

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 4/1997

DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT

RE: COUNCILLOR DONALD JOHN FERN,
BEGA VALLEY SHIRE COUNCIL

STATEMENT OF DECISION

Dated: 13 March 1998

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ORIGIN OF COMPLAINT

This matter originated in 1996 with a complaint made to the Independent Commission Against Corruption of possible corrupt conduct concerning Councillor Donald John Fern, Bega Valley Shire Council.

The complaint was made pursuant to the Protected Disclosures Act 1994 which protects the identity of the complaint who, accordingly, remains anonymous.

The officers of the Independent Commission Against Corruption formed the view that the matter was not one which should be made the subject of a formal investigation by that Commission. This view was reported to the Commission's Operations Review Committee which advised the Commissioner that the matter should not be investigated but recommended that the allegations received by the Commission should be forwarded to the Department of Local Government pursuant to section 464 of the Local Government Act, 1993.

The complaint was duly referred to the Director-General, Department of Local Government on 26 July 1996. The referral stated that the complaint

had been received by the Independent Commission Against Corruption on 26 April 1996. Details of the allegations of the complaint were set out as follows:

“The complainant states that Councillor Don Fern, Bega Valley Shire Council, was a real estate agent at Tathra until he was elected to the Council. The real estate agency, Ivery Fern, is now operated by his son, Mr Michael Fern, although Don Fern continues to hold the lease on the premises and resides in the house behind the office. According to the complainant, Ivery Fern is currently the sole agent for “Tathra River Estate”, a prospective development. The complainant states that Council imposed a moratorium on this development because of the inability of the sewerage plant to cope following a report and recommendations by Council staff.

According to the complainant, Mr Don Fern has, as a Councillor, twice attempted to have the moratorium lifted, including proposing a motion to that effect in Council. Cr Fern has remained in the Council chamber during meetings while the topic was being debated, contrary to local government requirements. The complainant alleges that there is a conflict of interest because of Mr Fern’s connections with the real estate agency.”

By section 464(2) of the Act a matter referred to the Director-General under that section must be treated by the Director-General as a complaint made pursuant to the pecuniary interest provisions of the Local Government Act.

On 30 January 1997, after some preliminary inquiries had been made by the department, the Director-General notified Councillor Fern that he had decided that the matter should be subject of an investigation under section 462 of the Act.

As required by section 468(1) of the Act, the Director-General presented a Report to this Tribunal of that investigation. The Tribunal received the Report on 20 October 1997 and, on 13 November 1997, the Tribunal gave notice to the Director-General and Councillor Fern that, after considering the Report, it had decided to conduct a hearing into the complaint.

THE COMPLAINT

In accordance with its usual practice, the Tribunal's Notice set forth particulars of the complaint and the allegations made in support of the

complaint which would be the subject of the proposed hearing. They were as follows:

“TAKE NOTICE that the Local Government Pecuniary Interest Tribunal will conduct a hearing into a complaint referred to the Director-General of the Department of Local Government by the Independent Commission Against Corruption pursuant to section 464 of the Local Government Act, 1993, that Donald John Fern, then being a Councillor of Bega Valley Shire Council, committed breaches of section 451 of the Local Government Act 1993 with respect to the consideration by the Council at Council meetings held on 14 November 1995 and 23 April and 28 May 1996 of the lifting of a moratorium previously placed by the Council on all development at Tathra and the Tathra River Estate requiring sewerage.

PARTICULARS of the breach alleged are as follows:

Councillor Donald John Fern, being a councillor who had a pecuniary interest in a matter with which the Council was concerned and being present at meetings of a the Council at which the matter was being considered:

- **failed to disclose the interest to the meeting;**
- **took part in the consideration and discussion of the matter; and**
- **voted on a question relating to the matter**

contrary to the provisions of section 451 of the Act.

THE MATTER WITH WHICH THE COUNCIL WAS CONCERNED AND THE MEETINGS AT WHICH COUNCILLOR FERN WAS PRESENT AND THE MATTER WAS BEING CONSIDERED WERE:

14 November 1995 - Ordinary Meeting of Council

Background

On 18 August 1995, following a public meeting in July 1995 which had supported a moratorium, the Bega Valley Shire Council passed a resolution in the following terms:

- A. That a moratorium be placed on all development at Tathra and Tathra River Estate requiring sewerage except that one single dwelling unit be allowed on each existing undeveloped lot and replacement of single dwelling units on existing lots be allowed.**
- B. That no other development requiring sewerage is to be permitted unless by express resolution of Council.**

C. That the moratorium to be reviewed after Council's determination of the Environmental Impact Statement for the augmentation of the Tathra Sewerage Scheme or within one year, whichever is earlier.

At the meeting of the Council held on 14 November 1995, Councillor Fern and another Councillor moved that Council immediately lift or cancel the Moratorium on Development in Tathra and Tathra River Estate imposed by resolution at its meeting on 8 August 1995.

On being put to the vote the motion was declared lost.

23 April 1996 - Ordinary Meeting of Council

At this meeting Councillor Fern and another Councillor, on a notice of motion, moved that Council immediately lift the moratorium in Tathra and the Tathra River Estate.

This motion was carried and became the Council's resolution.

28 May 1996 - Ordinary Meeting of Council

Following the Council meeting of 23 April 1996, two Councillors gave notice of a motion to rescind the above resolution.

The rescission motion came before the Council at its meeting on 28 May 1996. Councillor Fern spoke and voted against the motion which when put to the vote was declared lost.

THE PECUNIARY INTEREST OF COUNCILLOR FERN IN THE ABOVE MATTER 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 or another person with whom the person is associated as provided in section 443.

(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”

Section 443 (referred to in section 442(1)) contains the following provisions:

“443. (1) For the purposes of this Chapter, a person has a pecuniary interest in a matter if the pecuniary interest is the interest of:

- (a) the person; or**
- (b) another person with whom the person is associated as provided in this section.**

- (2) A person is taken to have a pecuniary interest in a matter if:
- (a) a relative of the person has a pecuniary interest in the matter
- (3) However, a person is not taken to have a pecuniary interest in a matter as referred to in subsection (2):
- (a) if the person is unaware of the relevant pecuniary interest of the relative”

The word “relative” is defined in the Act to include a “lineal descendant” of the person.

Alleged Facts

Councillor Fern was elected to the Council in September 1995.

Prior to his election he had conducted his own real estate agency in Bega Street, Tathra and had employed his son, Michael Christopher Fern, as a salesman in the business.

On his election, Councillor Fern ceased to conduct the agency which was taken over and conducted from the same premises by his son who held a real estate agent’s licence.

At all times relevant to the complaint against Councillor Fern, Michael Christopher Fern was engaged in and conducted a licensed real estate agents business in the Tathra area which included an area of land known as the Tathra River Estate.

One of the sources of income of a real estate agent consists of commissions earned on the sale of lots and improvements resulting from the development of land.

There were parcels of land in the Tathra area generally and the Tathra River Estate in particular which had development potential which, if able to be realised, would enhance the prospects of a real estate agent earning substantial commissions on sales of land with development potential, sales of subdivided lots and sales of land developed by the erection of buildings thereon.

Michael Christopher Fern, to the knowledge or belief of Councillor Fern, had connections with and had performed some services for the owners of the Tathra River Estate who were developers. He entertained hopes and expectations of being engaged as the owner’s agent for sale if the property was sold or developed.

The ability to develop the lands in Tathra and in the Tathra River Estate was subject to Council approval and, in relation to part of the land, subject to re-zoning of the land which was partly in the control of the Council and partly in the control of government Ministers.

The existence of the Council's moratorium on all development at Tathra and the Tathra River Estate requiring sewerage was:

- (a) an impediment to:
 - (i) the achievement of the development potential of the affected land, and;
 - (ii) the profitable sale of land in the area which had development potential;
- (b) was calculated to discourage potential developers and other buyers from investing in land in the area; and
- (c) operated to the financial disadvantage of persons such as real estate agents whose livelihood was affected by the quantity and availability for subdivision and other development of land in the area in which they conducted their businesses.

Alleged Pecuniary Interest

It is alleged that by reason of the foregoing facts there was a reasonable likelihood or expectation of appreciable financial gain to Michael Christopher Fern if the Council's moratorium was removed and loss if the moratorium remained as a result of which he had a pecuniary interest within the meaning of the Act in the matters before the Council at the meetings referred to above.

By virtue of Michael Christopher Fern's pecuniary interest and the provisions of sections 442(1), 443(1) and 443(2)(a) it is alleged that Councillor Fern was to be taken to have a pecuniary interest in the matters before those Council meetings and was bound to comply with the requirements of section 451 of the Act.

In relation to section 443(3)(a) it is alleged that Councillor Fern was aware of the pecuniary interest of his son in the matters before the Council at those meetings.

HEARINGS

Preliminary Hearing

The Tribunal conducted a preliminary hearing in Sydney on 21 January 1998 for the purpose of ascertaining the matters in issue between the parties and dealing with procedural matters.

Mr Michael Lawler of counsel, instructed by Mrs Jean Wallace, Legal Branch, Department of Local Government, appeared to represent the Director-General.

Mr Alan Relf of A. Relf & Co., Solicitors of Eden, appeared for Councillor Fern.

In relation to the question of matters in issue between the parties, the Tribunal's Notice of Decision to Conduct a Hearing contained the following:

“ISSUES

Information contained in the Director-General's Report of the investigation of this complaint received by the Tribunal on 20 October 1997, establishes that the meetings described above took place, that Councillor Fern was present, that he did not disclose to the meeting the alleged or any pecuniary interest in the matters in question, and that he took part in the consideration and discussion of and voted on the matters. On this basis, the issue for determination by the Tribunal would appear to be:

Whether, in relation to the matters dealt with at the meetings Councillor Fern had at the time of the meetings a pecuniary interest within the meaning of the Act to which section 451 of the Act applied.

If the Tribunal were to find that any contravention of the Act by Councillor Fern has been proved, a consequential issue will be whether any, and, if so, what action should be taken by the Tribunal.

NOTE: The parties are at liberty to submit to the Tribunal that the issues arising out of the complaint are different or that there are other relevant issues not stated above, in which case, they each should specify to the Tribunal what they contend to be the issues to be determined by the Tribunal.”

At the preliminary hearing certain material already before the Tribunal was identified as exhibits (Exhibits A – M). These included the Director-General's Report to the Tribunal (Exhibit A). They also included correspondence between the Tribunal and the parties prior to the preliminary hearing, the detail of which need not be mentioned here.

On behalf of Councillor Fern, Mr Relf handed up a folder of written submissions dated 16 January 1998 relating to a number of issues raised in the complaint. He also tendered a document dated 19 January 1998 containing his “Observations” on evidentiary matters.

On behalf of Councillor Fern Mr Relf admitted for the purpose of the proceedings that the meetings as listed and described in the Notice of Decision to Conduct a Hearing took place and that he took part in the consideration and discussion of and voted on the questions relating to the matters that were before the meetings.

Mr Relf informed the Tribunal that Councillor Fern denied having had at the time of such meetings any pecuniary interest within the meaning of the Local Government Act, 1993 that he was required by section 451 of that Act to disclose but, subject to that denial, Councillor Fern admitted for the purposes of the hearing that he did not make any disclosures to the meetings of the alleged or any other pecuniary interest in the questions that were before the meetings.

The parties agreed that the issues as set forth in the Notice of Decision to conduct a hearing (Exhibit B), which have already been quoted above, would be issues for consideration and determination by the Tribunal at the hearing.

Numerous contentions in relation to such issues extracted from Mr Relf's correspondence with the Tribunal and his submissions and observations documents were recorded by the Tribunal and reproduced in the form of a document furnished to the parties after the preliminary hearing. This document later became Exhibit N.

The Tribunal gave certain directions on procedural matters and appointed 9 February 1998 at the Local Court at Cooma for the further hearing into the complaint.

FURTHER HEARINGS

Further hearings were conducted by the Tribunal on 9 and 10 February 1998 at Cooma. At the conclusion of the hearing in Cooma the Tribunal had before it, in addition to a large number of documents contained in the Director-General's Report and tendered by the parties at the hearings, the evidence of a number of witnesses in one or more different forms, namely, record of interview by departmental investigators, written statements

of evidence or oral evidence given in the witness box. The witnesses who provided such evidence were:

COUNCIL OFFICERS

David Jesson, General Council, Bega Valley Shire Council: transcript of taped interview by investigations officers, 2 June 1997 (Exhibit A, Attachment 12)

Garrett John Barry, Manager for Strategic Planning: transcript of interview, 4 December 1996 (Exhibit A, Attachment 8); Statement of Evidence, 29 January 1998 (Exhibit O)

Robert John Wearne, Senior Subdivision Engineer within the Council's Building & Planning Department: transcript of interview, 4 December 1996 (Exhibit A, Attachment 7)

David Andrew Searle, Manager, Water & Waste Water: statement of evidence, 5 February 1998 (Exhibit V)

TATHRA RIVER ESTATE

Alan Richards, Director Cuthbertson & Richards Pty Limited, son of Ray Richards, Senior Director of that company. (That company or C & R Sawmills Pty Limited (see Exhibit A, Attachment 20; Selling Agency Agreement, Exhibit Y) owned the property referred to as the "Tathra River Estate"): statutory declaration dated 12 May 1997 (Exhibit A, Attachment 9)

Michael Sadler, Partner in Crowther & Sadler, Land Surveyors and Development Consultants to Cuthbertson & Richards Pty Limited (Exhibit A, Attachment 6)

COUNCILLOR FERN

Donald John Fern, Community Representative appointed by Council to Tathra Area Committee (September 1993), elected as Councillor (September 1995), appointed by Council as Council Representative on Tathra Area Committee (26 September 1995): transcript of taped interview 2 June 1997 (Exhibit A, Attachment 10); statement of

evidence 8 February 1998 (Exhibit X); oral evidence at hearing at Cooma on 9 February 1998.

Michael Christopher Fern, son of Councillor Fern: transcript of interview 2 June 1997 (Exhibit A, Attachment 11); statement of evidence 8 February 1998 (Exhibit AC); oral evidence at hearing at Cooma on 10 February 1998.

John Peter Gough, co-owner with Michael Christopher of real estate agency of Ivery Fern Pty Limited: statement of evidence 7 February 1998 (Exhibit AB); oral evidence at hearing at Cooma 9 February 1998.

Documents received as exhibits at the hearing on 9 and 10 February 1998 were marked Exhibits N – AF. They need not be detailed here.

Mr Relf did not require any of the Council officers or representatives of the Tathra River Estate property to attend for cross-examination at the hearing. Accordingly the only oral evidence received by the Tribunal was that of Councillor Fern, his son Michael and Mr Gough.

The proceedings were recorded and a transcript provided. References to this transcript will be prefixed by the letter "T" followed by the page and line numbers. References to the transcript of interviews by the Department's investigation officers will be designated by the number of the attachment to the Director-General's Report, Exhibit A, followed by the page reference.

Mr Lawler presented an oral address to the Tribunal on behalf of the Director-General at Cooma until time ran out. This is recorded in the transcript of those proceedings. Mr Lawler subsequently furnished the Tribunal with supplementary submissions in writing dated 16 and 25 February 1998, copies of which were provided to Mr Relf.

In addition to the written submissions earlier referred to, Mr Relf also presented three further written submissions dated respectively 5 February 1998, 26 February 1998 and 2 March 1998.

BACKGROUND TO THE COMPLAINT

As the evidence and the submissions in this matter give rise to some quite complex issues, it will be helpful to begin with some important

background facts which did not appear to the Tribunal to be open to any significant dispute on the evidence.

Residential Development at Tathra

Tathra is a southern coastal town of New South Wales with a small population: 1,572 (1991 census), 1,684 (1996 census).

It was part of the Bega Valley Shire area when Councillor Fern moved there with his family in 1988 and became a real estate agent carrying on business from an office in the town.

When the events presently relevant began in 1995 there were limited prospects for development of the town and its surrounding area due to a number of physical, economic, political and other factors.

Of particular concern to the Council's Manager of Strategic Planning, Garrett John Barry, was the ability of the Tathra area to supply enough suitable land for dwellings to serve Tathra's predicted population growth. Mr Barry was responsible in the Council for forward planning which included questions of rezoning land, significant development applications, major environmental assessment and the like. He had undertaken a study the results of which were included in a report he prepared for the Council in February 1995 entitled "Bega and Tathra Urban Overview Report 1994-2016". On 14 February 1995 this report was adopted by the Council for the purposes of input into what was called Lower South Coast Settlement Strategies: Part Exhibit O.

One section of the report dealt with the availability of land for low density residential development in Tathra. It gave consideration to existing vacant subdivided residential zoned land and vacant unsubdivided residential zoned land.

The report concluded that, assuming medium growth to the year 2016, the maximum capacity of all the current residential zoned land to yield residential lots would fall far short of the required number. A shorter term – to the year 2005 – was also considered in the report. On Mr Barry's estimates, the capacity of the area to supply the need in both the shorter and longer term was heavily dependent upon the subdivision and development for

residential purposes of the area of land known as the “Tathra River Estate” (TRE).

In 1995, the area so described was the residue of a larger area which many years earlier had been partly developed by the then owner/developer. This earlier development (called TRE Stage 1) had created 68 residential unsewered lots adjacent to the Bega River of which 15 lots still remained vacant at the time of Mr Barry’s report: Exhibits Q and O (Urban Overview Report, para.5.1).

The residue left after the development of TRE Stage 1 was acquired by the Cuthbertson & Richards company in about 1989. In 1994 it was valued for rating at \$1M. It is described in the evidence as Lot 2 DP582074. It consists of 130 hectares of land, the northern part of which, 69 hectares, is zoned Rural “A” and the southern part, 61 hectares, is zoned partly Residential “A”(2(a)) and partly Residential (Tourist)(2(c)). See Exhibit P.

The new owners took over the task of seeking to develop the residue of the Tathra River Estate land into residential allotments in what became known as TRE Stage 2. The directors of the Cuthbertson & Richards company resided in Bairnsdale, Victoria, where the company was based. They employed the firm of Crowther & Sadler, also of Bairnsdale, as their development consultants and agents to deal with the Bega Valley Shire Council and other authorities in relation to the proposed Stage 2 development.

One aspect of the proposed development under consideration by the owners was the rezoning of the northern section of the land from rural to residential. Such rezoning involved obtaining favourable decisions from the Minister for Urban Affairs and Planning as well as the Council and other authorities. If the rezoning was achieved it would increase the capacity of the Tathra area to provide, through the Tathra River Estate lands, the much needed stock of residential land required for Tathra’s future population growth.

As will be seen, there existed formidable obstacles to the residential development of Stage 2 which were to continue into 1995 and 1996, the

years of principal of concern to the Tribunal, and beyond. The owners and Crowther & Sadler on their behalf, in consultation with Council officers and other interested agencies, put a great deal of work and money into the development of proposals to overcome these obstacles. They were continually being asked to produce reports on one aspect or another, described by Mr Sadler as “almost a minefield of reports”: Exhibit A, Attachment 6, pages 18-19.

Sewerage Services

Just one of the obstacles confronting the proposed TRE Stage 2 development was the need for there to be provided for any such development adequate sewerage services which could operate without endangering what was considered to be a sensitive environment. Mr Wearne, Exhibit A, Attachment 7, page 5.5; Mr Barry, Exhibit A, Attachment 8, page 7.

Apart from the TRE lands, there were blocks of subdivided residential land in the Tathra township where the zoning permitted development for dual occupancy or medium density housing such as home units or flats. Considered in 1995/1996, any such development of these lands would present additional demands upon the existing sewerage services, including Tathra’s Sewerage Treatment Plant and the disposal of treated effluent from that plant: Mr Barry Exhibit O, para. 7; Mr Wearne, Exhibit A, Attachment 7, pages 5.9 – 6.3.

There were other parcels of land in the township which were zoned residential and had not been subdivided. If later these lands were to be developed for residential purposes there would be further demands on the existing sewerage services. However most of these lands were under the control of the Department of Conservation and Land Management which had not at the relevant time evinced any imminent intention of promoting such development. Some of this land was subject to native title claims and there were other problems which would have to be overcome as well if the development for residential purposes was proposed.

TATHRA SEWERAGE AUGMENTATION – ENGINEERING SERVICES REPORT 23 MAY 1995

Prior to 23 May 1995 various studies had been commissioned at Tathra to provide information for decision-making by the Council and for the necessary Environmental Impact Studies. These studies were continuing in 1995.

According to Mr Barry, by early 1995 investigations by the Council's water and sewer engineers appeared to be concluding that there was a capacity problem with the Council's existing Sewerage Treatment Works at Tathra. It appeared that the plant might be reaching its capacity during peak periods and even occasionally becoming overloaded.

In consultation with his Engineering colleagues, Mr Barry reached the view that, "Should any significant development occur in the remaining urban zoned lands at Tathra or Tathra River Estate then there would not be sufficient capacity at the sewerage treatment works to cater for such development during the peak period December/January each year."

Subsequently Council's Manager of Water and Waste Water, Mr David Searle, in consultation with Mr Barry, who Mr Searle describes as a "Co-author", prepared a report for the Council proposing a temporary moratorium on significant development in the Tathra and Tathra River Estate areas: Exhibit O, paras. 8, 9; Exhibit V. A copy of this report is Attachment 21 to Exhibit A.

The report is dated 23 May 1995. It begins by referring to the various studies that had been commissioned and stating that because of the findings at Tathra a recommendation was made to limit certain development. The report then proceeds with a review of the present status of these studies and concludes as follows:

"In summary the findings for Tathra are that Council is unable to comply with present effluent disposal/re-use regulatory standards for increased flows at Tathra without expenditure of a large amount of money establishing effluent irrigation at a site removed from the Tathra area by both distance and ridge lines. The additional expenditure required to establish a remote irrigation site could be of the order of \$4 million. This is in addition to the treatment plant costs for the additional flows. An

effluent irrigation scheme for Lakes Entrance (a somewhat larger centre) is costing approximately \$9 million.

It is considered appropriate to limit development at Tathra until a decision is taken by the Shire as to whether it will commit to the expenditure required. If the development at Tathra River Estate is to be based on pumping sewerage to STP then development should not proceed until further costs are available for the effluent disposal so the developer is aware of the costs to be met and Council can decide if it will accept the sewerage from Tathra River Estate.

... ..

When all reports are complete for Tathra it is proposed to hold a community consultative committee meeting to consider them and report to Council. After Council has considered this further report it is committed to a public meeting and public consultation process before determining an option for Tathra. It is hoped that this preferred option can be selected by Council by the end of October this year. The Environmental Impact Statement which would then be necessary might be able to be determined by July 1996. Council would at that time be in a position to review any moratorium on development. Construction work could then be expected to commence towards the end of 1996.

Because Council at this stage cannot guarantee that the treatment of sewerage from further development at Tathra will meet regulatory standards the following recommendation is made."

The recommendation made by the report was in identical terms to those adopted by the Council for its moratorium resolution on 18 August 1995, quoted above, except for the addition, in paragraph C, of the words "or within one year, whichever is earlier."

The above report came before a meeting of the Council on 23 May 1995 when it was resolved that the Council defer the matter until, so far as Tathra was concerned, the Tathra Area Committee had been consulted.

The matter was again considered on 13 June 1995 when Council resolved to defer making a decision on imposing a moratorium on further development requiring sewerage at Tathra until after it conducted a public meeting on the subject in the town.

The public meeting was held in Tathra on 20 July 1995. It was attended by approximately 70 people and was addressed by Council officers. The public meeting carried a resolution identical to that which had been

recommended in the Engineering Services' report of 23 May 1995. (Director-General's Report, Exhibit A, page 13, para. 4.4)

Moratorium Resolution by Council

At its meeting on 8 August 1995 the Council passed a resolution adopting the three-part resolution as recommended by the Engineering Services report of 23 May 1995 but adding the provision for review of the moratorium within one year if the Council's determination of the Environmental Impact Statement for the augmentation of the Tathra sewerage scheme had not earlier been made.

This was one of the last resolutions of the outgoing Council prior to Council general elections to be held in September of that year.

THE REAL ESTATE AGENCY – COUNCILLOR FERN – MICHAEL FERN – IVERY FERN PTY LIMITED

Councillor Fern carried on business as a licensed real estate agent, trading as 'D J Fern, Stewart Town & Country Real Estate', at 31 Bega Street, Tathra from 1988 to September 1995. His son, Michael Fern, became employed in the business as a trainee salesman in 1990 and studied to become a fully licensed real estate agent. He obtained his salesman's certificate in 1990 and thereafter commenced selling in his father's business. He became entitled to a full real estate agent's licence in 1993 but continued to work under his father's licence because they did not need two licences for the business. (Exhibit AC)

The personal relationship between Councillor Fern and his son Michael had become severely strained by September 1995. Also Councillor Fern had developed a serious health problem. He decided to retire from the business and to run for election to the Council in the forthcoming September elections, having been active in community affairs and having previously stood unsuccessfully at a by-election for the Council held in December 1994.

Councillor Fern's evidence was that he decided in 1995 to make a gift of his real estate agency business to his son Michael by simply withdrawing from it and handing it over to him. He says this is what he did. The

changeover was not documented. He sought and received no consideration and he abandoned all financial interests in the business which he permitted Michael to just take over and run for himself. There was a lease of the business premises in Councillor Fern's name which continued in force but Michael Fern assumed responsibility for all payments under that lease. (Exhibit X, para. 5)

In September 1995 Michael Fern made an agreement with John Peter Gough to establish a new Real Estate Agency under the corporate name of "Ivery Fern Pty. Limited" with Michael Fern having 50 percent of the shares in the company and Mr Gough having the other 50 percent via a company of his.

Mr Gough had had a lot of business experience but no previous experience of operating a real estate agency. A corporate licence under the Property Stock & Business Agents Act 1941 was obtained for Ivery Fern Pty Limited and Michael Fern became the registered licensed agent in the business. Mr Gough organised and ran the office. Michael Fern did the selling. Ivery Fern Pty Limited took over the rent payments and subsequently negotiated for a new lease of the business premises to the company which, according to Mr Gough, had in fact become independent and separate from Councillor Fern. (Exhibit X, para. 5; AB, paras. 2 – 6, 10 – 11.)

The evidence of Michael Fern corroborated the foregoing account of Councillor Fern's withdrawal and Michael Fern's takeover of the real estate agency. The Tribunal finds no reason in the evidence to doubt the substantial accuracy of that account. The Director-General does not contend that Councillor Fern had any financial interest in the real estate agency business after September 1995. The validity of the present complaint against Councillor Fern depends on whether his son Michael had a pecuniary interest, within the meaning of the Act, in the matters before the Council at the Council meetings in question, a pecuniary interest of which Councillor Fern was aware. As that question turns partly, though not entirely, upon the relationship between Michael Fern and the owners of the Tathra River Estate and the prospects of Ivery Fern Pty Limited being able to earn commission on

transactions relating to that property, it is necessary to look at what that relationship was.

RELATIONSHIP MICHAEL FERN AND OWNERS OF TATHRA RIVER ESTATE

Councillor Fern became aware of the Tathra River Estate development and prospects of further development after he commenced business as a real estate agent in the area. In the early years he had a lot of contact with Mr Ray Richards, the principal director of Cuthbertson & Richards, and also contact with Mr Michael Sadler of Crowther & Sadler. He did a lot of work for them in the hope of obtaining an agency agreement. In 1992 he unsuccessfully negotiated with Mr Ray Richards for a transfer of part of the land to the Tathra Golf Club of which Councillor Fern was a director. Councillor Fern claims that at that time Ray Richards led him to believe that he would be considered as an agent on the sale of blocks in the Stage 2 subdivision then expected to be only one or two years away. However, no oral arrangement or written agreement in relation to this ever transpired.

In 1992 Ray Richards' son, Allan Richards, took over his father's responsibilities in the company business due to the former's advancing years. Councillor Fern says that when this happened, "I knew I had nothing and at that time I walked away from it altogether. After that I had absolutely no arrangement or understanding with Ray or Allan Richards." (Exhibit X, paras. 11, 36 – 38; Allan Richards' statutory declaration, Exhibit A, Attachment 9, paras. 3, 4)

According to Councillor Fern, his son Michael took a different view. Michael decided to maintain contact with the Richards and their consultant, Michael Sadler, in an endeavour to establish an understanding that his firm would be appointed agent for sale when the property came to be sold some time in the future. Michael spoke often on the telephone to both of the Richards, passed on local information of interest and made inquiries for them when requested. Councillor Fern said that one of his office files relating to the Tathra River Estate up to May 1995 "is littered with faxes, telephone calls and material collected by Michael." Councillor Fern also says that he advised

Michael that he was wasting his time as the Richards would only sell through one of the big agents; but, he says, Michael did not accept his advice. (Exhibit X, paras. 36, 37; Exhibit A, Attachment 10, pages 54.4 - .7, 62.5, 63.5) According to Councillor Fern, Michael “Held the view that, if he continually followed up the Richards and their surveyor, he would eventually get a prescribed written agreement (that is the agreement required by section 42AA of the Property Stock & Business Agents Act as a condition of entitlement to commission or other remuneration as a real estate agent)”. Michael Fern in his evidence confirmed that this statement correctly stated his view at the time in question: T174/175.

Michael Fern’s evidence confirmed his father’s evidence as to their different viewpoints on the value of maintaining contact with and performing services for the Richards in relation to the Tathra River Estate in the hope of procuring an agency. He gave evidence that he made contact with Ray Richards a number of times in 1991 and 1992, had a meeting with him and Michael Sadler at Tathra in 1993 and got himself involved with their problems. He made it clear to them that he was willing to help in any way he could but he did not raise the question of getting a prescribed written agreement at all because Ray Richards did not want to sell the property. He wanted to subdivide it and to build a big house on the top of a ridge. Michael said that over the years he had made himself available and done a lot of work for the owners of the Tathra River Estate but he did it because he liked Ray Richards “as a friend”, not even envisaging earning a commission. He said, “I simply chose to give them as much assistance as I was able to. It became my pet hobby.” (Exhibit AC, paras. 7 – 10)

It appeared from Mr Lawler’s cross-examination, that Michael Fern’s attitude was not quite so altruistic as he had expressed it in his statement of evidence. He agreed that, as a practising real estate agent, the sort of things he did for the Richards were done with the intention of financial gain and with the hope or expectation of making money: T.178/12; 182/14 – 30. However, he said that he recognised that in relation to the Tathra River Estate it was “pie in the sky” and that, although his father told him on a number of

occasions not to waste his time, he persisted because he enjoyed the town planning aspect of it “because it was the future of Tathra”: T182/36. He said that he rated his chances of earning a commission in respect of the Tathra River Estate as a “very long, long shot”: T185/27 – 30.

Michael Fern said that he formed the view that when Allan Richards took over responsibility for the business the situation changed in that, by contrast with his father, Allan was interested in the prospects of a return on the property. He said that he met Allan Richards only twice. Michael Sadler had most of the dealings with the Council on the proposed Stage 2 development and on some occasions he accompanied Mr Sadler but only as an observer and to give him local information that might be of benefit. (Exhibit AC, paras. 12, 13)

LOCAL OPPOSITION TO FURTHER DEVELOPMENT OF TATHRA RIVER ESTATE

The questions whether the Rural section of the Tathra River Estate should be rezoned and whether there should be further residential development of the estate and, if so, under what conditions were heated controversial public issues at Tathra in and from 1993. Views varied between no further development, to minimal, to some but restricted. A Tathra River Estate Residents Action Group was formed: see Exhibit A, Attachment 31. The group that wanted no further development held meetings – they wished to preserve the existing visual amenity and did not want reticulated sewerage extended into the area: T141 – 142. According to Councillor Fern, in 1995 the present Minister for the Environment was lobbied for an undertaking that no further development would take place if she were elected to parliament at the State elections that year: T80/46 – 52; T81/45; T82/2, 5.

Michael Fern had personal experience of the degree of local opposition. His evidence was that he knew, by 1993, that the proposed TRE Stage 2 development might never happen. He knew a lot of people who lived in houses in Stage 1 and almost all of them were opposed to the development of Stage 2. He said that this group was very vocal. In 1993 he put up a sign at the corner of the Snowy Mountains Highway and Thompson’s Drive, the

main street through the Stage 1 development, advertising a block of 100 acres for sale but not specifying where the property was located. It was actually a river frontage block adjoining the Tathra River Estate. He said that this sign was taken down by someone and warning signs put up on power poles in the area alerting the locals to the possibility of a move to proceed with the TRE Stage 2 development. Also an article on the matter was published in the local newspaper. He said that the controversy concerning the Tathra River Estate has continued ever since: Exhibit AC, paras. 13, 14; T142/47 – T143/6.

PROSPECTS OF SALE OF ENTIRE TATHRA RIVER ESTATE

Apart from the prospects of a real estate agent being employed to sell individual lots if a subdivision of the property were achieved, there was always the possibility that, if the owners decided to sell, they might sell the entire estate unsubdivided.

Prospective American Buyer

Once such possibility occurred in 1995. One of the persons who lived in Stage 1 of the Tathra River Estate and was part of the group opposed to the further development was Mrs Patricia Cohn. She had a daughter, Margot Strong, with connections in the United States of America. Margot Strong came to see Michael Fern. She told him that she did not want the Stage 2 subdivision to go ahead because of her mother's position. She said that her American connection could afford to buy the entire property off the present owners so that development could be stopped.

According to his evidence, Michael Fern thought that Margot Strong was pulling his leg. He knew that the owner did not want to sell anyway but he wanted to find out how far she would go with her proposal. He told her that he would approach the owners and find out what price they were prepared to sell at. Michael Fern said that he contacted Mr Ray Richards who told him that he would be wasting his time but he nevertheless contacted Margot Strong suggesting a price of \$5 million after which her husband contacted him with an offer of \$3.5 million, as to which he spoke to Ray Richards again

who told him, "If they settle in a month they can have it but don't waste your time."

On 24 February 1995 Michael Fern sent a fax message to the prospective purchasers advising that, "Our vendors, C & R Sawmills have accepted your offer of \$3,500,000 (Australian Dollars) for the land as discussed" The fax went on to state that the owners' solicitors were preparing the necessary documentation and asked for a return fax naming their lawyers: Exhibit AD.

Michael Fern told the Tribunal that the owners appointed solicitors to act for them in relation to the offer, the solicitors carried on some negotiations in which he was not involved because the prospective purchasers had by-passed him and by April or May 1995 he knew the sale was not going to proceed. He said that Mr Ray Richards told him that the deal was off: Exhibit A, Attachment 11, page 35.5 – 8; T143/12 – 149/2.

Michael Fern told the investigators that if the deal had proceeded with the agent's commission at 2 percent that would be \$70,000 but he would probably have done it for 1½ percent. Exhibit A, Attachment 11, page 38.5.

Councillor Fern gave evidence that he had been in the office when a lady representing the American interests spoke to Michael about buying the Tathra River Estate as a total package for a single residence with Michael suggesting a price of over \$3 million. He said that he told Michael that he was "mad" and that he couldn't pull that off: Exhibit X, para. 37. He also told the Tribunal that he thought at the time it was just a set-up to hinder delay and frustrate the endeavours of the owners of the estate to get their development approved by the Council. He said that he knew that Michael was just wasting his time but, "I didn't stop him doing whatever he wanted to do.": T117/10. He personally had nothing to do with the matter: T117/56.

Prospective ACT Buyer

In the latter half of 1996 there was another prospective buyer for the entire Tathra River Estate with whom Michael Fern became involved on behalf of the owners of the estate. Whilst these events occurred after the moratorium had been removed they are relevant because they illustrate the

kind of possibility for earning an agent's commission in relation to the Tathra River Estate that could have occurred at any time during the period to which the moratorium applied and as illustrating the sort of relationship that had developed between Michael Fern as a real estate agent and the owners of the Tathra River Estate property.

The prospective buyer was a syndicate of developers from the Australian Capital Territory represented by Mr Robert Warren. In the latter half of 1996 Mr Warren came into the office of Ivery Fern Pty Limited and spoke with Mr Michael Fern expressing admiration for the property and making inquiries about its development prospects and whether it was for sale. Michael Fern told them that although it was not for sale the owner could be interested at a price. Subsequently Michael Fern endeavoured to obtain from Mr Garrett Barry at the Council the up to date position with regard to future development of the Tathra River Estate site. According to Mr Barry, Michael Fern approached him on the basis that he had been given the right to sell the property as an agent. Mr Barry told the investigators that Michael Fern was asking for information that he would be able to give to an intending purchaser. Mr Barry sought authority from the owners to give out such information: Exhibit A, Attachment 8, page 14.2.

Council records contain an authority signed by Allan Richards to Michael Fern to have any information that he requires in relation to the property. It is dated 22 August 1996. On 23 August 1996, Mr Barry wrote a letter to Michael Fern providing the information that had been sought: Exhibit A, Attachments 27, 28. Michael Fern gave the Council's letter to Mr Warren: T150.

Michael Fern's evidence was that it looked to him that the matter might proceed and he negotiated a commission with Allan Richards who "screwed me down" but he submitted a prescribed written agreement, which was signed on behalf of the owners on 12 November 1996. Copies of the agreement are contained in Exhibit Y. It expresses the agent's opinion as to the current reasonable selling price to be "\$1,800,000 (no terms)" and provides that the price at which the property was to be offered was "\$2,000,000 (Two years

finance off vendor)", with the agent's commission, at the event of a sale at the agent's estimate of selling price, to be \$40,000. Michael Fern must have believed that there was some chance of the sale taking place because he prepared Particulars of Sale dated 7 January 1997 which included a statement that the vendor had agreed to finance the purchaser on the balance of the purchase price, i.e. \$1,800,000 at 11.5 percent interest over a three year term. Michael Fern's evidence in relation to this transaction is at T149 – 152.

He was asked whether he thought he had some hope of bringing off the sale in relation to Robert Warren. He answered, "Slight. Very slight." T154/28. He went on to explain that his reasons for having that view was that it was a lot of money and there were a large number of conditions required by the purchaser to be incorporated in the contract, conditions relating to such things as "development time, consent time, subject to DA approval, subject to a number of blocks being able to be subdivided, subject to zoning changes, subject to finance, vendor finance." T154/32 – 51. Contracts were never exchanged and the matter did not proceed: Exhibit AC, para. 16; T154/53.

COUNCILLOR FERN'S OBJECTION TO AND ACTION TO REMOVE THE MORATORIUM

Councillor Fern gave a considerable amount of evidence on his views as to the evils of the moratorium and his reasons for taking action as a Councillor to have it removed. What follows is a sufficient summary of that evidence for present purposes.

He claims that he did not become aware of the exact terms of the Council's August 1995 resolution until after the present complaint was made: Exhibit X, para. 13. Presumably this was in August 1996 when he was advised of the complaint: Exhibit A, Attachments 2 & 3. He says that until then, and at the time of his election to Council, he believed from what he had read in the local newspaper, other documents and some meetings he attended that the Council had imposed a total prohibition on any kind of development in Tathra or the Tathra River Estate. In his statement of evidence he claimed, "What was promoted publicly was different to the

moratorium resolutions.” Exhibit X, paras. 13 and 15. He told the investigators that the reason he got on to the Council was “Because of the apparent ability of the Green Faction in this Shire to prevent any sort of development. Tathra was a totally neglected little hole in this Shire and very little Shire money was spent in Tathra. I got on to Council to see if I couldn’t do something about it for that community.” Exhibit A, Attachment 10, page 14.5.

He also told the investigators that people who relied on some development in the area for their survival, plumbers, builders, labourers, builders’ labourers, electricians, had become depressed as a result of the moratorium. He agreed that the people who were relying on some development for their survival would include real estate agents: Exhibit A, Attachment 10, page 25. Councillor Fern emphasised in the course of the interview that his concern about the moratorium was the interests of the ratepayers of the Shire and the Shire generally and the “deplorable situation” for any prospect of advancement that the area had with a moratorium on it. Reminded by the interviewer that he had earlier stated that people who relied on some development for survival in that community included real estate agents, he said, “Well I said I imagine it would. I know I said it with a grin on my face and I can’t see that it couldn’t affect real estate agents – the moratorium on development.” When asked to explain what he meant by that statement, he said, “Well if there’s a moratorium on development, there’s no development, real estate agents are not presumably going to be able to sell land to be developed and so on and on it goes.” Exhibit A, Attachment 10, page 30.

With respect to the possibility of Councillor Fern’s son having a pecuniary interest in lifting the moratorium by reason of his son’s occupation as a real estate agent, Councillor Fern told the investigators that the potential for gain or loss was no different for his son than for the other two agents in the town because, “The three of them had financial pecuniary interests in development of Tathra.’ Exhibit A, Attachment 10, page 33.3 – 34.7.

According to Councillor Fern, the existence of the moratorium, as well as depressing business for local trades and professions, had a deterrent affect upon the area's development potential. He said to the investigators, "Why would a developer – any developer – coming into the town, on which there's been a moratorium imposed, decide to buy anything? Why would he? I mean – at best the moratorium did nothing but at worst, it made bloody sure that nothing happened." Exhibit A, Attachment 10, page 24.8. He went on to say that in any town or area as soon as you say there is a moratorium on development, "who wants to know about it": Exhibit A, Attachment 10, pages 24 – 25.

In relation to the possibility of a sale being made of the entire Tathra River Estate, such as arose early in 1995 with the American interests, Councillor Fern described to the investigators the effect of the existence of the moratorium as a "nightmare": Exhibit A, Attachment 10, page 57.1 – 4.

Michael Fern told the Tribunal that he shared his father's view that the existence of the moratorium was a "nightmare" in terms of the perception of prospective developers in the Tathra area. He considered that it was bad for the community, had the potential to do harm to the economy of the Tathra area and adversely affect the builders and trades people. When asked if real estate agents would be adversely affected, he answered, "Everybody associated". He also said that he was as eager as others who were opposed to the moratorium to see it removed.

It was clear from Michael Fern's cross-examination that the existence of the moratorium was a matter of concern to him in his business: T170/50. He explained:

- "A. It was a concern to me as a real estate agency, as it restricted the sale of properties in that bracket that could be redeveloped to a higher nature. From my point of view the price difference between a \$40,000 block of land with no development potential and a \$75,000 block of land next door with development potential, being a difference of 35 grand.**
- Q. If I follow what you are saying, the same land could be worth \$40,000 or \$75,000, depending upon whether it had prospects of development?**

- A. That's correct. For the purposes of the argument, the unit site in Tathra is worth a little bit under \$20,000 per site, so if you have got a 1,000 square block with units at 250 square, you have got four units, a site that is worth 80,000, which as a house block, that is worth 45.": T171/4 – 22**

Councillor Fern was asked by the investigators what he considered would be the most significant change if he succeeded in lifting the moratorium. He told them that he didn't expect any immediate rush of development "Because it wasn't happening anyway" but he did expect "A change in potential." He said, "What I expected was, for somebody who had the potential to spend money in the Shire to be least not confronted with that word moratorium": Exhibit A, Attachment 10, page 38.6. In relation to real estate agents, Councillor Fern told the investigators that it would be hoped that as a result of lifting the moratorium additional business would be generated for all of the real estate agents in the area not just Ivery Fern. Exhibit H, Annexure 10, page 52.5 – 9.

One of Councillor Fern's objections to the moratorium was that he considered that it was unnecessary, partly because there was so little development going on at the time that a moratorium to restrain it was not needed and partly because the proposal to the previous Council from the Council officers to impose a moratorium because of inadequacies in Tathra's sewerage treatment plant was put forward on a false basis. He told the investigators that he disputed the Council officer's report of 23 May 1995 because later documentation acknowledged that there was still capacity for an additional 200 odd houses, so a total moratorium, he says, was unjustified: Exhibit A, Attachment 10, page 11. He also claimed to the investigators that the real reasons for the moratorium were election pledges made prior to the March State election in 1995 that the development of the Tathra River Estate would be on hold pending ministerial advice on government policy for the area. He said that he considered the moratorium to be a political exercise from day one using alleged deficiencies in the Tathra sewerage treatment plant as an excuse: Exhibit A, Attachment 10, pages 12 – 14, page 21.5 - .9

Explaining his course of action, Councillor Fern told the Tribunal that after his election he was approached by various tradesmen and business

people to get the moratorium lifted. He said, “It was destroying the building industry in Tathra and was having a major adverse effect upon people living in the area. A number of people were nearly bankrupt, anyway. I spoke to a lot of people around Tathra and I quickly came to the conclusion that the moratorium resolution (as publicised) had destroyed the confidence in the local people to develop their area. I decided to support them. My sole motivate was to assist my electorate”: Exhibit X, para. 16.

Councillor Fern said that without knowing specifically what the 1995 resolution was, he formulated a notice of motion that went before the Council meeting on 14 November 1995 though it was defeated. He said that afterwards he was approached by a lot of people in Tathra who urged him to have another go at his resolution and that this time, he was aware of the procedures to be followed for a notice of motion and prepared it with reasons. On 23 April 1996 he moved it again in Council and succeeded and on 28 May 1996 a rescission motion, against which he voted, was defeated: Exhibit X, paras. 17 – 20.

THE TRIBUNAL’S DETERMINATION OF THE PRIMARY ISSUE

The foregoing account does not deal with every matter of fact canvassed in the evidence put before the Tribunal by the parties but it is sufficient for the purpose of enabling the Tribunal to pass directly to a determination of the complaint. Some of the issues, legal and factual, raised by Mr Relf’s contentions will be left for mention later.

The primary issue for determination by the Tribunal is whether, in relation to the matters dealt with at the three Council meetings, 14 November 1995, 23 April 1996 and 28 May 1996, Councillor Fern had at the time of the meetings a pecuniary interest within the meaning of the Act to which section 451 of the Act applied.

The relevant provisions of sections 442 and 443 of the Act have been set out earlier. Section 451 provides as follows:

“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.”

It has already been pointed out that the complaint here is based on the allegation that, under sections 442 and 443(1)(b) and (2)(a), Councillor Fern had a pecuniary interest because his son Michael Fern had a pecuniary interest in the question whether the moratorium should be lifted or remain in force.

However, it should be repeated that it is not alleged that Councillor Fern had any personal pecuniary interest in that question and now that the hearing is concluded it is appropriate that the Tribunal should state that the evidence before the Tribunal established that, at the relevant time, Councillor Fern did not in fact have any financial interest in the real estate agency in which he had been involved prior to his election to the Council or to which his son and, later, Ivery Fern Pty Limited succeeded and that he did not otherwise have any prospects of financial gain or loss arising out the action he took in relation to the moratorium.

The question is whether Michael Fern had a pecuniary interest in the lifting of the moratorium. In terms of sections 442, that depends on:

- (a) whether there existed a reasonable likelihood or expectation of appreciable financial gain to Michael Fern if the moratorium was lifted, or loss if it remained: Section 442(1) and, if so,
- (b) whether that reasonable likelihood or expectation was not so remote or insignificant that it could not reasonably be regarded as likely to influence any decision in relation to the matter:
Section 442(2)

Meaning and Application of Sections 442, 443

There were conflicting submissions made by the parties as to the proper construction of sections 442 and 443 and their application to the present case.

As to the expression, “reasonable likelihood or expectation” in section 442(1), Mr Relf submitted that the word “reasonable” applied to both the word “likelihood” and the word “expectation”. Mr Lawler did not contest that submission nor does the Tribunal.

As to the words “likelihood” and “expectation”, the Tribunal had to consider in an earlier case an argument that the language of section 442(1) was directed to probabilities of financial gain or loss so that if the evidence did not establish a probability there was no pecuniary interest. The Tribunal held that both “likelihood” and “expectation” admit the possibility of failure and indicate that the language is being addressed to chances or possibilities as well as probabilities and to cases where the nexus between the Council's decision in a matter and the accrual of financial gain or loss to the person may be subject to contingencies, uncertainties and the risk of non-fulfillment. The Tribunal concluded:

“This being so, sub-section (1) of section 442, or at least the word “expectation” contained therein, should be interpreted as applying to cases where the prospects of a financial gain or loss fell short of being a probability but consisted of a reasonable chance or possibility. This still leaves sub-section (2) to operate as a proviso excluding cases of remoteness or insignificance.”: Director-General Re: Councillor Roberts, Hastings Council, PIT1/1995, 3 August 1995, pages 19 – 20.

The Tribunal sees no reason to depart from that view, Mr Relf did not appear to contest it but Mr Lawler volunteered the concession that the evidence in the present case did not establish a probability of financial gain to Michael Fern if the moratorium was lifted. The Director-General’s contention was the evidence established a reasonable expectation of appreciable financial gain to Michael Fern from the lifting of the moratorium. Mr Relf contended the opposite.

Mr Relf, in submitting that the evidence failed to established a pecuniary interest in Councillor Fern, relied strongly on the views, opinions and beliefs expressed in their evidence by Councillor Fern and Michael Fern as to

Michael Fern's prospects of earning a commission from the Tathra River Estate. He also relied on Councillor Fern's often expressed conviction that he had no pecuniary interest arising out his son's activities on behalf of the Richards or otherwise as a real estate agent in Tathra.

In the **Roberts'** case and other cases dealt with by the Tribunal, the Tribunal has proceeded on the view that, on a proper construction of the section, a conclusion that a pecuniary interest existed or did not exist was intended to rest on an objective judgment of the facts and circumstances, that is a judgment based on facts and indicia unaffected by personal feelings or opinions and not a subjective judgment which is based on personal and individual feelings, beliefs, opinions or perceptions: **Roberts**, pages 30 – 32. The Tribunal adheres to that opinion and, accordingly, will make an objective assessment of the facts and circumstances established by the evidence in the present case in determining whether, within the meaning of section 442, Michael Fern had a pecuniary interest in the lifting of the moratorium.

Mr Relf contended that, on a proper construction of section 442(1), the reasonable expectation of appreciable financial gain or loss to "another person" referred to in that provision is a reasonable expectation on the part of the first person mentioned, not the "other person". Thus, it was submitted that if Councillor Fern had no expectation that his son would or might gain financially from a removal of the moratorium, there would be no pecuniary interest within the meaning of the section even if his son had expectations to the contrary.

For the Director-General it was submitted that in so far as this contention relied on the subjective lack of the relevant expectation on the part of Councillor Fern it should be rejected because that expectation was to be determined objectively by reference to the conclusions of a reasonable person. The Tribunal would agree with that objection to the submission but Mr Lawler also submitted that Mr Relf's argument misconceived the interaction between sections 442 and 443. On that point, Mr Lawler's written submissions contained the following:

“17. It should be conceded by the Director-General that, to use the words of paragraph 10 of the Issue Notes, (see Exhibit N) the reasonable expectation of appreciable gain or loss to “another person” referred to in s.442(1) is a reasonable expectation on the part of first person not the “other person”. This is the ordinary meaning of the words of the definition. However, whether the first person in the definition is Councillor Fern or Michael Fern depends entirely upon whether the term “pecuniary interest” in s.443(1) is being interpreted in relation to the application of paragraph 443(1)(a) or the application of paragraph 443(1)(b).

18. Section 443 specifies who has a pecuniary interest in a matter. Section 442 defines what a pecuniary interest is. As a matter of simple construction, that definition is applicable to interpret each occurrence of the phrase “pecuniary interest” in s.443. In particular, the definition of pecuniary interest in s.442 is applicable when determining both the pecuniary interest of “the person” referred to in s.443(1)(a) and the pecuniary interest of “another person” referred to in s.443(1)(b).

19. When the s.442(1) definition is applied to ascertain whether there is a “pecuniary interest” in “another person” within the meaning of s.443(1)(b), that other person becomes, for the purposes of the application of the definition, the first person referred to in the definition. The structure created by s.443 and s.442 is one that mathematicians describe as “recursive”.

20. Thus, by virtue of the definition in s.442(1), the pecuniary interest that Michael Fern has in the matter (ie. His pecuniary interest as “another person” within the meaning of s.443(1)(b)) may arise because of a reasonable likelihood or expectation of appreciable financial gain or loss to himself *or* because of a reasonable likelihood or expectation of appreciable financial gain or loss to another person with whom Michael Fern is associated within the meaning of s.443 (ie. A third person). In theory, the third person may have a pecuniary interest because of an interest of a fourth person and so on. Obviously, beyond one or two levels of recursion the interest would inevitably become too remote and s.442(2) would apply in relation to the person against whom the complaint has been made – the first person.”

Whilst acknowledging, with respect and admiration, the mathematical logic of Mr Lawler’s argument, the Tribunal cannot accept it. In the opinion of the Tribunal, both Mr Relf’s submission and Mr Lawler’s concession do not reflect the purpose and intent of sections 442 and 443. Those sections are auxiliary to sections 451 (Disclosure and Participation by Councillors or members of a Council Committee in Meetings) and section 456 (Disclosure by Adviser at Meetings of Council or Committee). When read with that connection in mind, the person first mentioned in section 442(1) is always the

Councillor, Council Committee member or adviser whose conduct is in question. If that be so the associated person referred to in section 443 never becomes the first person referred to in section 442(1) for the purposes of the definition. Thus there can be no “recursive” operation carrying the application of the definition of pecuniary interest beyond the person referred to in the definition as “another person” to a third person or persons further removed as suggested by Mr Lawler’s analysis. There is but one remove involved, that is from the Councillor, Council Committee member or adviser in question to one or more of the persons associated with that person as described in section 443(2), but no further.

This solution is not without its problems in the application of the definition but it serves to give guidance to the solution also of those problems.

No difficulty arises where the only person to be considered on the question whether a pecuniary interest existed is the Councillor, Council Committee member or adviser whose conduct is under consideration; but questions can arise where such persons are alleged to have a derivative pecuniary interest under sections 443(1)(b) and 443(2) because of an associated person’s pecuniary interest in the matter.

As Mr Lawler submitted, section 442 defines what a pecuniary interest is for all cases but it does so by describing it in qualitative terms.

Using the reasonable person model to provide an objective approach and taking the present case as the example, the question being posed for application of the definition is whether the reasonable likelihood or expectation of appreciable financial gain or loss to Michael Fern is to be considered from the point of view of a reasonable person in the position of Councillor Fern or a reasonable person in the position of Michael Fern. Mr Relf’s answer would be Councillor Fern but on Mr Lawler’s analysis the answer would be Michael Fern.

In the Tribunal’s opinion, Mr Lawler’s answer on this aspect of the argument must be right because, in terms of the section, it is “financial gain or loss to the person (Councillor Fern) or another person (Michael Fern)” that

has to be considered and, as no pecuniary interest is alleged against Councillor Fern, the test has to be applied to the position of Michael Fern: but then, it has to be applied in relation to the matter that was before the Council for decision and it seems to the Tribunal that this is at the root of the problem which is being addressed by the arguments of Mr Relf and Mr Lawler.

Sub-section (2) of section 442 in laying down the further test of remoteness or insignificance of the pecuniary interest, provides that this is to be measured as a matter of degree by considering whether or not the interest “could reasonably be regarded as likely to influence any decision the person might make in relation to the matter.” The question is, which “person” is being referred to by the words “any decision the person might make in relation to the matter.”

As the pecuniary interest provisions are concerned with controlling the conduct of persons in relation to decisions to be made on matters at meetings, there is force in the view that the “person” being referred to must be the Councillor, Council Committee member or adviser charged with the responsibility of making decisions, not the person associated with them under section 443(2) who has no decision making role. If that view was right, it would lend support to Mr Relf’s argument that it is from the viewpoint of Councillor Fern or, on the objective approach, a reasonable person in the position of Councillor Fern that the existence of a reasonable likelihood or expectation of appreciable financial gain or loss to Michael Fern is to be judged; but in the Tribunal’s opinion that view is not right.

In the Tribunal’s opinion, the solution is to be found in regarding section 442 as laying down in general terms criteria by which to measure in an objective way, in whatever factual situation is being considered, the existence or non-existence of a pecuniary interest in the particular matter before the Council for decision. When the interest under consideration is not that of, say, the Councillor in question but, say, a relative of the Councillor, the standard laid down by section 442(2) is to be applied hypothetically to the relative. Taking the present case, the hypothetical question to be determined objectively by the Tribunal is whether, upon the basis that Michael Fern is

found to have had a financial interest in the question whether the moratorium should be lifted or not, that interest was so remote or insignificant that, if a reasonable person in his position was faced with having to decide the question, it could not reasonably be regarded as likely to influence any decision that person might make.

The Tribunal will apply the foregoing principles in determining the present complaint.

THE TRIBUNAL'S FINDINGS AND REASONS

The Tribunal is required by section 483 to make its findings on the balance of probabilities. That standard of proof does not exclude the need for evidence having sufficient cogency to match the seriousness of an issue on which a finding is to be made. In the Tribunal's view, the evidence has established in accordance with that standard that Michael Fern had a pecuniary interest, within the meaning of the Act, in the lifting of the moratorium but the Tribunal has also concluded, on an objective approach to the question, that that interest was so remote that it could not reasonably be regarded as likely to influence any decision a person with Michael Fern's interest might make on that matter. The Tribunal's reasons follow:

The Pecuniary Interest of Michael Fern

On his own evidence it would difficult to find that Michael Fern did not have a reasonable expectation of financial gain if the moratorium was lifted or loss if it remained. The essence of Ivery Fern's business was the earning of commissions as agent on the sale of real estate. The opportunities for a real estate agent to earn commissions were proportional to the prospects of land and property being put out for sale generally in the agent's area of operations. The sale of land with potential for residential development and the subdivision of land in the area into residential lots for sale would be a prime source of business for any real estate agent. The more favourable conditions were for the promotion of such development in the area the better the prospects for a real estate agent to earn commissions. Those conditions would include the policies and manner of exercise of power by regulatory

authorities, the principal ones being which the local council and the relevant government departments. This is all self-evident but is reinforced by the evidence before the Tribunal of the conditions in respect to the earning capacity and prospects of Michael Fern as a real estate agent in the area of Tathra at the relevant time.

The mere existence of the moratorium resolution of the local Council was, according to the evidence of both Michael Fern and Councillor Fern a disincentive to potential developers and investors in land with prospects of residential development. It was a matter of concern to persons like real estate agents as it was considered as liable to have adverse effects upon their business. It was regarded by Michael Fern of sufficient significance in relation to his business that he wished to see it removed.

As well as having a general effect, the moratorium resolution was directed specifically at residential development of the Tathra River Estate lands. The Tribunal is satisfied, on the evidence of Michael Fern's activities on behalf of the owners of the Tathra River Estate, that his efforts were directed to promoting his prospects of obtaining an agency for the sale of that land or individual lots if it could be subdivided, in which case, there would be substantial commissions to be gained. A person who had done what Michael Fern did for the benefit of the owners of the Tathra River Estate would reasonably entertain some expectation of ultimate financial reward for their efforts. However the strength of the chances of that expectation being fulfilled in the circumstances disclosed by the evidence has to be considered.

The Remoteness of Michael Fern's Interest: Section 442(2)

One aspect of the question of remoteness under section 442(2) to be considered is the strength of the chances or possibilities that if the Tathra River Estate came to be subdivided or sold Ivery Fern or Michael Fern would receive an appointment as agent for the sale. On the whole of the evidence one would have to conclude that the strength of the chances or possibilities of that happening was of a very low order.

The high watermark of the favourable evidence consisted of a statement in the statutory declaration by Allan Richards given to the investigators:

Exhibit A, Attachment 9, para. 8. He stated that there was “an understanding” given to Michael Fern by word of mouth by his family and himself that Michael Fern would be “in the driver’s seat” regarding the sale of the lots of the subdivision and that this understanding would have been reached about 1991. Michael Fern himself denied to the investigators that there was any such understanding from Ray Richards or Allan Richards and he also denied having an expectation that he might be in the driver’s seat: Exhibit A, Attachment 11, page 29.6. In the same statutory declaration Allan Richards declares that there was no formal agency agreement between Cuthbertson & Richards and Michael Fern or Ivery Fern concerning the sale of the estate in globo or concerning lots of the subdivision when approved. He stated that there was an understanding that if Michael Fern in his capacity as a real estate agent had a buyer for the Tathra River Estate and the amount offered was acceptable the company would be interested in proceeding and they would then talk about commission. That understanding would have been reached about 1991: Exhibit A: Attachment 9, paras. 7 – 9.

The Tribunal concludes that if there was any understanding about Michael Fern’s being in the driver’s seat it was in very vague and non-committal terms and most probably incapable of giving rise to any kind of binding obligation. Michael Fern certainly did not assert that there was any obligation or promise on the part of the owners of the Tathra River Estate to provide him with an agency if the property came to be subdivided.

The American prospect of the sale of the entire Tathra River Estate which turned up in early 1995 had some bizarre features. According to what Margot Strong told Michael Fern the purpose of the purchase would be to prevent the entire Tathra River Estate Stage 2 from being developed. According to Michael Fern she also told him that price was no object, indicating that there were virtually unlimited funds available because her American connections were associated with the American pop star Michael Jackson: Exhibit AC, para. 15. The offer of \$3.5 million which Michael Fern put to Ray Richards was two and half times the valuation on the property. Councillor Fern told his son he was mad and couldn’t pull it off. Ray Richards

told Michael Fern not to waste his time. Michael Fern was passed by when such negotiations as took place proceeded. Michael Fern was never offered an agency agreement for this matter and nothing came of it. In the Tribunal's view, the incident lends no weight to Michael Fern's possibilities of being able to earn a commission on the sale of the entire Tathra River Estate.

On the evidence, the possibility of Michael Fern's being able to earn a commission as illustrated by the prospective buyer from the ACT in late 1996 was also slight. Although Ivery Fern managed to obtain a prescribed written agency agreement, the agency was limited to that one prospect, a prospect which always appeared to have little chance of success. The price was twice the current valuation of the property and the purchaser's proposal depended upon vendor finance for practically the whole of the purchase price. The nature of the conditions for the proposed contract put forward by the prospective purchaser as described by Michael Fern in his evidence made the prospects of a contract for sale ever emerging highly unlikely. Contracts were never exchanged and Michael Fern's own assessment of his chances of earning a commission in relation to that matter was that they were "very slight."

As mentioned already, Michael Fern told the Tribunal that his hopes of earning a commission in respect of the Tathra River Estate was "pie in the sky" and a "very long, long shot." Of course, these statements by Michael Fern need to be evaluated on the basis that he might have been understating his chances in order to assist his father's case in these proceedings but they were corroborated by independent evidence.

The owner's development consultant, Michael Sadler, by reason of his involvement on behalf of the owners and his contacts with the Council and Michael Fern was placed in a good position to assess Michael Fern's prospects of obtaining an agency in respect of the sale or development of the Tathra River Estate. Michael Sadler told the investigators that while he appreciated that Michael Fern was seeking to develop a good relationship that might lead to something the Richards had made no commitment on the subject of the appointment of selling agents and it was his understanding that

Ray Richards involved the Ferns in the matter simply to gauge another area of “market intelligence” with no other involvement contemplated: Exhibit A, Attachment 6, page 11.4, .6. He described Michael Fern’s position as being “our eyes and ears on the ground” but with no official charter or selling agreement or formal instruction: Exhibit A, Attachment 6, pages 10.10 – 11.1.

Mr Sadler described to the investigators the struggle that he and the owners were having in the period here in question to have the land rezoned and a residential subdivision advanced. He spoke of more and more reports being called for by the authorities and meetings with about 21 different agencies. There was evidence that the owners were hoping to achieve some 500 lots but that local opposition might reduce the possibilities to some 200 lots. He told the investigators that, although Mr Richards was quite happy to use the “Fern operation” because it was “Johnny on the spot within Tathra”, “I think you will find that he will say well, is this agency the right one for me, do I need a Hooker or do I need a First National, do I need a bigger agency rather than ... just a local agency within a small set up like Tathra, to sell a significant project, can you sell 2 – 3 – 400 blocks out of a single agency at a beachfront? Do you need a Canberra franchise or a Sydney franchise to sell it?”: Exhibit A, Attachment 6, page 19.8.

These were prophetic words. Councillor Fern independently shared the prophecy. On the question of Michael Fern’s chances of being appointed as the agent for the Tathra River Estate it was put to Councillor Fern that the agent who had put in the most work on behalf of the developers was the agent that was most likely to be appointed. The answer was as follows:

“No, no. My attitude to this thing is that if I were tabling, or Cuthbertson & Richards, or the owners of the lands, or whoever owned the land, and I had a property like that to top up and sell, I wouldn’t be looking to a little unrelated agency in a back town to promote and give an exclusive agency to. It would just be beyond my conception that that would happen because that would be foolhardy of the owner to waste the potential of the promotion of probably the best land in the country development-wise. Nice aspect. Water all around it. It has everything. Why would you give it to a little tin pot agency?”: T101/2 – 19

Mr Fern explained that it was normal practice to give an exclusive agency to a particular agent or big agency with the capability to promote the

development venture, the agent appointed being rewarded for that by receiving an exclusive agency: T101/28. Councillor Fern went on to say that whilst he agreed that in most circumstances if an agent had put in time and money they would have a reasonable expectation of being rewarded for their efforts but, he said, there were circumstances that were just too big, "As far as I'm concerned, that agency (referring to his former agency and Ivery Fern) had Buckley's hope of ever getting an exclusive agency on that developed property. It is just ridiculous to think that we could have.": T101/37 – 51.

In 1997 the owners of the Tathra River Estate appear to have given up hope of themselves being able to proceed with the proposed Stage 2 development of the Tathra River Estate because they put the entire estate up for auction. Mr Allan Richards invited Michael Fern to tender for appointment as agent to conduct the sale which he did on 8 April 1997 in the name of Ivery Fern Pty Limited: Exhibit AF. The tender was unsuccessful. The agency was awarded to L J Hooker because the owners considered that Ivery Fern was just too small: Exhibit A, Attachment 9, para. 12. Hookers auctioned the property on 3 July 1997. According to the evidence the property was sold for \$780,000. Councillor Fern said that he was not surprised that Ivery Fern was not appointed agent, he said, "I always thought that they would go with a large Estate Agency. They went with Hooker." The prophecy fulfilled? (See Exhibit AB, para. 27; Exhibit X, para. 41)

Did the Existence of the Moratorium Affect Michael Fern's Financial Prospects

Whilst the limited nature of the relationship between Michael Fern and the owners of the Tathra River Estate and the low level of his chances of obtaining an agency are relevant considerations on the question of remoteness, on the evidence in the present case there are, from an objective stand point, even stronger reasons for concluding that any decision on the question of whether the moratorium should be lifted or remain in place would be unlikely to have been influenced by such chances of financial gain or loss as Michael Fern may have had.

It is to be borne in mind that the question here is not only whether Michael Fern had prospects of financial gain or loss but also whether the removal or retention of the moratorium would be likely to affect those prospects because it is implicit in section 442(1) that a person will have a pecuniary interest in a matter before the Council only if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the person flowing from the Council's decision on the matter. What is contemplated is a causal relationship between the possible outcomes of the question before the Council and the present or future financial welfare or prospects of the person in question.

In the present case there is persuasive evidence that the lifting or retention of the moratorium would, more probably than not, have made little or no difference to Michael Fern's prospects of financial gain or loss in his business as a real estate agent. This was because there were overriding conditions at Tathra which operated to govern the future prospects for residential development in the town and the nearby Tathra River Estate and the prospects of a real estate agent earning commissions therefrom irrespective of the existence of the moratorium resolution. For the reasons which follow it appears to the Tribunal that a decision in favour of removing it or retaining it would have been of little significance at any relevant time to Michael Fern's financial prospects as a real estate agent in the area.

When elected to the Council and up to the time of making his statement of evidence in February 1998, Councillor Fern saw fit to challenge the integrity of the Council's officers and the validity of their reports recommending a moratorium on additional residential development at Tathra or the Tathra River Estate on the ground of limited capacity and inadequacies in the existing sewerage services. He appears to have radically modified, if not withdrawn, that criticism after having read on 3 February 1998 the Council's Environmental Impact Statement for the Tathra Sewerage Treatment Plant and other reports on that subject in the Council's business papers: Exhibit X, paras. 44 – 46.

The Environmental Impact Statement is not before the Tribunal but the solicitor for Councillor Fern did not seek to cross-examine any of the Council officers or other witnesses who provided information to the Department's investigators and the Tribunal on the subject. The Tribunal prefers to act upon the information which they have given.

The Engineering Services report of 23 May 1995 (Exhibit A, Attachment 21) has already been mentioned. A further Engineering Services report dealing with Tathra's existing sewerage system was made to the Council on 12 December 1995. The section on Tathra commenced by stating that the existing sewerage system was significantly overloaded during the summer peak tourist season and that the system discharges treated effluent to an exfiltration pond adjacent to the Treatment Plant from which the treated effluent percolates through the sands and enters the ground water system. It refers to studies which had been carried out on the augmentation of the system. In regard to suggestions that the Tathra golf course should be used for reuse of treated effluent, concern was expressed about the potential damage to the adjacent wetland areas. The report, after referring to studies for the upgrading of the sewerage treatment plant works and the cost thereof mentioned the Council's moratorium as a "moratorium on further development at Tathra pending clarification of the ability of Council to satisfactorily treat and dispose of all additional sewerage loadings created by future developments." It went on to say, "At this time there is no firm evidence that Council does have the capacity to treat any future development ...". The report concluded with a recommendation that the existing moratorium remain in place until further clarification that there is capacity to satisfactorily reuse additional effluent above the flows current experienced." (See Attachment to Exhibit V) The relevance of this report is that though it favours retention of the moratorium it is the state of continuing unresolved deficiency in the Tathra sewerage system which was affecting, and until rectified, would continue to affect the prospects of further residential development, regardless of whether the moratorium was in place or not.

In relation to the Tathra River Estate there were numerous other obstacles to be dealt with and overcome before subdivision and residential development of that land would be likely. The witnesses refer to issues concerning interference with the visual amenity of the area, environmental considerations including the protection of flora and fauna and wetlands, traffic, engineering, water supply and garbage disposal problems together with interference with archaeological features discovered in the area: See Mr Wearne's interview: Exhibit A, Attachment 7, page 7.3; Mr Sadler's interview: Exhibit A, Attachment 6, pages 18 – 19. Mr Wearne suggested that the resolution of these issues were within reach given sufficient time but no time frame could be put on it because the State Minister for Planning had remarked prior to the March 1995 election that the Tathra River Estate was one of a number of sites in New South Wales that would not be further developed and that the Minister for Environment also stated that the Tathra River Estate was one of 19 sites that would not be allowed to proceed: Exhibit A, Attachment 7, page 7.

As to the possibility of rezoning the rural land in the Tathra River Estate representations as to the desirability for the future of Tathra to permit such rezoning were made by officers of the Council to the Minister in March 1996. The Minister responded on 12 April 1996 that he would need to be convinced that the environmental constraints of the site could be overcome without any adverse environmental impact and that appropriate and binding mechanisms on management of the development would be met. He declined to make any commitment to further consider any rezoning until the Council and his Department provided detailed proposals for upgrading the sewerage system, a reconfiguration of the proposed residential development with consideration of full servicing and visual aspects of the development. The Minister advised the Council: "Whatever checks and undertakings are needed to bind any future development to overcome identified environmental constraints should be addressed": Exhibit W (part).

An additional obstacle to further residential development of the Tathra River Estate lands was the existing body of public objectors including the

militant group from the Stage 1 development about which Michael Fern gave evidence.

A number of witnesses whose judgment on the matter commands respect because they were well placed to express an opinion did not consider that the existence of the moratorium had any effect, or any significant effect, on the prospects of residential development at Tathra.

Mr Wearne, the Council's Senior Subdivision Engineer, did not think that the lifting of the moratorium changed anything for the developers of the Tathra River Estate because the continuing incapacity of the sewerage treatment plant placed a "clear constraint" on any such development: Exhibit A, Attachment 7, page 5.5.

When interviewed on 4 December 1996, Mr Barry, the Council's Manager for Strategic Planning, told the investigators that, in respect of the moratorium being lifted, if all the areas that were currently zoned urban were to be developed tomorrow there would be no way that the sewerage treatment plant could cover them and that was the dilemma that was facing the Council. He said that in his view a prudent person probably wouldn't attach much increase in value to the lifting of the moratorium with respect to the Tathra River Estate: Exhibit A, Attachment 8, pages 4 – 5.

Mr Sadler told the investigators on 5 December 1996, in regard to the lifting of the moratorium, "Nothing's changed, the greatest impediment during the whole of the process of my client's ownership of the Tathra River Estate has been effluent disposal so whether we have a minute on Council's books prohibiting development specifically within the Tathra River Estate we were never able to develop anyway, albeit that we had land which is zoned appropriately for residential purposes": Exhibit A, Attachment 6, page 5.3

Mr Sadler gave a further reason for the proposed Stage 2 development of the Tathra River Estate being at a standstill at the relevant time. He said as follows:

"The authorities have, on more than one occasion and I say, the planning authorities, the Bega Valley Shire Council have said that we are within our rights to lodge an application for urban development within the appropriately zoned land at Tathra River Estate, however, in an agreed position with Council my client has tried to take a holistic view of the

whole of the estate where part of it is still zoned for rural purposes to examine those areas which can be appropriately zoned for residential development for the whole estate.

So rather than piecemeal development and some band aid solutions to effluent disposal we have taken a decision not to develop anything and try and resolve a situation of effluent disposal. That resolution requires either partly augmentation of the existing sewerage treatment plant and additional effluent disposal area for the treated effluent or reuse of the treated effluent. Neither of those things have occurred and that's currently what Council is investigating at the moment.

We know that the plant can be upsized to take additional effluent, the existing Tathra Sewerage Treatment Plant can be upsized. And that would at the developer's expense as is normal. The second phase is then we generate this additional effluent. We have to dispose of that effluent and that, as we understand it, is the subject of the EIS at the moment which is going to propose additional reuse areas be made available either on the Tathra golf course or partly on our own parts of our own property on the Tathra River Estate."

The investigator then asked Mr Sadler whether the situation changed for the owner/developer with the lifting of the moratorium. Mr Sadler replied, "No. Not one dot.": Exhibit A, Attachment 6, page 5.4 – 6.4

As to whether Michael Fern had any prospects of a sales agency on the Tathra River Estate development, Mr Sadler said that because of having to wait till the sewerage problems could be solved, "we have never had anything to do on a positive sales basis that anyone could achieve a pecuniary interest out of": Exhibit A, Attachment 6, page 19.5.

Mr Sadler also described the moratorium as "A furphy", adding that its removal had "never given us anything because we've never been able to get on and develop.": Exhibit A, Attachment 6, page 9.5. Mr Sadler also said to the investigators, "We don't really care about the moratorium because the time frames mentioned within the motions were never going to restrict or influence decisions about the Tathra River Estate. The Tathra River Estate is bigger than the issues raised in those motions relating to effluent disposal." He added, "Perhaps if we had been involved we would have said well we don't care whether Tathra River Estate is taken out (of the resolution) just change the motion with respect to Tathra.": Exhibit A, Attachment 6, page 13.

Mr Allan Richards, speaking for the owners of the Tathra River Estate, referred to the lifting of the moratorium in April 1996. He said, "It is obvious that the lifting of the moratorium was a benefit but in no way did it trigger any great gains. Around that time there were at least six other reports for the development being investigated, investigated or completed and my conclusions were that until these were all finalised and pulled together into one document and cleared through State and Local Government then the estate was basically in limbo. The financial "carrot" in relation to the Tathra River Estate is in its subdivisional potential. The lifting of the moratorium in my eyes did little to hasten that opportunity.": Exhibit A, Attachment 9, para. 6.

In his statement of evidence Mr Barry mentioned another factor affecting the prospects of further residential development at Tathra at the relevant time, a factor which had also been referred to in the evidence of both Councillor Fern and Michael Fern. Mr Barry had been asked his opinion as to the impacts of the moratorium on Tathra and Tathra River Estate areas had the moratorium not been revoked by the Council. He said, "With hindsight, I say that the impact of the moratorium, had it remained in force from August 1995 to the present, would have been minor given the continued depressed economic situation leading in turn to relatively low demand for housing blocks in the area.": Exhibit O, para. 9.

Michael Fern was asked to consider whether the existence of the moratorium was an impediment to the development or redevelopment for the purposes of flats or blocks of land zoned for medium-density housing within the town of Tathra. He gave reasons to suggest that the prospect of such development was governed by particular considerations of supply and demand for that kind of accommodation in Tathra, concluding by saying, "Nobody in their right mind would build units in Tathra, so it didn't affect us at all, the moratorium." He said that irrespective of the existence of the moratorium, there had been a complete loss of demand for development by way of flats in the relevant period, "Absolutely no demand at all. Developers

can come into that town now and buy a block of units cheaper than they can buy and build them.”: T198/7 – 43.

CONCLUSION

Having regard to the provisions of section 442(2) the Tribunal has come to the conclusion on the weight of the evidence that at the relevant time Michael Christopher Fern did not have a pecuniary interest within the meaning of the Act in the matter of lifting the moratorium that had been imposed by the resolution of the Council on 18 August 1995. This was because, although the evidence shows that he did have a general financial interest in seeing the moratorium removed, his actual prospects of earning a commission or other remuneration as a real estate agent in relation to the lands and properties that were affected by the resolution were so remote that they could not reasonably be regarded as likely to influence the decision a person might make in relation to the matter.

The reasons why his prospects were so remote were that, firstly, his chances as a real estate agent of financial gain in relation to the affected lands and properties were only slight and, secondly, such as they were, it was most unlikely that they would be enhanced by the removal or diminished by the retention of the moratorium.

As the complaint against Councillor Fern depended entirely upon his son Michael having had the requisite pecuniary interest, it follows that the complaint against Councillor Fern has not been proved and must be dismissed.

OTHER MATTERS

1. Mr Relf’s principal argument in defence of Councillor Fern was directed to the validity of the moratorium resolution itself. He approached the resolution from several viewpoints and advanced a number of different reasons for contending that it was null and void. His end purpose was to argue that because it was null and void it could not constitute “a matter” before the Council in respect of which a person could have a pecuniary interest.

Mr Relf's main point was that the resolution placed an unlawful fetter on the Council's duty and power to decide every development application on its merits. How this contention could stand with the presence of paragraph B of the resolution ("That no other development requiring sewerage is to be permitted unless by express resolution of Council") escapes the Tribunal. However, assuming that Mr Relf was right that the resolution for a moratorium was null and void, a point that is unnecessary for the Tribunal to decide, it does not follow that, for that reason, a motion to remove it or retain could not be a "matter with which the Council is concerned" within the meaning of section 451 of the Act.

From the factual point of view the resolution was in existence. It had been formally passed by a previous Council, it had been well publicised in the area, its existence was considered by some members of the community to be detrimental to Tathra's welfare, it had excited local debate and attracted strong objection from some quarters who had lobbied Councillor Fern when he was elected, it was regarded by Councillor Fern with anathema and members of the new Council were divided on the merits of retaining it.

As Mr Lawler contended, "matter" is a word of wide import. The Tribunal considers that in the present context the word should not be treated as a technical word as Mr Relf would have it but it should be construed liberally so as generally to cover whatever a Council takes to be its business and on which it seeks a decision by its members. On that basis, if it had been necessary to decide the matter, the Tribunal would have held that Councillor Fern's motions and the defeated rescission motion in question here were all "matters" as to which pecuniary interest questions could arise under the Act.

2. Councillor Fern had admitted in the course of his evidence that he expected that the lifting of the moratorium would be of benefit to his son's real estate agency business but he strongly emphasised that that was not his purpose, that his purpose was to benefit the entire

community, that any benefit to his son's business would be the same for all such businesses and would be only an incidental result of his seeking to benefit the Tathra community generally: T100/47 – 56; T104/38 – T105/7; T106/11. Mr Relf sought to argue that in the light of Councillor Fern's high motives, good intentions and belief that he was acting in the best interests of Tathra in pursuing the removal of the moratorium, the Tribunal should not find that Councillor Fern had any pecuniary interest, either on his own behalf or on behalf of his son Michael, in the action he took at the Council meetings. In this connection, Mr Relf also relied upon the fact that, having been elected as a Councillor, Councillor Fern had become obliged to act in the best interests of his electors and the Council. An allied submission by Mr Relf was that the pecuniary interest provisions of the Act could apply only if the sole reason for Councillor Fern's actions was that his son Michael had a pecuniary interest in the matter.

It is well established in the present area of the law, and the Tribunal has had cause to emphasise on previous occasions, that a Councillor's honesty of purpose, worthy motives, good intentions, concepts of public duty, or concern for the public welfare will not excuse the Councillor from complying with the requirements of section 451 if the Councillor, or some associate of the Councillor referred to in the Act, has a pecuniary interest in the matter. It is the duty of a Councillor to obey the law, the requirements of section 451 are clear and are mandatory, they must be observed, not for their own sake but in the public interest in the integrity of local government. Mr Relf's submissions on this aspect of the matter were wide of the mark.

3. Mr Relf, in his submissions, sought to rely on the provisions of section 443(3)(a) and section 457 as exonerating Councillor Fern from compliance with section 451 even if his son Michael Fern was found to have had a pecuniary interest in the matters in question. These two provisions are different and would require separate consideration if it were necessary to decide whether, on the facts of the present case,

they would apply to Councillor Fern. As the differences may be important to take into account where both sections arise in the same case, the Tribunal should refer to the submissions on the matter made by the parties' legal representatives on the matter.

Section 443(3)(a) provides that a person is not taken to have a pecuniary interest in a matter as referred to in subsection (2) (which describes which persons are "associated" persons) if the person is unaware of the relevant pecuniary interest of the associated person. Mr Relf's submissions suggested that this provision called for a subjective consideration of the facts so that, if the person referred to, knowing all the facts which would constitute a pecuniary interest in the associated person, nevertheless believed or was of the opinion that the associated person did not have a pecuniary interest in the matter, he must be found to have been "unaware" of that pecuniary interest and therefore, be found not to have a pecuniary interest in the matter. Mr Relf's contention as recorded in Exhibit N, para. 8 was as follows:

"At the time of the meetings in question, Councillor Fern made an objective judgment that his son had no prospect at all of ever getting a listing for sale of the Tathra River Estate property and should, therefore, be found, within the meaning of section 443(3)(a), to have been unaware of his son's pecuniary interest if, contrary to Councillor Fern's judgment, it is found that his son had any such prospects, or his son subjectively believed that he had such prospects."

In support of this contention, Mr Relf relied on evidence by Councillor Fern that he had made his own assessment of his son's chances of obtaining an appointment as agent for sale in respect of the Tathra River Estate and had concluded, knowing that he would be taken to have a pecuniary interest in the matter of the moratorium if his son had an interest in that matter, that Michael's chances were virtually non-existent.

Counsel for the Director-General submitted that "The objective nature of the definition of "pecuniary interest" means that Councillor Fern can only succeed on this basis if he can show that he was unaware of the

relevant facts giving rise to the reasonable expectation. It is submitted that the evidence that Councillor Fern was aware of the salient facts is overwhelming.”

On the question of principle, the Tribunal agrees with the submission of Counsel for the Director-General. Whilst under section 443(3)(a) Councillor Fern’s own state of knowledge would be in question and, in that sense, the inquiry would be subjective, the knowledge to be considered would be his knowledge of the facts relevant to the existence or non-existence of a pecuniary interest in Michael Fern. Councillor Fern’s opinions or beliefs as to whether, on the basis of the facts known to him, a pecuniary interest within the meaning of the Act had been established would be irrelevant because, at that point, it is a matter for objective judgment.

Section 457 of the Act provides that a person does not breach section 451 or 456 if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.

In the course of his evidence Councillor Fern told the Tribunal that before moving his motion at the Council meeting of 14 November 1995 to have the moratorium removed, he made inquiries of Michael Fern and ascertained that he and Ivery Fern Pty Limited had no prescribed written agreement as required by the legislation governing real estate agents from the owners of the Tathra River Estate property appointing his son or Ivery Fern agent in connection with the sale or development of that property. He said that the purpose of that inquiry was that he firmly believed that without a prescribed written agreement from the owner of the property by which a real estate agent became entitled to commission or other remuneration, the agent had “nothing”, that is to say, no prospects of financial gain that would constitute a pecuniary interest in a matter under the provisions of the Act. Councillor Fern said that, on the basis of his inquiries of Michael Fern, he believed that

he was not prevented from pursuing endeavours to remove the moratorium because his son Michael had no pecuniary interest in the matter. Mr Relf contended that this state of mind on the part of Councillor Fern would be sufficient to constitute a defence under section 457 of the Act.

There is a clear difference between subsection (3)(a) of section 443 and section 457 in that a lack of knowledge is sufficient to find in favour of the person under the former but not under the latter. Under section 457 it is necessary to find both that the person did not know and that the person could not reasonably be expected to have known. However, in the opinion of the Tribunal, one matter common to both sections is that the knowledge in question is knowledge of the facts upon which the existence of a pecuniary interest in the matter depends. This was the conclusion of this Tribunal in the **Roberts'** case (mentioned above) when the Tribunal held, "The defence must be based on ignorance of the facts that constituted the pecuniary interest not on a mistaken view of the law or the legal effect of those facts." Counsel for the Director-General submitted that this was a correct view but Mr Relf contended that the Tribunal was in error and that a conclusion honestly arrived at such as that reached by Councillor Fern as to the existence of a pecuniary interest in his son Michael was sufficient to make out the defence provided by section 457.

The Tribunal adheres to the conclusion expressed in the **Roberts'** case. As to the facts in the present case, if it had been necessary to decide the point, the Tribunal would have held that a defence under section 457 was not made out.

Having regard to the conclusions reached by the Tribunal in determining this complaint, the remaining submissions of the parties do not require attention here.

Pursuant to section 484 of the Act a copy of this Statement of Decision will be furnished to Councillor Fern, the Director-General and the Independent Commission Against Corruption. The Tribunal will leave it to the

Independent Commission Against Corruption to provide a copy of its decision to the person who made the initial complaint.

The Tribunal will thereafter furnish a copy to the Bega Valley Shire Council and such other persons as the Tribunal thinks fit.

Dated: 13 March 1998



K J HOLLAND Q.C.
Pecuniary Interest Tribunal