

**LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL**

**LOCAL GOVERNMENT ACT 1993**

**PIT NO. 2/2000**

**DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT  
RE COUNCILLOR DOMINIC WY KANAK, WAVERLEY COUNCIL (3)**

**STATEMENT OF DECISION**

**Background**

1. Dominic Wy Kanak (Councillor Kanak) had, for some time prior to the events leading up to this matter, been a resident of Bondi Beach involved in campaigning to oppose a proposed Olympic Volleyball Stadium at Bondi Beach.
2. Councillor Kanak had in 1999, before the events here dealt with, instituted proceedings in the Supreme Court of New South Wales against the Olympic Co-ordination Authority in relation to the said proposed Olympic Volleyball Stadium.
3. Councillor Kanak was elected as a councillor for the Council of Waverley at the election held on 11 September 1999.

4. The present proceedings concern events which took place at an ordinary meeting of the Council on 28 September 1999.
  
5. Following correspondence received by the Department of Local Government making certain allegations concerning Councillor Kanak's actions at the said meeting, the Department undertook certain preliminary inquiries. On 19 September 2000 the Director-General of the Department of Local Government made a complaint pursuant to s.460 of the Local Government Act that Councillor Kanak had contravened the provisions of Chapter 14 Pt. 2 of the Local Government Act in that at the meeting on 28 September 1999 he took part in the consideration and discussion of and voted on a motion that he, together with Councillors Main and Copeland submitted to Waverley Council, regarding the rejection of the Olympic Volleyball Stadium on Bondi Beach. Following further investigations, this Tribunal received on 22 May 2001, a report from the Director-General, Department of Local Government, of the investigation under s.462 of the Local Government Act 1993.
  
6. Having considered the report the Tribunal decided pursuant to s.469 of the Act to conduct a hearing into the complaint.

### **The proceedings**

7. The Notice of Decision to Conduct a Hearing was dated 1 June 2001, and as is the practice of the Tribunal, set out particulars of the complaint and the

allegations made in support of it which would be the subject of the proposed hearing.

8. For reasons which will become clear it is desirable to set out fully the provisions of the Notice:

**“TAKE NOTICE** that the Local Government Pecuniary Interest Tribunal (sic) will conduct a hearing into a complaint by the Director-General, Department of Local Government pursuant to section 460 of the Local Government Act, 1993 that Dominic Kanak being a Councillor of Waverley Council committed breaches of section 451 of that Act with respect to consideration by the Council at a Council meeting held on 28 September 1999 of matters relating to a proposed Olympic Volleyball Stadium on Bondi Beach as set out in paragraphs 2.5 and 2.6 of a Notice of Motion dated 21 September 1999 and submitted by Councillor Dominic Kanak jointly with two other councillors.

**PARTICULARS** of the breaches alleged are as follows;

Councillor Dominic Kanak, being a councillor who had a pecuniary interest in matters with which the Council was concerned and being present at a meeting of the Council at which the matters were being considered;

- failed to disclose that interest to the meeting;
  - took part in the consideration and discussion of the matters;
- and
- voted on questions relating to the matters

contrary to the provisions of section 451 of the Act.

**THE MATTER WITH WHICH THE COUNCIL WAS CONCERNED AND THE MEETING AT WHICH COUNCILLOR KANAK WAS PRESENT AT WHICH THE MATTER WAS BEING CONSIDERED WERE:**

**1. 28 September 1999 - Ordinary Meeting of Council**

**1.1 Background**

- (a) Dominic Kanak prior to and at the time of the said meeting was a resident of Bondi Beach campaigning to oppose a proposed Olympic Volleyball Stadium at Bondi Beach.
- (b) Dominic Kanak had prior to the said meeting instituted legal proceedings in the New South Wales Supreme Court against the Olympic Co-ordination Authority in relation to the said proposed Olympic Volleyball Stadium.
- (c) Dominic Kanak was elected as a councillor for the Council of Waverley at the election held on 11 September 1999.
- (d) On or about 21 September 1999, Councillor Kanak together with two other councillors, gave notice of a Motion in the following terms:

**"To the General Manager, Waverley Council**

**Resolution to be considered at an extraordinary meeting of Waverley Council re rejection of the Olympic Volleyball Stadium on Bondi Beach (to be held within 7 days as requested by the undersigned councillors.**

Date: Tuesday 21<sup>st</sup> September 1999

1. That any development application renewed or otherwise for the 'Demountables' at the rear of the Bondi Pavilion in Bondi Park not be proceeded with by council.

2.1 That noting the recently commenced proceedings by Mr. D. WY Kanak v the Olympic Co-Ordination Authority (OCA), the Minister for Urban Affairs & Planning (D.U.A.P) & Others in the Equity Division of the Supreme Court alleging

- misleading and deceptive conduct as against the OCA and SA Smits & Associates Pty. Ltd under the Trade Practices Act (C'th) and the Fair Trading Act (NSW) in relation to representations made in the Development Application documents to the Minister for Urban Affairs & Planning being

(a) the Statement of Environmental Effects and the Accompanying Technical Reports; and

(b) the text of the DA itself; and

- doubt arising as to the proper legal sanctioned use of Crown Land at Bondi Park,

that Council for the time being rescind its approval and agreement of the Principles of Agreement signed with the OCA and resolves not to enter into any new principles of agreement without prior resolution of full council except as mentioned at 2.2.

2.2 The Mayor may negotiate a new Principles of Agreement with the Olympic Co-ordination Authority to manage the Olympic road cycle race only.

2.3 That Council direct the Mayor or any other representative of the Council to not sign or otherwise agree to a Master Agreement (or similar) with the Olympic Co-ordination Authority relating in any way to the Olympic Beach Volleyball without prior resolution of full council. If the master agreement has already been signed then Council for the time being rescinds that agreement and may only enter a new master agreement to manage the Olympic road cycle race.

2.4 That Council immediately terminate the instructions of Minter Ellison, Solicitors and immediately instruct and retain other Solicitors to utilize all legal means to oppose the Volleyball Stadium development application and in particular for damages and to set aside the Principles of Agreement, and the Master Agreement if signed, after an urgent opinion is sought from a suitable counsel/barrister (to be chosen with the approval of the majority of Councillors at another special meeting if necessary, in consultation with other representative groups opposed to the Stadium project).

2.5 That Council join, fund and assist current legal proceedings maintained by Mr. D. WY Kanak against the OCA and the Minister for Urban Affairs & Planning.

2.6 That Council provide suitable and adequate funding, administrative support and office resources to residents and users of Bondi Beach currently campaigning to oppose the volleyball stadium at Bondi Beach.

Extraordinary meeting, requested by the following Greens councillors:

CR. DOMINIC WY KANAK

CR. MORA MAIN

CR. GEORGE COPELAND

"

## **1.2 PROCEEDINGS AT THE MEETING**

- (a) At this meeting the resolution as set out in the said Notice came forward for consideration by the Council.
- (b) Councillor Kanak moved the motion as set out in the said Notice and it was seconded by Councillor Copeland.

- (c) It was moved by Councillor Main and seconded by Councillor Copeland that the Notice of Motion be taken point by point. The Mayor ruled this Motion out of order.
- (d) It was moved by Councillor Main that the Motion be amended by deleting paragraphs 2.5 and 2.6. The said Motion was not seconded.
- (e) Councillor Kanak spoke on the substantive Motion in the course of which he said words to the effect that he no longer pressed cll. 2.5 and 2.6.
- (f) The original Motion as moved by Councillor Kanak and seconded by Councillor Copeland was put and declared lost. Councillor Kanak voted in favour of the Motion..

**THE PECUNIARY INTEREST OF COUNCILLOR KANAK  
IN THE MATTERS WITH WHICH THE COUNCIL WAS  
CONCERNED AT ITS MEETING AS LISTED ABOVE IS  
ALLEGED TO HAVE BEEN AS FOLLOWS:**

Section 442 of the Local Government Act, 1993 provides:

"442. (1) For the purposes of this Chapter, 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 ...

(2) 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 or if the interest is of a kind specified in section. 448."

**4. THE ALLEGED PECUNIARY INTERESTS**

It is alleged that, by reason of the foregoing facts, there was a reasonable likelihood or expectation of appreciable financial gain to Councillor Kanak if the Council at its said meeting had passed the Motion as set out in the Notice above.

## **5. ALLEGED CONTRAVENTIONS**

"451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.

(2) The councillor or member must not take part in the consideration or discussion of the matter.

(3) The councillor or member must not vote on any question relating to the matter."

- (a) It is alleged that Councillor Kanak failed to declare a pecuniary interest in the matters being considered at the meeting of the Council of 28 September 1999 which have been specified above in relation to that meeting and that he took part in the consideration or discussion of and voted on those matters.
- (b) It is further alleged that Councillor Kanak's interest in those matters 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 matters, within the meaning of section 442(2).
- (c) It is further alleged that Councillor Kanak knew or could reasonably be expected to have known that the matters under consideration at the meetings were matters in which she had a pecuniary interest.



## **ISSUES**

The information contained in the Director-General's report of the investigation of the complaint, which was received by the Tribunal on 22 May 2001, would appear to establish that the meeting described in this Notice took place, that Councillor Kanak was present, that he took part in the consideration and discussion of and voted on those matters. On this basis, the issues for determination by the Tribunal would appear to be:

1. Whether, in relation to the matters dealt with at the said meeting, Councillor Kanak had, at the time of the meeting, a pecuniary interest within the meaning of the Act to which section 451 of the Act applied.
2. Whether, within the meaning of section 451 of the Act, Councillor Kanak disclosed that interest to the meeting as soon as practicable or at all.
3. Whether, within the meaning of section 457 of the Act Councillor Kanak did not know and could not reasonably be expected to have known that the matters under consideration at the meeting were matters in which he had a pecuniary interest.
4. If the Tribunal were to find that any contravention of the Act by Councillor Kanak has been proved, a consequential issue will be whether any, and if so, what action should be taken by the Tribunal.”

### **Course of the Proceedings.**

9. For reasons dealt with below, it is necessary to set out some of the detail concerning the course which the proceedings took. These details are also relevant to two other decisions given in this matter contemporaneously, with this decision.

10. Following the grant by the Tribunal of an extension of time to Councillor Kanak in which to respond to the said Notice, he did, by email sent on 11 July 2001, convey, amongst others, the following matters:
  - (a) he wished to contest “the hearing/related decisions”;
  - (b) he wished to seek advice on how to subpoena the Director-General of the Department of Local Government, the Minister for Local Government, all those who had provided material considered in the Director-General’s report to this Tribunal and all those who may have firsthand knowledge of the events of the Council meeting.
  - (c) that Councillor Kanak believed that there were issues related to the report in that it was “illegal’ and ‘challengeable” as was the legislation under which the process had occurred and that he would therefore appeal on these points to a higher court in any event.
  - (d) that “inquiries have been made” concerning legal aid/assistance; that Councillor Kanak had yet to receive full replies and in substance that he wished to have legal help in order to adequately defend himself.
11. By letter dated 16 July, Councillor Kanak was advised of the procedure which the Tribunal intended to follow concerning the issuing of subpoenas including its desire to know what efforts had been made to secure a person’s co-operation, what evidence it was sought to elicit from the person proposed to

be subpoenaed and how that evidence was said to be relevant to the issues to be determined by the Tribunal.

12. Councillor Kanak was also advised in the said letter that the Tribunal would give him a reasonable period of time in which to pursue his legal aid/assistance inquiries. The Tribunal requested that he advise it no later than 31 August of the state of all applications for legal aid/assistance. Councillor Kanak did not comply with that request.
13. By email dated 30 August, Councillor Kanak suggested that there were certain errors of a typographical nature in the Notice of Decision to Conduct a Hearing and asked certain particulars of the breaches alleged. He said that this material needed to be answered in order for him to make more progress with his legal aid applications.
14. By email dated 3 September, Councillor Kanak indicated he was resubmitting a request to the New South Wales Legal Aid Commission and that some approach had been made to the Community Legal Aid Centre. He said he would explain these circumstances further in a future email/correspondence. He never did.
15. By further email sent on 3 September, Councillor Kanak sought further particulars said to be necessary for him to produce a better submission for seeking legal aid/assistance.

16. A preliminary hearing was appointed for 19 October. The Tribunal, by letter dated 4 September to Councillor Kanak, enclosed the Notice of Preliminary Hearing and reminded him that the Tribunal had not received advice, as earlier requested, of the state of all applications for legal aid/assistance. The Tribunal did not accept that the responses to the matters raised in his email of 30 August could reasonably be needed to make more progress with his legal aid applications. It was noted that these matters were raised more than 2 months after receipt by Councillor Kanak of the Notice of Decision to Conduct a Hearing. A response was made to a typographical error and to a request for certain particulars.

17. Following the Tribunal members return from overseas, Councillor Kanak was advised by letter dated 9 October that it was of the opinion that the matters raised by him were not properly the subject of a request for particulars in that any reasonable reading of the Notice did not disclose any ambiguity or matter reasonably requiring the particulars sought.

In the same letter, it was pointed out to Councillor Kanak that he still had not provided the Tribunal with advice as to the state of all applications for legal aid/assistance and the Tribunal expressed the view that it did not accept that the responses to the various matters raised by him in the emails could reasonably be needed to progress any legal aid application.

18. By email of 2 October, Councillor Kanak sought that the preliminary hearing set for 19 October 2001 be adjourned for reasons which it is not necessary to

recount. The Tribunal adjourned the preliminary hearing from 19 October to 22 October.

19. At the preliminary hearing on 22 October, the following matters, amongst others, occurred:
  - (a) Councillor Kanak attended the hearing in the company of Mr. Jeff Ash, who said he was present to assist Mr. Kanak. He sought and was granted permission to address the Tribunal and he did, in addition to Councillor Kanak, address it.
  - (b) Councillor Kanak suggested that the Tribunal had no jurisdiction to hear the complaint because, there had been no initial complaint to the Director-General, which complaint was a pre-condition to the exercise of a power to refer the matter to the Tribunal. The Tribunal directed the Department to furnish to Councillor Kanak all the relevant correspondence said to constitute the complaint, subject to being permitted to delete from the material anything which would identify the complainant. Leave was granted to Councillor Kanak at the hearing to make any further submission that he wished to as to why that correspondence ought to be made available to him in an unaltered form. No such submission was ever made.
  - (c) Councillor Kanak alleged that some of the report was inconsistent with the evidence supplied with the Director-General's report and he sought to have the right to request further particulars so that this matter could be clarified before a formal hearing.

A direction was given that Councillor Kanak request, in writing of the Department within 14 days, any further particulars or information. The Department was directed within 14 days of the receipt of that request to supply the information or documents.

- (d) At the suggestion of the Tribunal, the Department indicated that it would seek to place before the Tribunal evidence of what costs had been ordered and/or incurred or were otherwise dealt with in the proceedings in the Supreme Court instituted by Councillor Kanak and referred to in the motions before the Waverley Council meeting on 28 September 1999. A direction was given that the Department within 28 days from 22 October supply to Councillor Kanak any documents intended to be sought to be tendered on the question of the quantum of costs involved and any statement of any witness intended to be called on that issue.
- (e) Following advice that Councillor Kanak intended calling oral evidence, a direction was given that he supply to the Department within 28 days statements of any intended witnesses including himself together with copies of any documents intended to be tendered (including any evidence, if he wanted to dispute what had taken place at the Council meeting, from persons who were at the meeting). No statements were ever received.
- (f) While a transcript of the Council meeting proceedings was attached to the Director-General's report, Councillor Kanak sought access to the tape. The Department indicated it would be made available to him.

- (g) The final hearing of the matter was set for Monday, 17 December 2001.
20. By email dated 7 November to the Department, Councillor Kanak sought various particulars.
21. By email dated 12 November, Councillor Kanak in substance stated that he wished an extension of time in which to request the further particulars/information because of the non-finalisation of a Freedom of Information request process (including appeals) instituted by him against the Department. This Freedom of Information application is referred to in pp. 6 and 7 of the Director-General's report. He also wanted the hearing date vacated.
22. By email dated 13 November, Councillor Kanak raised again the question of the possibility of him receiving legal aid. He repeated the email of 3 September set out above. He indicated that the New South Wales Legal Aid Commission had written to a solicitor, nominated by Councillor Kanak, asking for further information, before reaching a decision.
23. By email of 14 November, the Tribunal noted that the topics raised in Councillor Kanak's emails of 12 and 13 November had not been raised at the preliminary hearing on 22 October. Councillor Kanak was advised that the Tribunal considered that the information contained in them was insufficiently precise or detailed to enable it to agree to his request to vary the directions

given. He was advised that on the assumption that he wished to be more specific in his request that a further short hearing had been appointed for Friday 16 November at which time the Tribunal would expect, on any further request, to be provided with copies of all relevant documents.

24. Following two further emails from Councillor Kanak, a further preliminary hearing took place on 16 November, at which the following, amongst other things, occurred:

(a) Councillor Kanak was advised by the Tribunal that, as previously requested, it needed more specific information about any legal aid application and, in particular, needed to know to whom he had applied and when and that the Tribunal wished to be provided with copies of all relevant documents. Although some information was orally provided by Councillor Kanak it was not of the type requested. The matter was left open to Councillor Kanak to provide the requested information if he so saw fit. He never has provided it.

(b) As to the FOI request, it was made clear by the Department that, for its part, Councillor Kanak only had to ask for any document that he wanted and the Department would supply it in accordance with the direction given by the Tribunal on 22 October and would not take (subject to the question of confidentiality) any point that it may not have been available to Councillor Kanak under the FOI request. The Tribunal made it clear to Councillor Kanak that if he wished to have documents from the Department he could merely ask for them and the



Tribunal would exercise its powers to get the documents for him and that in those circumstances the FOI procedure had no bearing on the conduct of his defence.

- (c) Following a discussion concerning particulars and documents, it was agreed that Councillor Kanak would make a further request by Tuesday, 20 November and the documents would be supplied by 23 November.
- (d) As to the evidence relating to costs in the Supreme Court proceedings, it was indicated that there would be sent by the Tribunal to the Supreme Court a written request that the Supreme Court file in the proceedings between Councillor Kanak and OCA be made available to the Tribunal and, when available, access would be granted to both parties.
- (e) It was noted, in discussion, that details had been provided to Councillor Kanak (and the Tribunal) of some part of the transcript of the proceedings before the Council on 28 September which had been omitted in transcription from that contained in the Director-General's report. Councillor Kanak objected to this additional material but it was pointed out that the Tribunal was required by the legislation to conduct a hearing into a complaint and was not limited to the information which was before the Director-General at the time the report issued.
- (f) Following discussion, Councillor Kanak was advised that if need be the Tribunal would assist him by issuing subpoenas to witnesses for the hearing date upon it being satisfied that they may be in a position to provide relevant evidence.

25. Councillor Kanak requested, by email dated 19 November, some 23 paragraphs of further particulars/information.
26. On 20 November he added to those requests.
27. By email dated 20 November Councillor Kanak objected to the Tribunal accessing “my personal financial information” and made an application for review under s.53 of the Privacy and Personal Information Protection Act 1998. Though it was not so phrased, it became clear that Councillor Kanak was referring to the foreshadowed request by the Tribunal to the Supreme Court for access to the Supreme Court file for the purposes referred to above.
28. A further request for particulars was sent by Councillor Kanak on 22 November.
29. By letter of 27 November Councillor Kanak was advised that the Tribunal did not intend to carry out any review of its decision to make the request of the Supreme Court for, amongst others, the reason that s.6 of the Privacy and Personal Information Protection Act 1998 expressly provides that nothing in the Act affects the manner in which this Tribunal exercises its judicial functions as they relate to the hearing or determination of proceedings before it.

30. The Tribunal by letter of 19 November had requested the Supreme Court to make available the said file. Councillor Kanak had objected, to the Supreme Court, to the production of that file to this Tribunal. In the end the objection delayed the process and the file was not available to the Tribunal or the parties for the hearing.
  
31. The particulars requested by Councillor Kanak in his emails of 19 and 20 November were furnished to him by the Department. Councillor Kanak by his three emails dated 23 November, 23 November and 26 November requested further particulars. The Department, unless otherwise directed, declined to answer these further particulars being outside the time set by the Tribunal's directions. Councillor Kanak requested an extension of time to allow for these further particulars to be answered. The request was refused.
  
32. On 12 December Councillor Kanak requested that if the Director-General, Glenn Schuil and Louise Ashelford (the Departmental investigators responsible for the Director General's report) were not willing to attend the hearing, that subpoenas issue against them to ensure their attendance. Councillor Kanak was advised that Mr. Schuil would be in attendance but that the Tribunal did not then intend to issue a subpoena to the Director-General or Ms. Ashelford but that he could renew that application, if he so saw fit, at the hearing. (He did not do so.)

## **The hearing**

33. The hearing took place on 17 December. Councillor Kanak was present and again was accompanied by Mr. Ash. The Department, as previously, was represented by Mr. M. Lawler of Counsel.
34. Documentary evidence was tendered. There was argument concerning the authority of Mr. Schuil and Ms. Ashelford to carry out the investigation under the various provisions of the Act. Reference was made to proceedings instituted by Councillor Kanak in the Land and Environment Court against, amongst others, the Tribunal. Following further discussions concerning documentation and other matters, Councillor Kanak cross-examined Mr. Schuil.
35. Following the morning adjournment, the Tribunal was advised of certain discussions that had taken place, over the adjournment, between Mr. Lawler, Councillor Kanak and Mr. Ash. Following further discussion, Councillor Kanak indicated to the Tribunal that he was prepared to formally admit his breach of the legislation. Councillor Kanak said he wanted to “cut to the chase” and he wanted the Tribunal to proceed to determining what action, if any, should be taken as a consequence. Submissions were put both by Councillor Kanak and Mr. Lawler as to what following such admissions, ought to be the consequences of his admitted breach. It was not contended by Mr. Lawler that anything more severe than a reprimand in the circumstances was warranted.

36. The Tribunal reserved its decision.
37. By email dated 18 December Councillor Kanak requested an opportunity to make further submissions on penalty if the Tribunal were minded to order other than counselling or a reprimand. Councillor Kanak was advised that, in that event, he would be given an opportunity to make further submissions.

### **Post hearing applications**

38. Prior to the Tribunal delivering its decision in the substantive matter, Councillor Kanak sent to the Tribunal a number of documents, the ones relevant for present purposes being:
- (a) lengthy written submissions marked A (sic), B to F(b) (dealing with a number of matters other than penalty);
  - (b) a motion that the substantive proceedings be adjourned to permit Councillor Kanak to pursue what was said to be rights of appeal to the Legal Aid Review Committee under s.56 of the Legal Aid Commission Act 1979, before the Tribunal considered the other Notices of Motion which he filed and before it finalised a Statement of Decision in the substantive matter. That motion became Exhibit D at a hearing which took place on 4 February 2002. The relief sought in the motion was refused for the reasons given on that occasion;

- (c) a motion that the matter be re-opened to permit the parties an opportunity for further written submissions on the question of liability. In substance Councillor Kanak wished to withdraw the admissions he had made. Other associated relief was sought (Exhibit E). This application was on the 4 February refused with reasons to be given. The Tribunal's written reasons are given at the same time as these reasons;
- (d) an application by Councillor Kanak "to appeal the decision not to call the witnesses Louise Ashelford and Gary Payne, the Director-General NSW DLG" so that Councillor Kanak could cross-examine those witnesses on alleged mistakes and inconsistencies in the report. This document became Exhibit H. The relief sought was on 4 February refused. The application is closely associated with the application to re-open and is dealt with in the reasons for the refusal of that application;
- (e) a Notice of Motion (which became Exhibit G) seeking orders permitting a "review" of the Tribunal's decision made in June 2001 to conduct a hearing. A review was also sought of various other interlocutory decisions allegedly made by the Tribunal.

On 4 February –

- (i) the question of review of the Tribunal's decision to hold a hearing (substantially based on an alleged denial of natural justice) was refused with reasons to be given. Those reasons are given contemporaneously with this decision;

- (ii) various parts of the motion were refused for reasons given on 4 February;
- (iii) Councillor Kanak was granted leave to file an serve no later than 7 February at 12 noon any further submissions he wished to put to the Tribunal on the question of penalty;
- (f) in an email sent 11 January 2002 Councillor Kanak sought to put forward the following qualifications to the admissions which he had made in the proceedings. This document was in the following terms:

“On the 17 DEC2001, as the transcript which I now have received from the PIT effectively bears out, I said I should have made a formal declaration\disclosure at that part of the 28SEP1999 Waverley Council Meeting when the Mayor asked for declarations. What I say from that point is that I should have qualified that declaration with the foreshadowed intention that I was going to, and in fact did, move to delete those parts of the 28SEP1999 motion in question [parts 2.5 & 2.6] before the PIT that had caused the Public Controversy at the meeting that the ‘declaration’ was one for the Public Record and formality as Section 448 of the Local Government Act 1993 I believe applied in these circumstances and therefore a strict ‘Disclosure’ was not required.”

39 By email dated 7 February, Councillor Kanak provided the Tribunal with a document headed “Written Submissions on Penalty”. The submissions were said to be made on condition that Councillor Kanak’s defence be allowed to be later amended in the event of obtaining formal qualified legal practitioner assistance and that further submissions be allowed. The Tribunal did not accept these conditions and so advised Councillor Kanak. In the end little turns on this. The matters referred to in the submissions are facts that are established or are reasonable inferences available. The last sentence of the

document reads “I do not concede an interest but if the Tribunal finds otherwise I seek further submissions in defence”. To the extent to which this sentence seeks to resile from the admission made by Councillor Kanak at the hearing on 17 December then such is not permitted for reasons given contemporaneously with these reasons on the application to reopen. To the extent to which Councillor Kanak seeks leave to make further submissions, that is denied. The history of this matter shows that Councillor Kanak has had more than ample opportunity to present to this Tribunal any submissions he saw fit to make on the substance of the allegations or in relation to penalty. There is, in the Tribunal’s opinion, no justification at all to grant him leave to make further submissions “in defence” or otherwise;

40. By documents sent on 4 February (after the said hearing) and entitled “Written Submissions for Notice of Motion for Adjournment 4 February 2002” and further documents on 6 February Councillor Kanak sought, a variety of orders which were dealt with by the Tribunal on 21 February by letter of that date to Councillor Kanak.

### **The substantive issue**

41. At the hearing of this matter on 17 December, Councillor Kanak admitted the allegations made against him. He was content that the matter proceed for determination by the Tribunal on the question of penalty alone. This was also his position in his email of 18 December.



42. For reasons separately given, the Tribunal has refused an application by Councillor Kanak to, in substance, re-open the hearing on the merits and to withdraw the admissions then made.
43. In addition to the allegations and facts alleged in the Notice of Hearing, the evidence establishes in the Tribunal's opinion, the following matters:
- (a) the 1999 proceedings instituted by Councillor Kanak against the Olympic Co-ordination Authority and referred to in paragraph 2 above and referred to in the Notice of Motion dated 21 September 1999, signed by Councillor Kanak, were the subject of a decision by Windeyer J on 8 March 2000. As has been said, unfortunately, owing to the objections of Councillor Kanak this Tribunal has not had access to the full Supreme Court file. However, on the said date Windeyer J dismissed the proceedings. He ordered that the plaintiff pay the costs of the first, third and fourth defendants. By a decision issued on 13 October 2000 the costs and disbursements of the Olympic Co-ordination Authority were determined at a figure in excess of \$65,000.00. While these events took place after the Council meeting on 28 September 1999, they do give some indication, albeit limited, of the costs the subject of the motion before the Council on that date;
  - (b) Councillor Kanak was elected a member of the Waverley Council on 11 September 1999. On 21 September 1999, Councillor Kanak together with two other councillors gave notice of a motion in the terms set out above. The relevant Council meeting took place on 28 September

1999. The Director-General's report establishes and this Tribunal accepts that an information kit was provided by the Council to new councillors prior to the first meeting after the election held on 11 September 1999. Such kit included the Council's Code of Councillor Practice, the Code of Meeting Practice, The Payment of Expenses and Provision of Facilities Policy for Councillors and Managing Conflicts of Interest Policy. The Tribunal accepts that Councillor Kanak did not receive these documents prior to the first meeting as he had moved from the address that he had provided to the Council when he nominated as a Councillor and had not, at that time, advised the Council of the change of address. There had been organised for October 1999 a week-end retreat for councillors to be advised on a range of issues including their pecuniary interest obligations;

- (c) as indicated in paragraph 1.2(d) and 1.2(e) of the Notice of Decision to Conduct a Hearing (above), there is no doubt that at the meeting Councillor Kanak sought to excise from the motion before the meeting the relevantly offending paragraphs 2.5 and 2.6. There is also no doubt that at the meeting his attempts to do so, in a formal manner, were unsuccessful. Councillor Kanak says, and the Tribunal accepts, that prior to the meeting Councillor Kanak had agreed with certain other councillors to seek to excise those portions as he apprehended a "conflict of interest situation". As has been said however his attempts to do so were unsuccessful.

43. The evidence before the Tribunal clearly establishes the facts alleged in the Notice to Conduct a Hearing. The Tribunal does not understand that there has ever been any serious contention to the contrary. Councillor Kanak at the hearing on 17 December admitted the case against him. That admission was clearly correct. There could be, in the Tribunal's opinion, no real doubt but that Councillor Kanak had a pecuniary interest in the resolution which he proposed to the Council at the said meeting in that he had a reasonable likelihood or expectation of appreciable financial gain if the full resolution were passed. That interest could not be said to be remote or insignificant. Further, it is clear in the Tribunal's opinion, that Councillor Kanak knew that the matters then under consideration at the meeting were matters in which he had a pecuniary interest. So much was clear from the wording of the resolution. So much was clear from his attempts to excise those portions of the motion. Councillor Kanak saw that there was a "conflict of interest" and that was what prompted him to seek to remove paragraphs 2.5 and 2.6 from the motion before the Council.
44. The admissions made by Councillor Kanak are totally consistent with the evidence before the Tribunal and the Tribunal finds that the facts and allegations made in the Notice to Conduct a Hearing are established. It finds that the complaint against Councillor Kanak is proven.

### **The consequences**

45. Having so found the Tribunal's powers to either disqualify, suspend, reprimand or counsel are contained in s.482 of the Act.
46. At the time that Councillor Kanak proposed the Notice of Motion he was a newly elected councillor. He had been elected on a platform which included opposition to the proposed Olympic Volleyball Stadium being constructed on Bondi Beach. The Supreme Court litigation sought to prevent such construction. The motion proposed by Councillor Kanak for the meeting of 28 September was part of that campaign of opposition. The Tribunal accepts that Councillor Kanak had altruistic motives in terms of his opposition to the volleyball stadium, the instigation of the litigation and, in general terms, the motion which he proposed for the said meeting.
47. The breaches in the present case and the steps leading up to them were transparent. The Notice of Motion signed by Councillor Kanak on or about 21 September 1999 made it abundantly clear that he had, as plaintiff in the proceedings set out in the Notice of Motion, a financial interest in a resolution that the Council, amongst other things, fund those proceedings. There was nothing hidden. The basic facts and circumstances were transparently in writing.
48. There is also no doubt, in the Tribunal's opinion, that at a point of time after Councillor Kanak appreciated the difficulty with paras. 2.5 and 2.6 of the Notice of Motion, he and his supporters sought both formally and in statements to the Council meeting to make it clear that they were not pressing those

offending paragraphs. Such attempts, however, were unsuccessful to achieve the desired result.

49. One matter which causes the Tribunal some concern is Councillor Kanak's reluctance in the present proceedings to acknowledge his wrongdoing. On the one hand at the Council meeting, he sought to excise the offending paragraphs of the Notice of Motion for the reasons set out above yet in these proceedings his actions show a marked reluctance to make the concessions which he ultimately did. Even at the hearing on 17 December he initially sought to put the acknowledgements which he made in terms of a public perception of what was required of him rather than a legislative requirement. The same attitude is displayed in his email of 11 January set out above.
50. Councillor Kanak failed to comply with his obligations in relation to the pecuniary interest which he had in the business before the Council at its meeting on 28 September 1999. His failure is not to be viewed lightly even though his failure was transparent. His attempts to qualify the admissions which he made at the hearing on 17 December and his subsequent actions in seeking to resile from those admissions and to re-open the whole question of liability has not made the task of this Tribunal any easier. Those steps which he took subsequent to the hearing carry with them the clear implication that Councillor Kanak while appreciating the nature and extent of his duties under the Act is prepared to seek to take any procedural advantage which may be available to him to seek to avoid the admissions which he made at the hearing. The Tribunal views such with concern.

51. However, the Tribunal having regard to all the circumstances and the submissions of the parties will order that Councillor Kanak be reprimanded.

### **Findings and Order**

- 1.. The Tribunal finds that Councillor Kanak had a pecuniary interest within the meaning of the Local Government Act 1993 in relation to the matter before the Council on 28 September 1999 with respect to the proposed Olympic Volleyball Stadium on Bondi Beach and that contrary to s.451 of the Act in relation to that matter, he failed to disclose that interest to the meeting and he took part in the consideration and discussion of the matter and he voted on questions relating to it.
  
- 2.. The Tribunal orders that Councillor Kanak be and he is hereby reprimanded for his said breaches of the said Act.

In accordance with s.484(1) of the Act, the Tribunal will furnish of copy of this Statement of Decision to Councillor Kanak and the Director-General together with a copy of the Tribunal's Order. Pursuant to s.484(3) the Tribunal will also provide a copy of the Statement of Decision and Order to the Waverley Shire Council and to such other authorities or persons as the Tribunal thinks fit.

DATED: 1 March 2002

**D.P.F OFFICER QC  
Pecuniary Interest Tribunal**