

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 1/1994

DIRECTOR GENERAL
DEPARTMENT OF LOCAL GOVERNMENT
& CO-OPERATIVES

RE: COUNCILLOR MACKENZIE
PORT STEPHENS COUNCIL

***STATEMENT OF DECISION
ON ACTION BY TRIBUNAL
AFTER FINDINGS***

Dated: 22 May 1995

STATEMENT OF DECISION ON ACTION BY TRIBUNAL AFTER FINDINGS

For the reasons explained in the Tribunal's Statement of Decision in this matter on 8 May 1995 (The Question of Penalty, pp. 96-97), a further hearing was conducted on 22 May 1995 in Sydney to enable the parties to make submissions as to what action the Tribunal should take regarding Councillor MacKenzie in consequence of its findings against him.

The Director-General notified the Tribunal on 15 May 1995 that he did not wish to make submissions and did not appear at the further hearing.

Councillor MacKenzie appeared in person and made the oral submissions recorded in the transcript of the hearing, a copy of which is attached to this Statement of Decision.

At the conclusion of those submissions the Tribunal stated orally its reasons for arriving at a decision to make the order which was then pronounced, namely, that Councillor MacKenzie be suspended from civic office till 31 July 1995. That date was an error. It has since been corrected by an order of the Tribunal to 22 July 1995. The reasons for the order of suspension appear in the attached transcript and will not be repeated here. This statement supplements those reasons in some respects.

The Statement of Decision of 8 May 1995 contains references to the evidence which was relevant to observations and findings expressed in that Statement. Many of them relate also to observations and reasons stated in the attached transcript on the question of what orders should be made by the Tribunal in the matter and do not require repetition.

There are some further references to evidence relevant to, and some that should be repeated on, certain topics which are material on the present question. They are listed below:

1. Councillor MacKenzie's knowledge and understanding at and following the time of his election to Council of his legal obligations as a Councillor with respect to pecuniary interest returns: T.179/20,25; T.227/37-T.228/28.

2. His lack of concern for the obligation to lodge returns within the prescribed times: T.6/42; T.7/22-45; T.180/23-42.
3. His disregard for criticism of or the threat or risk of repercussions for his conduct in the performance of his duties: MacKenzie I.14.1-14.4; T.175/20.
4. His expressions at the hearing of apology and contrition for past failures to comply with the requirements of the legislation: T.202/18; T.236/40.
5. His expressions at the hearing of changes in his attitude to his obligations and his statements of intention to comply in the future: T.202/3,20; T.258/48; T.275/16.

In the reasons stated orally at the present hearing, reference was made to the consequences of an order by the Tribunal disqualifying a councillor from holding civic office if the period of the order extended beyond the time of a council election. The statutory position should be briefly stated here because of its bearing on the question of possible action by the Tribunal in regard to Councillor MacKenzie in this case and also because of its general relevance to that kind of order.

By section 275(1)(g) of the Local Government Act, 1993, a person is disqualified from holding civic office whilst disqualified under a provision of the Local Government Act, 1993.

A person who is disqualified from holding civic office may not be elected or appointed to a civic office and may not hold, or act in, a civic office: section 276(1).

A person who acts in a civic office while disqualified is guilty of an offence: section 652(1); and, if convicted, risks both a penalty (maximum: 20 penalty units) and disqualification for seven years: section 276(3).

A person who vacates the office of Councillor by disqualification may not be elected to a civic office in the same Council area (and may not hold, or act in, a civic office in that area) until the first ordinary election after the person ceases to be disqualified: section 276(2)(b).

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A civic office becomes vacant if the holder is disqualified from holding civic office: section 234(c).

By section 287, an ordinary election of Councillors for an area is to be held on the second Saturday of September 1995 and the second Saturday of September in every fourth year after 1995.

If a casual vacancy occurs in a civic office (refer to section 234(c) noted above), the office is to be filled by a by-election, subject to the provisions of Part 5, Chapter 10 of the Act (which includes section 294): section 291.

By section 294, if a casual vacancy occurs on or after 1 January last preceding the end of the Council's term, the Minister may order that the vacancy be not filled.

The Act provides that the Electoral Commissioner is to conduct elections: section 296.

By section 306(1) a person who is not duly nominated is not eligible for election.

A nomination is to be proposed to and made by the Returning Officer as prescribed by the Regulations: section 306(4).

A nomination must be accompanied by a candidate resumé in the form of a Statutory Declaration containing the matters prescribed by Regulation: section 308.

Relevant provisions contained in the Local Government (Elections) Regulation 1993 follow.

Regulation 14 requires the General Manager of a Council to give notice of a vacancy in a civic office within seven (7) days to the Electoral Commissioner, the Director-General and the Secretary of the Local Government and Shires Associations of New South Wales. (As noted above, by section 234, a casual vacancy would occur if disqualification was ordered by the Tribunal).

Regulation 15 stipulates that the nomination day for an ordinary or a by-election is the fifth Friday before the election day (or such other day as the Electoral Commission determines in a particular case).

Regulation 18(1), (3) and (4) require a candidate for election to be proposed for nomination in a nomination paper of a prescribed form (Form 2) by two proposers. The nomination paper will be invalid unless the nominee completes and signs the "Form of Consent" which is included in Form 2. There must be printed on the form section 274 (stating who is qualified for election) and sections 275 and 276 (mentioned above).

The prescribed Form 2 is contained in Schedule 7 to the Regulations. The nominee's "Form of Consent" contained therein requires a declaration by the nominee that to the best of the nominee's knowledge and belief the nominee is "entitled to be elected" to the office for which the nominee has been proposed. This form directs the nominee's attention to the printed provisions of the Local Government Act, 1993 covering qualification and disqualification for a civic office.

The nomination paper must reach the Returning Officer by 5 p.m. on the day two (2) days before the nomination day: Regulation 18(5).

On nomination day the Returning Officer must, amongst other things, nominate as candidate the persons whom he or she believes to be duly qualified under the Act and whose nomination papers he or she believes to be valid: Regulation 24(1)(e).

Under the foregoing statutory provisions, the next local government election is fixed for 9 September 1995. The nomination day will therefore be 11 August 1995 and the last day for lodgment of valid nominations will be 9 August 1995. As a nominee for election must make a statutory declaration that he or she is entitled to be elected and the Returning Officer must, on nomination day, nominate as candidates only persons whom he or she believes to be duly qualified and whose nomination papers he or she believes to be valid, an order of disqualification made by this Tribunal which was in effect on 9 August 1995 would preclude the nomination of Councillor

MacKenzie as a candidate in the next election of Councillors. It would also operate as a disqualification for not only the next election but also for the four years before the succeeding election in 1999.

An order which had the effect of disqualifying Councillor MacKenzie from holding civic office for a period in excess of four years would, in the Tribunal's view, be out of proportion to the nature and seriousness of the breaches committed by Councillor MacKenzie and would rightly be regarded as excessive. To avoid this result, an order of disqualification, if made by the Tribunal, would need to expire before some short period prior to 9 August 1995 to enable him to be nominated in time for the election on 9 September 1995 if he decides to stand. An order of disqualification, would, under the legislation, have the effect of causing a casual vacancy to occur, requiring the General Manager to give notice of the casual vacancy within seven (7) days to the Electoral Commissioner, the Director-General and the Secretary of the Local Government and Shires Associations of New South Wales and require a by-election to be held to fill the casual vacancy unless the Minister were to make an order under section 294 that the vacancy be not filled. An order of suspension for the maximum period of two months (which under section 21(1) of the Interpretation Act 1987 means two calendar months) would avoid the time and trouble that would be occasioned by an order of disqualification made at the present time for a period expiring prior to 9 August 1995. In terms of time there would be little difference between the two orders.

In the view of the Tribunal, the contraventions by Councillor MacKenzie in all the circumstances, would warrant a period of disqualification. However, for the practical considerations to which I have referred, the Tribunal decided to impose the maximum period of suspension from civic office instead of disqualification for a similar period.

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A copy of the Tribunal's corrected order has already been furnished to Councillor MacKenzie, the Director-General and the Port Stephens Council to each of whom a copy of this Statement of Decision will also be provided.

DATED: 22 May 1995



K J HOLLAND Q.C.
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