LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT No. 2/2001

DIRECTOR GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR CHRISTOPHER GULAPTIS, MACLEAN SHIRE COUNCIL

STATEMENT OF DECISION ON SUMMARY DISMISSAL APPLICATION

11 August 2003

1. The Local Government Pecuniary Interest Tribunal ("the Tribunal") determined, on 29 October 2002, to conduct proceedings into a complaint by the Director-General, Department of Local Government that Christopher Gulaptis had committed breaches of s.451 of the *Local Government Act 1993* with respect to consideration by the Council at a meeting on 12 April 2000 of questions relating to a Gulmarrad Section 94 Road Contribution Plan, at a Council meeting held on 17 January 2001 of questions relating to the Council's acquisition from Dovoni Pty Ltd of certain land and at a Council meeting on 11 April 2001 of questions relating to an application by Australian Indigenous Christian Ministries Ltd for the establishment of a Recreation Establishment (Religious Retreat) in the Shire.

2. Under cover of a letter dated 31 January 2003 from the solicitors for Councillor Gulaptis submissions were made that the complaint and the material comprised in the Director-General's report disclosed no contravention by Councillor Gulaptis of the provisions of the Act and that the three complaints should be summarily dismissed by the Tribunal without proceeding to a formal hearing. The submissions were settled by Mr Maston of counsel and, as one would expect, involved a detailed consideration of the complaints and the Notice of Decision to Conduct Proceedings.

3. Section 470 of the *Local Government Act 1993* provides:

> "**470**(1) After considering the report of the Director-General and any other document or other material lodged with or provided to the Tribunal, the Pecuniary Interest Tribunal may determine the proceedings without a hearing if:
>
> (a) the person who made the complaint and the person against whom the complaint is made have agreed that the proceedings may be determined without a hearing, and
>
> (b) there are no material facts in dispute between the person who made the complaint and the person against whom the complaint is made, and

(c) in the opinion of the Tribunal, public interest considerations do not require a hearing.

2. To avoid doubt, a decision by the Pecuniary Interest Tribunal to determine proceedings into a complaint without a hearing is a decision to which sections 484 (Pecuniary Interest Tribunal to provide details of its decisions) and 485 (Appeals to Supreme Court) apply."

4. Section 470 ought be read in conjunction with the preceding section 469 which provides:

"**469**(1) After considering a report presented to it in relation to a complaint, the Pecuniary Interest Tribunal may decide to conduct proceedings into the complaint.

(2) If the Pecuniary Interest Tribunal decides not to conduct proceedings into a complaint, it must provide a written statement of decision, and the reasons for its decision:

(a) to the person against whom the complaint was made;

(b) to the person who made the complaint; and

(c) to the Director-General.

(3) To avoid doubt, a decision by the Pecuniary Interest Tribunal not to conduct proceedings into a complaint is not a decision to or which sections 484 (Pecuniary Interest Tribunal to provide details of its decisions) or 485 (Appeals to Supreme Court) applies."

5. Pursuant to a request from the Tribunal concerning the Tribunal's power to summarily dismiss proceedings without proceeding to a formal hearing, the solicitors for Councillor Gulaptis by letter of 24 February 2003 relied upon s.48(1) of the *Interpretation Act 1987* as empowering the Tribunal to revisit its decision to conduct proceedings and to

determine not to do so. Section 48(1):

> "If an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion arises."

The section is subject to s.5 of the said Act which provides in substance that the *Interpretation Act* applies except insofar as there is a contrary intention in the Act concerned.

6. Reference in the submission was also made to two authorities. Relevantly in *Minister for Immigration and Ethnic Affairs v Kurtovic* (Gummow J):

> "There was an inconvenience common law doctrine of somewhat uncertain extent to the effect that a power conferred by a statue was exhausted by its first exercise.': *Halsbury's Laws of England* (1st ed), Vol 27, p 131. However, s 33(1) of the *Acts Interpretation Act* 1901 (Cth) ... provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed 'from time to time as occasion requires'. But in any given case, a discretionary power reposed by statue in the decision-maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of power. The result is that when the decision-maker attempts resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statue conferring the particular power in issue."

7. Alternatively the submission was that the Tribunal could exercise its power under s.469 and decide not to conduct proceedings into the complaint.

8. Alternatively it was submitted that s.471(1) of the *Local Government Act 1993* empowering the Tribunal to determine its own procedure could be utilised to achieve the result desired by Councillor Gulaptis and it was submitted that nothing in s.470 prevented that power being exercised.

9. The Department by submissions dated 21 May 2003 maintained that the Tribunal, being a statutory Tribunal had no inherent power to determine its own procedure except as provided in the Act and that the only power in the Tribunal to determine proceedings (once commenced) without a hearing was contained in s.470 of the Act. It was submitted that s.48(1) of the *Interpretation Act 1987* did not operate to give the Tribunal the power effectively to reverse a decision to commence proceedings under s.469 firstly because of the scheme of Chapter 14, Division 2 and in particular, that once the Tribunal had made a positive decision to commence proceedings then it must proceed to a hearing unless it is a case where the proceedings may be determined under s.470. It is further submitted that the power to commence proceedings as a matter of construction did not confer a power to terminate them.

10. It was further submitted that s.471 enabled the Tribunal to determine procedure but not to dispense with a hearing of some kind. It was further submitted that if s.469 or s.471 provided sources of power to terminate proceedings without conducting a hearing then s.470 would have little work to do.

11. Further submissions were made by the Department in relation to s.470 and the Tribunal will return to those submissions in due course.

12. By submissions in reply dated 25 July the solicitors for Councillor Gulaptis maintain that s.48(1) of the *Interpretation Act* was available and that there was not either expressly or impliedly an ouster of the operation of that section so as to prevent a reconsideration by the Tribunal of its decision to conduct proceedings. Reference was made to various authorities and the distinction between an exercise of power in which substantive rights are finally determined and an exercise of power involving matters of procedure or matters of a preliminary nature.

13. The first question which arises is whether or not the Tribunal has the power for which Councillor Gulaptis contends and if so, what is its source.

14. Under s.460 of the *Local Government Act 1993* a person may make a complaint to the Director-General or the Director-General may make a complaint that a person may have

contravened Part 2 of the Act. The Director-General may investigate the complaint (s.462(1)) or he may determine to take no action concerning the complaint if it meets any of the categories referred to in s.463 including that it is frivolous, vexatious, trivial and the like. The Director-General is required to give the person against whom a complaint is made notice of the nature of the complaint and whether any action has been or is intended to be taken concerning the complaint. Notice to similar effect is given to the complainant (s.466). Having investigated a complaint the Director-General must present a report to the Pecuniary Interest Tribunal (s.468). It would be expected that the report would contain details of the investigation by the Director-General including material evidence or submissions made to the Director-General by the person against whom the complaint was made following notification under s.466.

15. After receipt of the report the Tribunal is required to make a decision whether or not "to conduct proceedings into the complaint" (s.469). The section provides that this decision is to be made "after considering a report presented to it in relation to a complaint". There is no provision in s.469 or elsewhere in the Act which would empower the Tribunal itself to investigate further prior to making such a decision. Prior to making such a decision there is no power in the Tribunal to require or receive any further evidence or submissions or to consult with any person (compare s.471). There is no requirement to give to any person an opportunity to be heard prior to making that decision as to whether or not to conduct proceedings. Not only is there nothing in the statute which would require or envisage such an opportunity, the legislation expressly permits the person an opportunity to be heard if a decision is made to conduct a hearing into the complaint (compare *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106). The exercise of statutory power such as are involved in s.469 have traditionally not been the subject of an obligation to afford natural justice or an opportunity to be heard before such a decision is made (see *Oates v Reid* (1998) 81 FCR 296 at 313 and *Commissioner of Police v Reid* (1989) 16 NSWLR 453, particularly at 461. See also the Tribunal's decision in *Director-General, Department of Local Government Re Councillor Dominic Wy Kanak, Waverley Council* 1/3/02). Indeed, to permit of such a course would in substance be to conduct a preliminary hearing into the question of whether or not to conduct proceedings because no doubt if one party were to be given an opportunity to be heard or to make submissions, then the other party would need to have an opportunity to

respond. In the Tribunal's opinion such a course clearly was not contemplated by the legislation.

16. The power in s.469 is a power to determine whether proceedings are to be conducted into a complaint. The procedure laid down in the Act if such proceedings are to be conducted envisages a substantive determination of the complaint following the receipt of evidence, submissions, information and a hearing if necessary. In the Tribunal's opinion, the power contained in s.469 is a power to be exercised after consideration of the report and is a power which, if a decision is made under subsection 2, involves the concept that the report discloses nothing requiring the Tribunal to make a substantive decision in relation to the complaint and it discloses nothing which would require investigation, evidence or submissions over and above that contained in the report.

17. Section 470 empowers the Tribunal, after considering not only the report of the Director-General but any other document or material lodged or provided to the Tribunal, to determine the proceedings (which have been instituted) without a hearing in certain circumstances. This section envisages a substantive decision in relation to the complaint without a hearing and where all parties agree and there are no material facts in dispute and it is in the public interest.

18. The application for the Tribunal is variously put as "summary dismissal of proceedings on the basis that there is no case to answer" and that the "three complaints should be summarily dismissed by the PIT without proceeding to a formal hearing".

19. In the Tribunal's opinion s.469 and the Act generally does not envisage or permit the course of action for which Councillor Gulaptis contends. As has been stated, it involves a decision to conduct proceedings with the various steps and processes above described. It involves a consideration of the report. It does not envisage the receipt of any further information or submissions prior to that decision being reached.

20. In the Tribunal's opinion, it is not necessary for all present purposes to determine whether or not the Tribunal could in some circumstances revisit a decision reached under s.469 by virtue of the provisions of s.48 of the *Interpretation Act*. It is sufficient to say in the

Tribunal's opinion that the section does not empower the Tribunal to receive submissions from the parties on the substantive complaint and then to make a determination (if Councillor Gulaptis' submissions be accepted) that the complaints be dismissed.

21. To the extent to which the application is based upon s.469 of the *Local Government Act 1993*, it is rejected.

22. To the extent to which the application is based upon s.471, it is likewise rejected. In the Tribunal's opinion the power of the Tribunal to determine its own procedure is by subsection (1) expressly made "subject to this Act". That section needs to be read in light of the detailed provisions of s.470. Section 471 would not empower the Tribunal at this stage to summarily dismiss the complaint and so determine the proceedings which it has decided to conduct without any form of hearing at all. While hearings are to be held in public, unless the Tribunal decides otherwise (s.472), it does not necessarily follow as seems implicit in the submissions from Councillor Gulaptis that a public hearing involves a calling of evidence and the conduct of proceedings as on a civil trial. Unless a hearing is dispensed with in accordance with s.470, while there needs to be a public hearing, its form, content and duration is a matter to be determined by the Tribunal under s.471 and would no doubt take into account what, if any, evidence the parties wanted to adduce and what form submissions ought to take.

23. The Tribunal does not understand Councillor Gulaptis to base his application on s.470 of the Act. Even if it were so based, then the power under s.470 could not be exercised by the Tribunal in the present circumstances if for no other reason than that the Director-General, as complainant, does not consent to that cause of action as is required by s.471a. The solicitors for Councillor Gulaptis have submitted that the Director-General for various reasons ought not make a determination as to whether his consent under this section should be granted. The Tribunal does not intend to enter into that matter. The fact is the Director-General is the complainant and the fact is that the Director-General has determined that he will not consent under s.471a.

24. Accordingly, the application made by Councillor Gulaptis is refused.

25. Arrangements would be made for the matter to be listed for a short directions hearing in the near future so that a determination of the substantive complaints can be advanced as soon as possible. To this end, the parties' attention are drawn to the notes on pages 15 and 16 of the Notice of Decision to Conduct Proceedings.

DATED: 11 August 2003

DAVID P.F. OFFICER QC
Pecuniary Interest Tribunal