

CONCLUSION

Schedule 3, Part 2, Clause 7(1)(b) requires the nature of "the position" held in each corporation to be disclosed. Section 8(b) of the Interpretation Act 1987 provides that a word or expression in the singular form includes the plural form. On a strict interpretation it would follow that if more than one position is held in a corporation, all should be disclosed and that, therefore, Councillor Hale failed to conform to the requirements of the legislation by not disclosing her position as the Secretary of the companies in question. The question for the Tribunal to decide is whether a hearing by the Tribunal into a complaint of such breaches is warranted in the present case. The nature and circumstances of the breaches have to be taken into account. The nature and importance of Councillor Hale's interests in all of the companies in question was clearly manifested by her disclosures in the returns that she was a shareholder and director of each of them. In the context of making a written public disclosure of a councillor's private interests, the additional information that she also held the subordinate position of secretary would have added nothing of any significance to the reader.

In the Tribunal's opinion, her failure to disclose her position of Secretary to these companies would not, in the light of her other and more significant disclosures, justify a hearing by the Tribunal. Failure to disclose in her Primary return her position as Secretary of the fifth named company (named Carrion Comfort Pty Limited in the allegation) is subsumed in the Tribunal's conclusion stated in paragraph 1 above in relation to Southwood Press (NSW) Pty Limited.

3. ALLEGATION

That Councillor Hale failed to disclose in her Primary return an interest as shareholder in Southwood Press (NSW) Pty Limited: Report, Appendix 1.

CONCLUSION

The complaint of this breach does not require a hearing for the same reasons as stated in relation to this company in paragraph 1 above.

4. ORDINARY RETURN 1996/1997

Councillor Hale disclosed in this return that she was a shareholder and director of Republican Weekly Limited: Report, Attachment 60; but on 27 November 1997 she notified the Department's Investigator that she was "neither a shareholder nor secretary" (sic) of that company in the period of that return: Report, Attachment 42.

An A.S.C. Search on 31 July 1998: Report, Attachment 71; indicates that she was appointed a director of the company on 27 January 1997 and allotted a share in a company on 19 June 1997: Report, Attachment 73; which would mean that she was wrong in the assertion in her letter.

However, she had in fact conformed to the disclosure requirements in relation this company and, therefore there was no breach.

5. ALLEGATION

Councillor Hale's Primary and Ordinary returns up to 1996/1997 contained numerous inaccuracies and inconsistencies regarding her sources of income from shareholdings, directorships and occupations in relation to companies named in the returns: Report, Appendix 1. These included the following:

- (a) according to the disclosures in her Primary return, she expected to receive, and in her Ordinary returns, she actually received director's fees from a number of named companies; but she informed the Department's Investigator and the Council's Public Officer that in fact she had received no director's fees from any of them: Letters 27 November 1997 and 23 July 1998, Report, Attachments 42 and 51.
- (b) the returns did not disclose any expectation or actual receipt of income by way of dividends on her shareholdings in the companies which she had named in the returns; but in the letters mentioned in (a) above she stated, in relation to her Primary return and her Ordinary return for

1995/1996, that she had received dividends from one of the companies (Stanvala Pty Limited) and, in relation to her Ordinary return for 1996/1997, she had received dividends from two of the companies (Stanvala Pty Limited and Sauron Pty Limited).

- (c) in her Primary return she described her occupation as “Publisher” employed by Hale & Iremonger Pty Limited of which she was a director and as “Printer” employed by Southwood Press Pty Limited of which company she was also a director.

In her Ordinary returns for 1995/1996 and 1996/1997 she described her occupation as “Publisher” employed by Sauron Pty Limited.

In her Ordinary return for 1997/1998 she described her occupation as “Publisher/Company Director” employed by Sauron Pty Limited.

However, in her letter of 27 November 1997 (Report, Attachment 42) she told the Department's Investigator that she had never been employed by Hale & Iremonger Pty Limited, had not been employed by Southwood Press Pty Limited since about 1972 and that her principal sources of income for the periods of the returns were wages and bonuses from Sauron Pty Limited, supplemented by rental income from a number of properties.

COMMENT

With respect to disclosure of sources of income, the requirements for a Primary and an Ordinary return differ in that, for a Primary return, the disclosure required is of sources of income the person reasonably expects to receive in the period commencing on the first day after the return date and ending on the following 30 June; but, for an Ordinary return, the disclosure must be of sources of income actually received in the return period which has already passed: Schedule 3, Part 1, Form B; Part 2, Clause 2. The first being prospective, the disclosure can only be according to the expectation at the date of lodgement of the Primary return and might turn out to be inaccurate or unrealised. The second, being retrospective, requires disclosure according to the person's knowledge at the date of lodgement of the Ordinary return of a state of facts or events already

passed and does not contemplate variation or non-fulfilment by reason of subsequent events.

COUNCILLOR HALE'S EXPLANATION

In her abovementioned letter of 27 November 1997, Councillor Hale told the Investigator that in completing her returns she "attempted to comply with both the spirit and letter of the legislation and endeavoured to declare all relevant interests as fully as possible, even to the extent of declaring sources of income of which it transpired I was not in receipt". She offered in the letter to make available for inspection the company and her personal returns for the relevant periods, mentioning, however, that those for 1996/1997 were not yet finalised. It is material to note that the return period for 1996/1997 was the 12 months ending 30 June 1997, the lodgement date for that return was 30 September 1997 and she had lodged the return on 23 September 1997, all before the date of her letter: Report, Attachment 60.

In connection with her incorrect disclosure of director's fees as a source of income, she explained that when completing the returns she indicated director's fees as a source of income whenever she "thought there was a possibility of my receiving **income of any kind** from a company." The letter went on:

"I am never sure of the real position at the time of making the return because, although Disclosure of Interest returns are to be lodged by 1 October each year, personal and company tax returns are not required to be lodged until the following year. I believed a reference to Director's Fees would adequately indicate my financial involvement with the companies." (Report, Attachment 42)

In relation to her Primary return, she said that she listed her directorship of the companies as a "potential **source** of the income rather than its nature." In regard to her Ordinary return of 1996/1997, she said that, as the accounts for the companies and herself had yet to be finalised, she had completed the return to the best of her knowledge at 28 August 1997, whereas it is dated and was lodged on 23 September 1997.

CONCLUSIONS

As to the Primary return, an omission to disclose a reasonably expected source or potential source of income could constitute a serious breach because, as well as being an infringement of the legislation, it could

conceal an interest capable of affecting the person's performance of duty; but an overstatement of potential sources of income or the disclosure of an unlikely potential source made by the person for more abundant caution is nevertheless a disclosure of a potential interest and the failure of the interest to materialise could hardly constitute a breach of an obligation to disclose expected sources of income. Even if it could somehow be said to amount to a failure to comply with the legislation, it would be a breach of no consequence in the present context and, in the Tribunal's opinion, would not call for a Tribunal hearing into a complaint about it.

Director's Fees

The position in relation to the Ordinary returns in this case is different in that sources of actual receipt of income were called for by the legislation and sources were given from which no income of that nature had in fact been received or would necessarily ever be received. However, the intention and the effect of Councillor Hale's disclosure of director's fees notionally as a source of income, to cover income of whatever nature she might receive or have received from the companies in respect of the period of the returns, was to make manifest to the reader the existence of a financial stake in the companies in question. Thus, far from being any attempt to conceal, or from having the effect of concealing, a financial interest in the companies listed, their disclosure as a possible source of income was assured. A correct description of the precise nature of the income, if it had been given, would not seem to the Tribunal to have added anything of importance to the disclosure that was actually made.

Dividends

The seriousness of Councillor Hale's failure to disclose in the "Sources of Income" section of her returns the companies Stanvala Pty Limited and Sauron Pty Limited as sources of dividend income from shares is radically diminished by her disclosures made in the "Interests and Positions in Corporations" section of the same returns of her interest as a shareholder in each of those companies. Such a disclosure necessarily imports to the reader a potential for receipt of any dividends or other financial advantages to which persons are or may become entitled by virtue of being a

shareholder in a company and, although clearly a source of income within the description of sources to be stated in the earlier section, disclosure in both sections of the return would in substance be repetitious. In the Tribunal's view, whilst there were breaches in the returns in respect of the dividends, they do not call for a hearing into that aspect of the complaint.

Employment

Councillor Hale's incorrect statements in her Primary return as to her employment by Hale & Iremonger Pty Limited and Southwood Press Pty Limited when the correct source of income from employment was Sauron Pty Limited were clearly misstatements of the facts but, in the context of an obligation to disclose the sources of income the person reasonably expects to receive from an occupation, were, in the absence of evidence of any sinister intention, of no consequence.

The breach that requires consideration in relation to the section of the return requiring disclosure of sources of income from an occupation is Councillor Hale's failure to disclose in her Primary return her employment by Sauron Pty Limited.

On the question whether this breach would warrant a hearing into the complaint, it is relevant to consider other disclosures made in the same return regarding Sauron Pty Limited. Councillor Hale disclosed, under the section of the return requiring the address of each parcel of real estate in which she had an interest at the return date and the nature of her interest, that Sauron Pty Limited was a part owner of real estate, the address of which she disclosed, and that the nature of her interest was that she was a director of that company. She further disclosed, under the section of the return for sources of income from an occupation which she expected to receive, an occupation she described as "property owner" and her employer as being Sauron Pty Limited, against which company she described her position as "Director". Under the section for interests and positions in corporations, she disclosed that she was a shareholder and director of that company, the principal objects of which she described as "property owner." Put together, these disclosures would leave the reader in no doubt that Sauron Pty Limited was a company from which Councillor

Hale expected to receive income, at least as a shareholder and director, and, apparently, also as an employee. In the Tribunal's opinion, a hearing into the inaccuracies of the descriptions contained in her disclosures is, in these circumstances, not called for.

Councillor Hale's Problem Regarding Disclosure of Nature and Sources of Income from companies

It is apparent from Councillor Hale's explanations that, in respect of the companies in which she held positions or had interests, a problem which faced her in completing and lodging her returns by the due dates under the legislation was that the financial accounts and/or taxation returns for the companies were in the hands of her accountant and had not been prepared or finalised before the dates at which she was required to state the actual nature and sources of her income. It may be inferred that at those dates she did not know, or at least was unsure, whether, for the periods in question, income from the companies, if any, would come to her in the form of dividends, director's fees, loan accounts, wages or some other form of remuneration.

Where persons conduct their business or financial affairs through private companies, a decision as to the manner of distribution of the company's revenue or other funds to shareholder/directors is often delayed until the finalisation of the accounts. It is not the concern of this Tribunal to comment on such a practice but it is relevant to recognise that it is fairly widespread in relation to private companies and, having regard to the due dates for lodgement of returns by councillors and others required to lodge returns, it is liable to give rise to the sort of problem which confronted Councillor Hale. It appears from her explanations that she endeavoured to deal with the problem in a way that would make it clear in her returns that she had financial interests of one form or another in the companies she named; but the disclosures she made in the returns did not always accord with the requirements of the legislation or the ultimate distributions of income that occurred.

There may well be other Councillors and persons in a similar position to Councillor Hale in relation to their interests in private companies when they

come to lodge their returns under the legislation. It would seem to the Tribunal that for such cases there is more value in the Tribunal endeavouring to be helpful rather than being critical of the practice which leads to the problem or led to Councillor Hale's failed attempts to deal with it. In respect of Ordinary returns the legislation requires by the lodgement date an accurate disclosure of actual results in relation to a past period of time. If the actual nature and source of income to be attributed to the period of the return in question cannot be stated, or stated with certainty, at the lodgement date because of delayed accounts, but the potential sources and nature of income are known or may be anticipated, a qualified disclosure could be given. It could take the form of accompanying a return (in which all the possible sources and kinds of income have been inserted in the appropriate sections) with a signed written statement to the effect that the information disclosed in those particular sections of the return was given to the best of the person's existing knowledge and belief but was subject to accounts that were not finalised at the date of the return and that, in the event of there being any subsequent variation from the disclosures in the return, a supplementary return as to those sections would forthwith be lodged with the General Manager of the Council for inclusion in the Register of Returns.

If that course was followed, and a supplementary return lodged if necessary, the Tribunal would certainly take account of the qualification and the supplementary return in considering whether to conduct a hearing into a complaint about any deficiencies in the initial return and, no doubt, the Director-General would likewise take them into account under section 463(1) of the Act in deciding whether or not to take any action on such a complaint in the first place.

6. ALLEGATION

The Report suggests in Appendix 1, Table 9, that in her Primary return Councillor Hale failed to disclose a property, 82 Smith Street, Summer Hill, as a source of rental income. The return did disclose that she was the owner of that property and it is disclosed as a source of rental income in her Ordinary returns for 1995/1996 and 1996/1997, the last mentioned of

which contains a note that she owned the property until October 1996. (On 19 March 1997 she transmitted a fax to the General Manager of the Council stating that she no longer had an interest in that property).

CONCLUSION

The Director-General's Report, in para.5.4.9, at pages 47-48, indicates that the investigations for the Director-General had not obtained any evidence that the absence from the Primary return of a reference to 82 Smith Street, Summer Hill as a potential source of income was a breach of the legislation. Accordingly, there is no basis for the Tribunal to deal with the matter as a complaint as to which a hearing by the Tribunal might be considered.

7. ALLEGATION

In her Ordinary return for 1995/1996, Councillor Hale failed to disclose the property, 19-21 Eve Street, Erskinville as a source of rental income. In her return she did disclose herself as the owner of that property and in her later returns for 1996/1997 and 1997/1998 she disclosed the property as also a source of income for the periods of those returns.

COUNCILLOR HALE'S EXPLANATION

In her letter of 27 November 1997 (Report, Attachment 42) she wrote to the Investigator:

“At 28 August 1996 (the date of my Disclosure of Interest return for 1995 – 1996), I believed I had received no rental income from 19-21 Eve Street, Erskinville. My accountant advised me in December 1996 that I should charge rent retrospectively for goods that had been stored there.”

CONCLUSION

As pointed out earlier, the disclosure required is of income actually received in the period of the return. Councillor Hale's explanation can only be interpreted as meaning that in fact she received no rental income from the property in the period of the return, that period having expired on 30 June 1996. She, not her accountant, was the owner of the property and as such she was the only one who would know the facts. When she says that she “believed” that she had received no income from it, this can be given no other meaning except that she did not receive any income from the property at the relevant time. She did not identify in her letter the party against whom her accountant advised her she should “retrospectively”

charge the rent but it follows from the fact that the notion of charging it was not given birth until December 1996, that no rent was paid before that date. It follows that there was no breach in respect of the period of that return. The actual receipt of the rent must have occurred in the succeeding period which would be the subject of her next return. The question of a hearing into this allegation does not therefore arise.

8. ALLEGATION

The Director-General's Report pointed out that in her Primary return Councillor Hale did not disclose fees paid or payable to her as a Councillor as a potential source of income although she did disclose them as income received in the periods of her later returns. In the Tribunal's opinion, a hearing would not be justified into a complaint of this omission because it was self-evident from her office as Councillor lodging the return that Councillor Hale would be entitled to receive such fees and allowances as the law allowed a Council to pay to its Councillors.

For the reasons given in the foregoing numbered paragraphs the Tribunal will not conduct a hearing in relation to the matters of complaint referred to in those paragraphs.

In accordance with section 470(1) the Tribunal will provide this written Statement of its decision to the Director-General. Copies will also be provided to Councillor Hale and Marrickville Council.

DATED: 25 November 1998



K J HOLLAND Q.C.
Pecuniary Interest Tribunal