

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 1/1994

DIRECTOR GENERAL
DEPARTMENT OF LOCAL GOVERNMENT
& CO-OPERATIVES

RE: COUNCILLOR MACKENZIE
PORT STEPHENS COUNCIL

STATEMENT OF DECISION

Dated: 8 May 1995

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RE: COUNCILLOR MACKENZIE, PORT
STEPHENS COUNCIL

STATEMENT OF DECISION

INTRODUCTION

As this is the first decision of this Tribunal to be published it is appropriate to begin with a brief outline of the Tribunal's functions.

The Local Government Pecuniary Interest is constituted under Chapter 14, Part 4, of the Local Government Act 1993 to hold hearings into and decide allegations of contraventions of Part 2 of that Chapter (which deals with duties of disclosure of pecuniary interests) and to perform such other functions as are conferred or imposed on it by the Act (section 489).

The relevant provisions of the Local Government Act 1993 (the "new Act") commenced on 1 July 1993 on which date the Local Government Act 1919 (the "old Act") was repealed. A transitional regulation (Local Government (Savings and Transitional) Regulation 1993) applied Part 3 (Complaints Concerning Non-Disclosure) of Chapter 14 of the new Act to complaints that a person had or may have contravened corresponding disclosure of interests provisions of the old Act (Regulation 29). The regulation also commenced on 1 July 1993.

Under the new Act complaints of contraventions are dealt with in the first instance by the Director-General of the Department of Local Government and Co-operatives. There is a procedure laid down: see Chapter 14, Part 3,

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Division 1 (Making An Investigation Of Complaints). Complaints do not come under the jurisdiction of the Tribunal before this procedure has been followed.

The Tribunal's functions are initiated by either a report presented to the Tribunal by the Director-General of an investigation into a complaint carried out by the Director-General or a report received by the Director-General from another authority under section 467 of the Act and presented to the Tribunal by the Director-General pursuant to section 468.

In either case the Tribunal, after considering the report, may decide to conduct a hearing into the complaint (section 469) or it may decide, for reasons to be stated in writing, not to conduct a hearing (section 470).

In the case of a complaint against a Councillor, the Tribunal may, if it finds the complaint proved, counsel or reprimand the Councillor, suspend the Councillor from civic office for a period not exceeding two months, or disqualify the Councillor from holding civic office for a period not exceeding five years (section 482(1)).

In the present case, the Tribunal received a report of an investigation by the Director-General into a complaint against Councillor Bruce MacKenzie of Port Stephens Council. The complaint alleged contraventions by Councillor MacKenzie of disclosure provisions of the old Act. The complaint procedure and investigation was conducted under the new Act in pursuance of transitional Regulation 29.

After considering the report, the Tribunal, constituted by myself, decided to conduct a hearing into the complaint.

As all but one of the witnesses resided in the Port Stephens district, the hearing was conducted at Raymond Terrace Courthouse on 28, 29 and 30 March 1995. It was a public hearing. The Director-General, as the Complainant, was represented by Ms Gay Murrell of counsel, instructed by Ms Louise Barber, a Legal Officer of the Department. Councillor MacKenzie appeared in person having expressly declined to exercise his right to be represented by a legal practitioner (section 473). As Councillor MacKenzie was unrepresented, Ms Murrell gave assistance to the Tribunal as needed to

ensure that Councillor MacKenzie understood the proceedings and was furnished with copies of witness statements and other documentary material presented to the Tribunal. She also made submissions on certain matters of law that might have been relevant to his rights and interests as respondent to the complaint. At the conclusion of the hearing the Tribunal reserved its decision. The Act requires the Tribunal to provide a written statement of a decision made in proceedings before it to the person against whom the proceedings were taken and, in this case, to the Director-General. The statement of decision must set out the findings on material questions of fact and refer to any evidence or other material on which the findings were based and give reasons for the decision (section 484(1), (2)).

The nature of the complaint and a short history of the course it has taken follows.

HISTORY OF THE COMPLAINT

The relevant provisions of the old Act are contained in Division 9A (Disclosure of Interests) of Part 4 which came into force on 26 September 1987. I will refer to the relevant provisions only as they affected Councillors.

Section 46B required a person who was, on 26 September 1987, a member of a Council, within three months of that date, to lodge with the Clerk of the Council a primary return in a prescribed form disclosing pecuniary interests and other matters. This section went on to require a person who was, on 30 June in any year, a member of a Council, within three months after that date, to lodge with the Clerk of the Council an ordinary return. The form of the return was prescribed in a schedule to the old Act.

By section 46F, the Clerk of a Council was required to compile and maintain a register to be called, in the case of Councillors, the "Register of Disclosures by Council Members". The same section provided that a register kept in accordance with the section was to be available at the Council's office at all reasonable hours for inspection by any elector.

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Section 46G of the Act provided that a person who failed to comply with section 46B was guilty of an offence under the Act and, if a Councillor, was disqualified for civic office for a period of seven years unless the court by which the person was convicted saw fit in the circumstances to reduce the period of disqualification to a shorter period, or to declare that the person should not by virtue of the conviction be disqualified for a civic office.

The Port Stephens Council compiled and maintained the Register of Councillors' returns as required by section 46F of the Act. An undated Primary return to 30 September 1987 signed by Councillor MacKenzie was filed in the register. Thereafter, Ordinary returns signed by Councillor MacKenzie for the period 26 September 1987 to 30 June 1988 (undated), 1 July 1988 to 30 June 1989 (dated 22 August 1989) and 1 July 1989 to 30 June 1990 (dated 14 September 1990) were filed in the register.

In March 1993 complaints were made by persons, including a ratepayer, who had inspected the register that the register contained no returns by Councillor MacKenzie for the two periods 1 July 1990 to 30 June 1991 (due 30 September 1991) and 1 July 1991 to 30 June 1992 (due 30 September 1992).

Communications concerning these complaints took place between representatives of the Department of Local Government and the Council. The Council sought and obtained legal advice.

In June 1993 the then Shire President, Mr John Richard Bartlett, signed an order pursuant to section 588(1) of the old Act that proceedings be taken against Councillor MacKenzie, the offence alleged being that he failed to lodge an Ordinary return for the period ending 30 June 1992 within three months after that date contrary to section 46B of the Act.

Proceedings were afterwards commenced against Councillor MacKenzie and three other Councillors in the Raymond Terrace Local Court. The case against Councillor MacKenzie was listed for mention in that court on 5 July 1993 when a plea of "not guilty" was entered and the hearing set down for 6 October 1993.

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At a meeting of the Port Stephens Council on 27 July 1993 a resolution was passed by the Council to withdraw its action against all four Councillors and forward the matter of the alleged breaches to the Director-General for determination. On 2 August 1993 the Director-General was advised of this resolution.

After writing to Councillor MacKenzie on 21 March 1994 inviting him to show cause why an investigation should not be commenced and receiving no response, a telephone call to him on 27 April 1994 and an undated letter from him on 4 May 1994, the Director-General, on 7 June 1994 decided to make a complaint under section 460(1) of the new Act that Councillor MacKenzie may have contravened the disclosure provisions of the old Act. Section 460(1) is contained in Division 1 of Part 3 of the new Act and provides that a person may make a complaint to the Director-General or the Director-General may make a complaint that a person has or may have contravened the Act.

By section 462(1) of the new Act the Director-General may investigate a complaint, in which case the Director-General is required to notify the Pecuniary Interest Tribunal of his decision to investigate and by section 468(1) the Director-General must present a report to the Tribunal of an investigation into a complaint carried out by the Director-General.

On 7 June 1994 the Director-General decided that an investigation be commenced, the terms of reference being:

“The conduct of Councillor B MacKenzie in respect of the requirements of the Local Government Act 1919, Disclosure of Interest, Section 46B, Returns.”

On 8 June 1994 the Director-General notified Councillor MacKenzie of his decision to conduct a formal investigation. On 17 June 1994 the Director-General notified the Pecuniary Interest Tribunal of his decision to investigate the matter.

On 5 December 1994 this Tribunal received from the Director-General his report, dated 29 November 1994, of his investigation.

Having decided to conduct a hearing into the complaint, the Tribunal on 21 December 1994 despatched to Councillor MacKenzie by prepaid Security Post an explanatory letter together with a Notice of Decision to conduct a hearing dated 21 December 1994. These documents were returned to the Tribunal through the post in the original envelope marked "Unclaimed 5/1/95". On 11 January 1995 the documents were marked as reissued by the Tribunal as of that date for personal service.

On 23 January 1995 the Tribunal received a telephone message from Councillor MacKenzie to the effect that he had been served that day with the documents and stating that he wanted to let the Tribunal know that he did not receive the original notice of 21 December 1994.

No further response having been received from Councillor MacKenzie, Notice of the appointment of the hearing of the matter at Raymond Terrace was issued on 20 February 1995 and, as already mentioned, the hearing took place on 28, 29 and 30 March 1995.

None of the foregoing history of the matter is in dispute between the parties.

PARTICULARS AND ISSUES

In the abovementioned Notice of Decision to Conduct a Hearing dated 21 December 1994 and reissued 11 January 1995, particulars were given of the contravention alleged against Councillor MacKenzie as follows:

- (i) failure to comply with section 46B of (the old Act) in that you, being a member of the Port Stephens Council on 30 June 1991, did not, within three (3) months after that date lodge with the Clerk of the Council an Ordinary return as required by that section.
- (ii) failure to comply with section 46B of that Act in that you, being a member of the said Council on 30 June 1992, did not, within three (3) months after that date, lodge with the Clerk of the Council an Ordinary return as required by that section.

The Notice then proceeded to state the issues which appeared to arise in the following terms:

Issues

1. The principal issue appears to be whether you failed to lodge the returns in question or either of them within the periods specified in section 46B.
2. If you failed to do so, incidental issues would appear to be -
 - (a) whether you lodged the returns or either of them but only after the respective period for lodgment had expired; and
 - (b) what is the explanation for your failure to lodge or late lodgement of the returns.

NOTE: You are at liberty to submit that the issues arising out of the complaint are different or that there are other relevant issues not stated above in which case you should specify what those issues are.

At the hearing neither party suggested that the issues were otherwise than as stated above except that Ms Murrell indicated that she would be raising two incidental issues, namely, first, if the returns had not been lodged, what property interests of Councillor MacKenzie ought to have been disclosed by returns for the relevant periods and, in particular, whether there were any new property interests arising in those periods that had not been disclosed in previous returns and, secondly, if there were undisclosed interests, particularly new property interests arising in the periods which ought to have been disclosed, whether the Council in those periods dealt with issues concerning those properties at the time when they had not been disclosed.

Ms Murrell alerted Councillor MacKenzie to the detail of these two issues and furnished him with copies of the statements and documentary evidence relating to them. Councillor MacKenzie raised no objection to the matter proceeding on the basis that these issues would be canvassed in the hearing.

As already mentioned, Ms Murrell raised some matters of law for consideration of the Tribunal on which she made submissions at the outset. It is convenient to deal with them first.

MATTERS OF LAW

1. Sufficiency of Complaint

This question was said to arise because of the provisions of subsection (2) of section 460 of the new Act. As was mentioned earlier, subsection (1) of that section provides that a person may make a complaint to the Director-General or the Director-General may make a complaint. Subsection (2) reads as follows:

(2) A complaint:

- (a) must be in writing; and**
- (b) must identify the complainant and the person against whom the complaint is made; and**
- (c) must give particulars of the grounds of the complaint; and**
- (d) must be verified by statutory declaration; and**
- (e) must be lodged with the Director-General.**

Unlike subsection (1), subsection (2) does not expressly distinguish between complaints made to the Director-General by some other person and complaints made by the Director-General. The question raised is whether, because of this, in order to found a valid investigation of a complaint, the Director-General, if he is the complainant, must comply with the provisions of subsection (2) or, at least, such of them as may be adapted to a complaint by him. It is suggested that only the requirement in (e), that the complaint must be lodged with the Director-General, is incongruous although it would be unusual to require a senior executive officer of the status of the Director-General of a Department to verify by statutory declaration a complaint made by him in the course of his official duties.

The argument for applying subsection (2) to a complaint by the Director-General postulates an intention to require a formal document complying

with the provisions of subsection (2) before a valid investigation of any complaint may be undertaken.

I have already outlined the procedure followed by the Director-General in this case leading to the investigation of Councillor MacKenzie. The documentary record of that procedure is to be found behind tabs 2 and 3 of the set of documents that became Exhibit B at the hearing. Whilst this procedure did not result in a formal document of the kind suggested to be required by subsection (2) and was not verified by the Director-General by statutory declaration, the documents demonstrate that otherwise all the procedural steps envisaged by the legislation were carried out up to and including the presentation of a report of the investigation to the Tribunal.

In my opinion, properly construed, subsection (2) of section 460 has no application to a complaint made by the Director-General under subsection (1) of that section.

It is sufficient to mention four contrary indications contained in the context in which subsection (2) appears. Firstly, clause (c) requires particulars of the grounds of the complaint to be given and the next section, section 461, provides that the Director-General may require the complainant to provide further particulars of the complaint within the time specified by the Director-General. It could not have been intended that the Director-General might require himself to give to himself further particulars of his own complaint. Secondly, by section 463 the Director-General is given the power to decide to take no action concerning a complaint if the Director-General considers that the complaint falls into a number of specified categories which include that the complaint is frivolous, vexatious or not made in good faith or is trivial or does not warrant investigation. Subsection (2) of section 460 is to be seen as an aid to the Director-General in considering complaints made by others. Apart from requiring particularity, the subsection is directed to

establishing the nature and seriousness of a complaint as well as the bona fides of the complainant. It is obvious that none of the categories listed in section 463 could apply to a complaint initiated by the Director-General himself. Thirdly, it is to be expected that a statutory officer in the position of the Director-General would be expected to perform his duties in an honest and truthful manner without the need to establish his bona fides by making a statutory declaration. Fourthly, the fact that clause (e) of subsection (2) requires a complaint to be lodged with the Director-General is sufficient indication in itself that the subsection as a whole was not intended to apply to complaints made by the Director-General.

I confirm the ruling given at the hearing following Ms Murrell's submissions that subsection (2) of section 460 does not apply to complaints made by the Director-General under subsection (1) and that the documents indicating the procedure followed by the Director-General earlier mentioned established the sufficiency of the Director-General's complaint and provided a proper foundation for the investigation which he directed to be undertaken in the present case.

2. Validity and Operation of Regulation 29

To deal with this matter it is necessary to refer to Schedule 7 of the new Act and the precise terms of Regulation 29.

Schedule 7 was given legal effect by section 749 of the new Act. Schedule 7 is headed - **Savings Transitional and Other Provisions Consequent on the Enactment of this Act**. The power to make regulations is contained in clause 2 of the Schedule which reads as follows:

"Regulations - general

- 2. (1) *The Governor may make regulations containing provisions of a savings or transitional nature consequent on the enactment of this Act and the following Acts:***

***Impounding Act 1993;
Local Government (Consequential Provisions) Act
1993;
Roads Act 1993;
Traffic (Parking Regulation Amendment Act 1993***

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to this Act or a later day.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication; or***
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.”***

The only relevant Act listed in subclause (1) above is the Local Government (Consequential Provisions) Act 1993. So far as material, that Act commenced on 1 July 1993, the same date as the commencement of the new Local Government Act 1993 (Government Gazette No. 73, 1 July 1993).

Regulation 29 is contained in Part 9 of the Local Government (Savings and Transitional) Regulation 1993. Part 9 is headed - **Provisions Arising out of Chapter 14 of the new Act**. Under a sub-heading - **Complaints Concerning Contraventions of the Old Act**, Regulation 29 proceeds as follows:

“29. (1) A person may make a complaint to the Director-General, or the Director-General may make a complaint that a person has or may have contravened Division 9A of Part 4 of the old Act.

(2) Part 3 of Chapter 14 of the new Act applies to a complaint made under this clause in the same way as it applies to a complaint made under section 460 of the new Act.”

According to its terms, Regulation 29 purports to allow a complaint of a breach of the old Act to be made after the repeal of the old Act and then to require the complaint to be dealt with in the same way as a complaint made under the new Act would be dealt with. The question raised by Ms Murrell is whether Regulation 29 is within the scope of the power to make regulations conferred by clause 2(1) of Schedule 7 of the new Act.

In my opinion it is within the scope of that power. The power under clause 2(1) is to make, by regulation, provisions of a savings or transitional nature consequent on the enactment of the new Act and the Local Government (Consequential Provisions) Act. Both of these Acts were assented to on 8 June 1993 and were to commence on a day or days appointed by proclamation. So far as material here, both were proclaimed to commence on 1 July 1993. As the Local Government (Consequential Provisions) Act repealed the old Local Government Act, the result was that the old Act ceased to have effect and the new Act began to have effect on 1 July 1993.

A situation that arose consequent upon those events is posed by the question: **“What if, after the new Act replaces the old Act, a person wants to complain about a breach of the old Act?”** Regulation 29 was enacted to provide the answer: the person may make that complaint; but the new Act procedures and legal consequences are to apply to the complaint.

In my opinion that operation of Regulation 29 gives it the character of a provision of a transitional nature within the meaning of clause 2(1) of

Schedule 7. More needs to be said about that later in another context, but first there are other parts of clause 2 to be mentioned.

Counsel's submissions drew attention to the provisions of subclauses (2) and (3) of clause 2 of Schedule 7. Subclause (2) enables a regulatory provision, if the regulation so provides, to take effect from the date of the assent to the new Act or a later day. As the new Act was to commence on a day or days to be proclaimed after the date of assent, subclause (2) contemplated the possibility of a regulation the provisions of which were expressed to have effect from the date of assent to the Act but before the date proclaimed for the Act's commencement.

Subclause (3) picks up on that possibility to provide a qualification, namely, that any such provision that takes effect earlier than the date of its own gazettal is not to operate to the prejudice of rights in existence or to impose liabilities for things done or omitted before that date of gazettal. The result is that, subject to the foregoing qualification, a regulatory provision may, if so expressed, have retrospective effect from the date of gazettal of the regulation back to date of assent to the Act.

Subclause (3) has no application to Regulation 29 because that Regulation is not expressed to take effect before the date of gazettal of the Regulation. The Regulation was expressed to commence on 1 July 1993 which was also the date of its gazettal. Regulation 29 has no effect before that date. It simply enables a complaint to be made after that date of conduct which was a breach of the old Act occurring before that date.

Insofar as Regulation 29 may be considered to have a retrospective operation by applying to pre-new Act conduct procedural mechanisms and possible legal outcomes which are different from those that applied to the conduct in question at the date when it occurred, the question arises

whether the principles of the common law adverse to the retrospective operation of legislation apply.

The principle under consideration is one of construction. It is that, if there is ambiguity, the court leans against the construction which would alter retrospectively rights and liabilities already accrued and attached as the legal consequences of past conduct and events by presuming that the legislature would not have intended to do so. If there is no ambiguity there is no room for the presumption: ***Walton v McBride, Court of Appeal, unreported, 3 October 1989; pp. 12-20.***

In relation to Regulation 29 it is a question of construction of the terms of that Regulation viewed against the background of the old Act and the new Act. Under the old Act the contravention in question was a criminal offence, the criminal standard of proof, that is proof beyond reasonable doubt, applied and, if the offence was proved, the penalty was disqualification from civic office for seven years unless the court saw fit to reduce it to a shorter period or relieve the offender from any disqualification.

Under the new Act, the corresponding contravention is not a criminal offence, the civil standard of proof applies (section 483) and, if the contravention is proved according to that standard, that is, on the balance of probabilities, the Tribunal, as mentioned earlier, has a range of options for dealing with the matter: counselling, reprimand, suspension for up to two months and disqualification from civil office for up to five years.

In my opinion, there is no ambiguity in Regulation 29 itself. It simply says, in effect, that a complaint may be made about conduct occurring before the new Act, i.e., conduct which was breach of the old Act, and, if made, the relevant provisions of the new Act will apply to the complaint.

But there is another question to be considered. That is whether, having regard to the presumption against retrospectivity, the power in clause 2 of Schedule 7 to make transitional provision by regulation should be construed as being limited to the making of such provisions as do not alter retrospectively the accrued rights and liabilities which attached under the old Act to the conduct complained of.

The expression, “**of a savings or transitional nature**”, in clause 2(1) of Schedule 7 to the new Act is imprecise. It is this imprecision that leaves room for argument based on the retrospectivity principle.

The reason for the generality in that expression is obvious. Any number of problems and questions could be postulated as likely to arise in relation to past acts and events under an existing system of legislation after its replacement by a new system introducing such a comprehensive body of reforms as the Local Government Act 1993. The power needed to be general to enable a variety of transitional contingencies and eventualities to be dealt with. Therefore, it should receive a broad construction on the ground that what was needed was no doubt what was intended. That, in my view, is one reason against putting a restricted interpretation on the kind of provisions permissible by regulation under the power in question here.

Another reason is that the provisions of the old Act and the new Act referred to in Regulation 29 are founded on a common purpose, namely, the protection of the public by the imposition of sanctions or disciplinary measures on persons failing to comply with the pecuniary interest disclosure requirements of the legislation. As I have said, it was done under the old Act by disqualification from office, but under the new Act by a range of lesser sanctions including disqualification from civic office but for

a lesser period. Regulation 29 pursues the same purpose of protection of the public in making the legal consequences attaching to a class of conduct occurring under the new Act the same for a similar class of conduct occurring under the old Act.

The new Act takes a different view of what the legal consequences of conduct of that kind ought to be. The purpose of Regulation 29 is to remove the anomaly that would arise if after the new Act came into force complaints about conduct occurring under the old Act continued to attract consequences that, in the reforms effected by the new Act, had been abolished.

But for Regulation 29, section 30(1) of the **Interpretation Act, 1987** would apply to supply to such conduct. That section would preserve the penalty and the liability for prosecution that attached under the old Act notwithstanding its repeal. The conduct would remain a criminal offence and the penalty could be seven years disqualification from civic office. The purpose of protecting the public from such conduct was not altered by Regulation 29. That regulation merely provided that the form of protection would be changed to bring it into uniformity with that provided by the new Act in respect of the same class of conduct.

It has been held that where the purpose of legislation open to be construed as having a retrospective operation on past conduct is the protection of the public, the presumption against that construction does not apply: see **Walton v McBride (supra) pp.15-17**. That case drew attention to the distinction recognised in many cases between **“Legislation which has a retrospective operation and legislation which affixes present and future consequences to past events.”** (Ibid, pp.17-18). The principle against retrospectivity does not apply to the latter.

In my opinion, the power to make regulations dealing with the consequences arising from the repeal of Division 9A of Part 4 of the old Act and the enactment of Chapter 14 of the new Act which is embodied in clause 2(1) of Schedule 7, should not be construed as precluding a regulation the provisions of which operate retrospectively upon persons whose conduct was a contravention of that Division of the old Act. For the reasons outlined, it is my opinion that the presumption against retrospectivity in the interpretation of legislation does not apply so as to prevent the power being exercised to make a regulation of the kind under consideration here. Of course, to be within the power, the provision must still answer the description, “*of a transitional nature*”; but, in my view, this provision does so.

I therefore confirm the ruling which I made at the time of the hearing that Regulation 29 was a valid exercise of the power to make regulations in Schedule 7 of the new Act and operates, according to its terms, to apply Part 3 of Chapter 14 of the new Act to a complaint made to or by the Director-General that a person has or may have contravened the specified provisions of the old Act, in the same way as it applies to a complaint made under s460 of the new Act.

COUNCILLOR MACKENZIE’S RESPONSE TO THE COMPLAINT

It is convenient to refer to the two returns in question here as the return for 1990/1991 (which was due 30 September 1991) and the return for 1991/1992 (which was due 30 September 1992).

It is also convenient to mention at this stage Councillor MacKenzie's general response to the complaint that neither of these returns were in the Register.

The mere absence of the returns from the Register does not prove that they were not lodged, but it calls for an explanation, one possible explanation

being that they were never lodged, another being that they were lodged but never placed within the Register.

Councillor MacKenzie's response when asked to explain has varied from time to time and is different as to each of the returns. Whilst always more than ready to concede that they may both have been lodged out of time, his position at the hearing as to the 1990/1991 return was, in general terms, that he had taken steps which in previous years had resulted in his return being lodged and entered in the Register and, as to the 1991/1992 return, he had personally handed the completed and signed return to the General Manager. He suggested that the return for the first of the two periods could have come into the possession of the General Manager and that the absence of both returns from the Register could be attributed to fault on the part of the General Manager.

One thing was clear. The returns were not on the Register. Councillor MacKenzie's response raised potentially serious questions if, in fact, he had taken appropriate steps to procure lodgement of the returns and their entry in the Register as he claimed. As will be seen, the investigation conducted by the Director-General cast doubts on the acceptability of Councillor MacKenzie's claims. The role of the Tribunal in these circumstances bears consideration.

ROLE OF THE TRIBUNAL

Whilst the Act contemplates that there will be a complainant who is making allegations of a contravention of the legislation, a hearing by the Tribunal to decide whether the allegations are proved and the right in the person complained about to be represented at the hearing and to contest the allegations, I do not consider the role of the Tribunal to be merely that of an adjudicator of issues posed by parties in adversarial litigation. The obligations to disclose pecuniary interests are directed not only to promoting honesty and integrity in the exercise of public duties and responsibilities but

also to promoting public confidence in the conduct of local government affairs.

The Tribunal is given wide powers calculated to assist in the ascertainment of the truth of alleged contraventions, similar to the powers generally conferred on an investigative body. The Tribunal's powers to take action with respect to a contravener are introduced by the words, "The (Tribunal) may, if it finds a complaint ... is proved" (section 482) which is consistent with the Tribunal employing, if necessary, the investigative powers conferred upon it to endeavour to ascertain the truth of the allegations without being confined to a consideration of only such cases as the parties see fit to put forward or such evidence as they see fit to adduce.

It is to be expected that generally it will be sufficient for the Tribunal to leave it to the parties and there will be no need for any active step to be taken by the Tribunal itself in the quest for the truth. In the present case, the Tribunal considered that, in an endeavour to ascertain the facts, it would be necessary for Councillor MacKenzie to attend the hearing with a view to his being available to give testimony and answer questions in the witness box. Accordingly, the Tribunal exercised its powers to issue a summons for his attendance to give evidence.

Summonses for the attendance of other witnesses and the production of documents were issued by the Tribunal on the request of the Director-General.

EVIDENCE BEFORE THE TRIBUNAL

The report to the Tribunal of the Director-General's investigations was accompanied by audiotapes of interviews of a number of persons, including Councillor MacKenzie, which had been conducted by senior investigation officers of the Department, Janette Ryan and Robert Bellamy at various dates in July and September 1994. A list of the tapes is Attachment "X" to the report. As they were part of the report, I listened to these tapes before deciding to conduct a hearing into the matter. At my direction, the tapes were

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later transcribed and checked for accuracy by the interviewers who had made them.

The report was also accompanied by two audiotapes described in Attachment "X" as being tapes of an interview of Councillor MacKenzie conducted by Senior Inspectors Mary Brophy and Alan Hartigan during a Special Investigation of Port Stephens Council on 4 August 1992. Included in the report as Attachment "R" was a transcript of an extract from one of the tape recordings of that interview. In the course of the interview the absence from the Register of pecuniary interest returns by Councillor MacKenzie for 1990/1991 and 1991/1992 was drawn to his attention. His responses will be mentioned later. On the assumption that the only part of these interviews which was relevant to the present complaint was contained in the extract transcribed in Attachment "R", I refrained from listening to the tapes of the interview of 4 August 1992 although technically it might be said that they were part of the report. At the hearing, my assumption was confirmed by Ms Murrell and Councillor MacKenzie who both agreed that Attachment "R" to the report contained the only relevant material in those interviews. Accordingly, with the agreement of the parties, I have regarded only the contents of Attachment "R" as being before the Tribunal as part of the Director-General's report and, subject to that, I have treated the contents of the two tape recordings as not being before the Tribunal.

At the hearing, I directed that the Director-General's report and everything that came to the Tribunal with it should be tendered in the proceedings because it comprised information that was in the possession of the Tribunal and as a public hearing of the complaint was being conducted it should be part of the record. It was duly tendered without objection and became Exhibit A consisting of the written report, the tape recordings of the interviews conducted by Janette Ryan and Robert Bellamy and the transcripts of those tape recordings. It should be noted that prior to the hearing Councillor MacKenzie had been provided with a copy of the written report and

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a transcript of the tape recordings of his interview by Janette Ryan and Robert Bellamy.

Prior to the hearing departmental officers had compiled a folder of relevant documents and statements obtained from a number of witnesses. A copy was provided to Councillor MacKenzie and was tendered without objection as Exhibit B.

A number of other exhibits were tendered by both parties in the course of the hearing.

A transcript was made of the evidence given by the witnesses at the hearing. A list of the witnesses follows:

1. John William Walsh - former Shire Clerk and General Manager.
2. Wesley Francis Phillips - formerly Chief Clerk, presently Corporate Development Manager.
3. Jean Margaret Bradley - Secretary to the General Manager from May 1992 until mid-July 1993.
4. Margaret Ruth Kime - Secretary to the Shire President 1985 to 1 April 1993.
5. Gay Louise Taylor - Rates Clerk.
6. John Richard Bartlett - Councillor since September 1983, Shire President 1993 (from February 1993).
7. James Ronald Neely - Manager Corporate Services from mid-1980 until 1994.
8. Janette Irene Ryan - Senior Investigations Officer, Department of Local Government.
9. Michelle Leanne Clark - Corporate Clerk.
10. Clyde Joseph Redman - Councillor since 1980.
11. Bruce MacKenzie - Councillor, past Shire President.

In the course of this statement of decision, references to the transcripts of the interviews, part of Exhibit A, will be by page number of the

individual transcript with the prefix "I"; references to the transcript of the hearing will be by page and line number with the prefix "T".

REVIEW OF THE EVIDENCE

Councillor MacKenzie has been an elected member of the Council since 1969. During his terms of office he resigned in 1972 and 1984 and on both occasions was subsequently re-elected. He was twice elected by fellow Councillors to the position of President. He was elected to that position on 12 September 1989 and re-elected on 11 September 1990. His second term as President expired with the local government general election on 14 September 1991. Councillor Horne was elected as President on 24 September 1991 and resigned on 16 February 1993 to be succeeded by Councillor Bartlett.

For the period of approximately two years during which Councillor MacKenzie was President his secretary was Margaret Kime, one of the witnesses who gave evidence at the hearing. As mentioned above, pecuniary interest returns from Councillor MacKenzie were filed in the Register for all periods from September 1987 when section 46B of the old Act commenced to the year ended 30 June 1990, the return for that year being dated 14 September 1990. He had been President for most of the year covered by that return and was President at the date it bears. He continued to be President throughout the 1990/1991 return period and up to about two weeks prior to 30 September 1991, the final date for furnishing that return. In respect of the return period 1991/1992, he was President for about the first two and a half months after which his Presidency expired. He was not President when the return for that period became due between 30 June and 30 September 1992.

There was no evidence that returns by Councillor MacKenzie for the two periods in question were ever on the Register. There was direct evidence which covered the period from September 1991 and established that if such returns had existed they had never found their way into the Register. The Council officer responsible under the General Manager for

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keeping the Register from 1987 when it was introduced until mid-1992 was Mr Phillips. He was certain that prior to 30 September 1991 he did not receive any return for Councillor MacKenzie for 1990/1991 and was certain that if it did exist before that time it never came into his possession (T.51/31).

On 18 September 1991 the General Manager Mr Walsh issued a memorandum directed to a number of Counsellors including Councillor MacKenzie reminding them of their obligations to lodge a return for the 1990/1991 period by 30 September 1991. A form of return was enclosed with advice as to how it was to be completed (Exhibit B, Tab 16). The fact that this memorandum was issued, irrespective of whether it was ever received by Councillor MacKenzie, is evidence that the return for the period referred to in the memorandum had not been received at that date.

Mr Phillips recalls a conversation after 30 September 1991 with Mr Walsh in which he advised Mr Walsh that Councillor MacKenzie's return had not been lodged to which Mr Walsh replied that it was the responsibility of individual Councillors to fulfil their pecuniary interests obligations, not the responsibility of staff.

In about July 1992 Mr Phillips handed over responsibility for keeping the Pecuniary Interests Register to Mrs Jean Bradley who was then secretary to Mr Walsh. At the time of the handover there was no return on the Register from Councillor MacKenzie for the 1990/1991 period. He drew Mrs Bradley's attention to that fact (T.52/23).

Mrs Bradley corroborated Mr Phillips' evidence. She said that Mr Phillips told her at the time that the last year's returns were all on the Register except for Councillor MacKenzie and that he said to her:

"If you don't get one from him this year don't worry because he didn't put it in last year. It is the obligation of the individual Councillor to lodge a return. Our only role is to remind them."
Exhibit B, Tab 18, para. 2).

When Mrs Bradley took over the Register the 1991/1992 return period had just closed. She prepared a memorandum to all Councillors dated 10 July 1992 reminding them of their obligations to submit their returns. She

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adopted the course of photocopying the last return on the Register from each Councillor, attaching it to the memorandum and requesting Councillors to make any relevant changes to the form and return it to her for typing as soon as possible after which she would forward the completed return to the Councillor for signature. This memorandum was given by her to another staff member whose responsibility was to place all Council Business Papers including such memoranda into bags for delivery to each Councillor. The same staff member was also responsible for setting up the table in Council Chambers prior to the Council's meetings and any papers that had not been placed in the Business Paper's bag would be placed on the Council meeting table at the position where the relevant Councillor sat.

Following the same procedure, Mrs Bradley handed out for delivery two further memoranda. One was dated 24 August 1992 and was addressed to Councillor MacKenzie and three other Councillors. The other was dated 12 November 1992 addressed to Councillor MacKenzie. Both memoranda indicated that the requisite returns had not been received and gave a reminder that the last date for completing and filing the returns was 30 September 1992. Whether or not Councillor MacKenzie ever received these memoranda, they are evidence that Councillor MacKenzie's return for the 1991/1992 period had not been received by the officer of the Council responsible for keeping the Register and had not found its way to the Register by 12 November 1992 (Exhibit B, Tab 18, paras 4-7).

Attachment "R" of the Director-General's report, Exhibit A, provides evidence as to the state of the Register on 4 August 1992 when Councillor MacKenzie was interviewed by the two inspectors from Department, Brophy and Hartigan. On that date they drew his attention to the fact that there were no returns from him on the Register for the past two years. One of his responses was to say, ***"I'll fix it up."*** He made other responses to be dealt with later. The point at the moment is that this interview provided further evidence that the returns for neither of the of two years were on the Register as at 4 August 1992.

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They were still not on the Register in March 1993 when the persons who inspected the Register at that time complained of their absence. The General Manager, Mr Walsh, reported these complaints to the then Shire President, Mr Bartlett. At a meeting on 23 March 1993, Mr Bartlett had a conversation with Councillor MacKenzie. In giving evidence Mr Bartlett said that he had a clear recollection of the conversation. He said to Councillor MacKenzie:

"I believe that you have failed to lodge your pecuniary interest return."

Councillor MacKenzie replied;

"I handed my return to John Walsh a week after local government inspectors asked that I lodge the return." (Exhibit B, Tab 21, paras. 7, 8; T125/25).

Councillor MacKenzie's reply did not make any sense to Mr Bartlett because he was not aware at the time that Councillor MacKenzie had been interviewed in August 1992 by local government inspectors (T.125/33, T.129/44).

After his conversation with Councillor MacKenzie, Mr Bartlett had a conversation with Mr Walsh in which Mr Walsh said:

"Bruce MacKenzie did not hand the form to me. Perhaps he handed it to another member of staff. I will make inquiries." (Exhibit B, Tab 21, para. 9).

On 25 March 1993, Mr Bartlett directed a memorandum to the General Manager setting forth the statement that Councillor MacKenzie had made to him at the meeting on 23 March 1993 and requesting him to check the files (Exhibit B, Tab 21, p.4). Mr Walsh, on 26 March 1993, directed the Manager of Corporate Services, Mr Neely to inspect the Pecuniary Interest Register and his secretary, Mrs Bradley, to search her office and the office of the secretary to the Shire President for returns by Councillor MacKenzie for the two years ended 30 June 1991 and 1992. These officers each reported to the General Manager that no such returns could be found. The General Manager reported the result of their searches to the Shire President and

further reported that he had searched Councillor MacKenzie's file back to September 1991 and could find no reference to his having lodged the returns (Exhibit B, Tab 21, p.4; Exhibit A, Attachment "U"; Exhibit B, Tab 19, paras. 2, 3; Exhibit B, Tab 18, paras. 10, 11, 12).

In relation to the search for the returns, Mr Neely gave evidence that at the time of the request from the General Manager for this search to be carried out or at a later time the General Manager said to him:

"Bruce MacKenzie has stated that he completed a return and gave it to me and that I misplaced it. That did not happen."
(Exhibit B, Tab 19, para. 2).

On 25 March 1993 Mr Bartlett, as well as directing the memorandum to the General Manager to conduct the search, also directed a memorandum to Councillor MacKenzie informing him that an inspection of the Pecuniary Interest Register and relevant files revealed that no returns had been received from Councillor MacKenzie for the two years in question. The memorandum stated:

"Please remedy this situation by 12 noon on Tuesday next, 30 March 1993." (Exhibit B, Tab 21, para. 11; Exhibit A, Attachment "Q").

The foregoing is clear, direct and cogent evidence establishing two salient matters of fact: First, neither of the returns in question were ever on the Register. Secondly, neither return was ever received by the Council officers who at the relevant time were, under the General Manager, responsible for maintaining the Register.

A question to be considered is how far does this advance the inquiry as to whether contraventions by Councillor MacKenzie occurred in these two periods? First, the contravention, if there was one, would consist of a failure to comply with the relevant statutory obligation (section 46G(1)). The statutory obligation of a Councillor was to lodge the required return with the Clerk of the Council within the prescribed time. This required positive action on the part of the Councillor directed to actual lodgment of the return, whether done personally by the Councillor or done by him through an agent or servant of the Councillor or the Council. A failure by a Councillor to take

such positive action must result in a failure to comply and, therefore in a contravention.

Let it be supposed that a Councillor may have taken the appropriate positive action. In that case a lodgment of the return will have been made and the return will be in the hands of the Clerk of the Council or some officer of the Council under his control. By section 46F, the Clerk of the Council had a statutory obligation to compile and maintain a Register which was to comprise the returns lodged by the Councillors. It may be assumed to be the natural tendency of a Clerk of the Council and the officers under him to perform their duties generally and their statutory obligations in particular. In relation to dealing with the returns in question they would normally have no reason to do otherwise. It would follow that, in the ordinary course of events, the most likely result to ensue from a return by a Councillor coming into the hands of the Clerk or one of his officers would be that the return would be placed in and retained in the Register.

If there is proof that a return was never on the Register, the most likely explanation is that it was never received by those officers responsible for putting it on the Register. If, further, there is proof that those responsible for maintaining the Register never received the return the most likely explanation is that it was never lodged. These are, of course, not the only possible explanations. After receipt, a return may have been mislaid, lost or even destroyed but, in the realm of probabilities, these explanations are, in the present context, less likely.

In the present case the probabilities do not rest on only a theoretical situation. Reference has already been made to the system established for facilitating the lodgment of returns by Councillors. Reminder memos to all Councillors were part of the system. They were either included in the Business Papers for Council meetings or placed at that Councillor's position at the meeting table. In the period relevant here, the system was followed by the General Manager and both of the officers responsible under him for

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keeping the Register, Mr Phillips and Mrs Bradley (Exhibit B, Tab 16, para. 5; Tab 17, para. 3; Tab 18, paras. 4-6).

The system was calculated to make these officers mindful of their duties in relation to returns at the time they were due. Evidence that they were in fact so mindful is provided by the abovementioned memoranda of Mr Walsh to all Councillors dated 18 September 1991 in relation to 1990/1991 returns and Mrs Bradley to various Councillors including Councillor MacKenzie dated 10 July 1992, 24 August 1992 and 12 November 1992 in relation to 1991/1992 returns..

In relation to Councillor MacKenzie in particular, there was further evidence by Mr Phillips who said:

“I usually had to chase up Councillor MacKenzie in order to obtain his pecuniary interest return before 30 September. Had I received the return (for 1990/1991) I would have put it straight into the Pecuniary Interest Register.” (Exhibit B, Tab 17, paras. 5, 6).

Mrs Bradley’s evidence was that when she received completed returns she filed them straight away. She said:

“All my filing, including the filing of pecuniary interest returns, was done on a daily basis. Nothing was left overnight. I had a pencilled list. I would mark the Councillor’s name off the list when I received his form back.” (Exhibit B, Tab 18, para. 6).

Other witnesses testified that Mrs Bradley was very efficient and meticulous in maintaining the Register and filing documents (Walsh T46/21, 25; Exhibit A, Kime I6.8).

So the answer to the question just posed is that, on the evidence so far considered, a failure to lodge the returns is the likely, although not the only possible, explanation for the absence of the returns from the Register and the fact that they were never received by Mr Phillips or Mrs Bradley.

The possibility that they were lodged by Councillor MacKenzie by his causing them to come or directly delivering them into the possession of Mr Walsh is not eliminated. If that did occur, the absence of the returns from the

Register would suggest that Mr Walsh must have mislaid, lost or destroyed them because he did not give them to Mr Phillips or Mrs Bradley or place them in the Register himself. These may not seem likely explanations but they must be considered. However, logically, they fall for consideration after considering what evidence there is that the returns were ever lodged.

The principal source of such evidence must be Councillor MacKenzie himself. It is legitimate in endeavouring to find the right explanation to turn to him for his account of the facts, not because he bears any onus to prove that he is innocent of any contravention, but because he is in the best position to give evidence which might explain how, if he lodged the returns, they failed to reach the Register.

COUNCILLOR MACKENZIE'S ACCOUNT

To understand and evaluate Councillor MacKenzie's evidence of the steps he took to lodge returns for the two periods in question it is essential to take into account his self-proclaimed attitude towards two things, namely, "paperwork" in general and the statutory obligation on Councillors to furnish pecuniary interest returns in particular.

Attitude to "Paperwork"

Councillor MacKenzie's self-assessment is that he is a man of action with a strong aversion to paperwork (***"I don't stay in bed and expect things to happen. I make them happen and I have done that as a Councillor for people and in my business enterprise"; T.176/8. "I used to fly round the building getting things done and no paperwork - I hate paperwork."*** (MacKenzie I. 12.2).

At various times Councillor MacKenzie has described himself, in relation to paperwork, as "terrible" (MacKenzie I. 12.2), "lax" (T. 6/47; MacKenzie I. 10.10), "lackadaisical" (T. 179/54), having a "don't care attitude" (T. 215/13) and being ***"possibly my own worst enemy as far as paperwork is concerned"*** (T. 176/30). This attitude to paperwork was remarked upon by others, including his former Presidential secretary Mrs Kime (Kime I.11.4) and Mr Neely (T. 135/31) who, according to Councillor

MacKenzie, used to say to him, ***“Macca, one day the paperwork will catch up with you.”*** (MacKenzie I.12.2). Mr Neely's evidence was that at some period he did say something like that to Councillor MacKenzie (T. 136/44-137/2).

Attitude to Returns

Councillor MacKenzie has always found the obligation on Councillors to furnish pecuniary interest returns objectionable and has been forthright in saying so. When asked if he had any problem with the concept of a Councillor, as a public officer, openly declaring his financial position, he frankly admitted that he did have a problem with it (T. 178/24).

When interviewed in July 1994 and in giving evidence to the Tribunal he repeatedly expressed his objections. He said that he had always objected to the forms and always would (T. 257/28). He said that he resented having to put in returns, he regarded and continues to regard the obligation to do so as an invasion of his privacy (T. 117/23; T. 256/58). He objects to the forms being made public and considers that the identity of persons wishing to inspect the Register should be recorded and they should be made to prove their bona fides, declare their motives and their business and be supervised by a senior Council officer (T. 177/24; T. 257/21). He said that when he has stood for Council elections since the disclosure requirements came into force in 1987 computer printouts of his property holdings have been exhibited on electric light poles all over the electorate for everybody to see. He did not know how these printouts had been obtained but he resented it (T. 178/47; T. 180/4).

He further believed that putting in returns of financial interests open to public inspection exposed Councillors to intimidation and extortion by thieves and robbers who could obtain access to information about Councillors' wealth and circumstances from inspection of the Register (T. 257/11).

He also believed that it operated as a deterrent to persons with business experience and capacity for management from standing for office in the big business that local government had become (T. 257/3).

These objections in principle were translated into Councillor MacKenzie's attitude towards lodging his pecuniary interest returns and also to being interviewed about their absence from the Register.

When asked by the interviewers in July 1994 whether he recalled the amendment to the old Act whereby the obligation to lodge pecuniary interest returns was introduced, he said:

"Mate, I wouldn't want to remember anything about the old Local Government Act because it's a joke and I think this is a joke."
(MacKenzie I.10.2).

When he was reminded that this was an annual obligation, he replied:

"Yeah, yeah. But see I'm an anti-rule sort of person in a way, you know. Some of the rules - I detest half the rules in local government and half the rules in everything so. But I done it. I might have been late sometimes." (MacKenzie I. 10.7).

In his evidence he said:

"Okay, I accept you have to do it in this day and age but I don't like it." (T. 177/25).

When asked to explain the contents of a return shown to him with his signature on it, he evaded the question by saying:

"Mate, when I signed these over the years, I've never looked at them. I've never even checked them. If that's a crime I'm guilty. God's honour, I'm guilty." (MacKenzie I. 14.10).

When asked whether he had checked the Register to make sure that, since he had found out that his 1990/1991 return was not on the Register, the return for 1991/1992 which he claimed to have handed to Mr Walsh was placed in the Register, he said, ***"I've never looked at a Register in my life."***

He added:

"No that's not my make-up, that's not my make-up. I'm probably too game, too lax, too 'don't give a stuff' - if it's not in, it's not in, stiff bananas, you know. I can't pretend - I didn't go and look at it - I didn't go, you know." (MacKenzie I. 30.3, .6).

He appeared to get enjoyment out of the fact that a letter he wrote to the Department was found to be undated (MacKenzie I. 26.2). At the outset

of the hearing, Councillor MacKenzie, without any show of remorse, volunteered that he probably had put all of his returns in late. He said:

“Might I say there probably has not been one year in the last two and a half decades (sic) that I have not been late with my pecuniary interests. I offer no apology except I am lax with paperwork.” (T. 6/44).

He added soon after:

“There is no way in the wide world I could ever prove that my returns probably even in one year were ever in on time. To that point, I am one hundred percent guilty. That is the story. I am not going to come here and pretend things that have not happened, sir. I am guilty. I have done it.” (T. 7/23).

He said that this tardiness would have applied to the 1991 and 1992 years here in question, he would have been late in those years (T. 7/37-45). When he was referred to a return dated 30 September 1994 for the period 1993/1994, he said that he thought it was probably the only one he'd put in on time, the reason being, ***“a lackadaisical manner”*** and the fact that he kept putting things off from one day to the next (T. 179/27-58).

Reminder Memos

Apart from the memo from Mrs Bradley of 10 July 1992 which had been addressed to all Councillors, Councillor MacKenzie would not concede having received any of the reminder memos about his 1990/1991 or 1991/1992 return or President Bartlett's memo of 25 March 1993.

This calls for an explanation for two reasons. First, the evidence established that there was a regular system employed by the Council for delivering memos and papers to Councillors. It has already been described above. The system was calculated to bring the memos to the notice of the Councillor to whom they were addressed and in the ordinary course of events would have done so. The memos now in question were put into the system and could be expected to reach Councillor MacKenzie. Secondly, memos to other Councillors who were late with their returns were put into the same system at the same time and an inspection of the Register (Exhibit H) at the

hearing showed that returns from all of the other Councillors were received, from which it may be inferred that they probably received their memos.

Councillor MacKenzie's evidence on this question showed that his reaction to the receipt of papers and memos that he was not interested in or to which he objected was to ignore them or immediately discard them. When interviewed in July 1994 he said that he did not put his mind to everything received with the business papers at meetings because, "**Some of it is garbage.**" When asked how did he know if it was garbage, he said, "**I've just got to look at it you know.**" (MacKenzie I. 18.9-19.1). Specifically as to internal memos, he said that he would read them:

"But I don't have to study them real quick - I don't have to study them real long. I can see whether they're trash or worthwhile."
(MacKenzie I. 19.10-20.1).

He did not dispute at the hearing that the memos in question were all sent to him. But he admitted that he often did not respond to memos. He said:

"If I read them I probably would respond, but if they were not important, I possibly would not respond to them."

He admitted that as at August and November 1992 he possibly did not think that disclosure of pecuniary interests in returns was a very important matter. (T. 246/13-26).

As to Mrs Bradley's memo of 10 July 1992 which he believed that he received (T. 245/43) he admitted that he took no action to respond to it (T. 245/46).

As to her memo of 24 August 1992, when interviewed he claimed that he had never seen it (MacKenzie I. 18.4, 20.4, 43.9). But at the hearing he said that he did not believe that he had received it (T. 245/51).

As to her memo of 12 November 1992, when interviewed he said that he did not recall getting it and did not believe that he had received it (MacKenzie I. 43.8). But at the hearing he added:

"That isn't to say it was not on my desk at some time. I don't always take all the literature on the desk home." (T. 245/57)

He vacillated a great deal about the memorandum from President Bartlett of 25 March 1993. Councillor MacKenzie did not like Mr Bartlett. He considered him to be a **“mate”** of the General Manager whom, he said, he strongly disliked. When interviewed, he referred to him as **“Scheming Bartlett”** and said that he would not be surprised what Mr Bartlett might get up to (MacKenzie I. 34.2, 43.1, 46.7, 47.6). When giving evidence Councillor Bartlett conceded that he and Councillor MacKenzie had never got on, **‘Political foes I suppose you would say.’** (Exhibit B, Tab 21, para. 3; T. 131/1). During his interview in July 1994, Councillor MacKenzie at first flatly denied ever having received Mr Bartlett’s memo (MacKenzie I. 34.8, 35.6). He expressed strong feelings at the suggestion that Mr Bartlett would have been sending him a memo. He said when interviewed, **“There’s no way in the wide world I ever ever in my life got a bloody letter from John Bartlett, ever.”** (MacKenzie I. 43.1). Later in the interview he modified his tone to say that he did not believe that he had received this memo (MacKenzie I. 43.7). He continued to vacillate between never having received it, not recalling it and receiving it but not having read it. When he was asked specifically, **“Did you get that memo?”**, he replied:

I don’t believe I got it. Then again I cannot deny it was written. I have never received a memo in my life from John Bartlett. A memo about anything in my life.”

It was then put to him that it may have been one of the many Council papers that he received that he didn’t get around to reading and he replied:

“I can’t honesty deny that. But I also say that if it was on my desk at a Council meeting and I saw Councillor Bartlett’s name on it, more than likely I would not have read it.”

When asked to explain, he said:

“My relationship with Councillor Bartlett was not great, and I wouldn’t have read his memo to me. I can’t say it was there and I can’t say it wasn’t, I have no recollection of reading a memo from John Bartlett to myself.”

He went on to say that if he saw John Bartlett's name on a memo to him, **"There would be a pretty fair chance I would not have read it."** He also said, **"I would not think it was a Shire President's duty to write a Councillor a letter like that, the one I have seen today."** And he went on to agree that it was possible that this would have been a reason why he would not have read the memorandum if he had received it. (T. 246/39-247/34).

On the evidence, the probabilities are that Councillor MacKenzie received all of the memos sent to him about his failure to lodge returns. They all had a clear subject heading referring to Councillors pecuniary interest returns and, having regard to his hostility on that subject, this would have been enough for him to treat them as trash and decline to read the contents or pay any close attention to them. His hostility towards Councillor Bartlett and the objections he expressed to the idea of a Council President writing to a Councillor in the terms of the memo of 25 March 1993 only add to the probability that he received that memo, saw what it was about, refused to pay any attention to it and discarded it.

The implication from Councillor MacKenzie's evidence that he did not receive them, if it was accepted, would be that, except for the memorandum of 10 July 1992, he was, at the dates of and during the entire period covered by the memos, unaware that it was being asserted by Council officers who were in charge of the Pecuniary Interest Register and later by President Bartlett that he had failed to lodge the relevant returns.

I do not accept his claim that he did not receive these memos. I believe that whether or not, having received them, he read the entire contents, he was well aware of their subject matter and must have realised that the memos had been sent on the basis that his return had not been received. He admits that he took no action in response to Mrs Bradley's memo of 10 July 1992 and it may be inferred from the evidence that he took no action to respond to the other ones from her or the one from the General

Manager in the previous year. Whether he did in fact react to the memo from President Bartlett, which he denies, is a question to be dealt with later.

RETURN FOR 1990/1991

As mentioned earlier Councillor MacKenzie's position at the hearing as to his return for 1990/1991 was that he had taken steps which in previous years had resulted in its being lodged. His evidence suggests that the return was prepared and did exist; but he has never claimed that he lodged the document personally or physically handed it to anyone. He has given conflicting evidence as to whether he remembers even signing it; but he says that he would not have examined it or read its contents even if he did sign it.

He has been questioned about this return a number of times and has given vague and conflicting accounts. He has continually avoided committing himself to any detail as to time or specific events and some of the answers he has given to questions about it appear to be designed to obfuscate. He has attempted to fend off attempts to probe him for details by diverting the questioner to his former presidential secretary, Margaret Kime, and throws open the suggestion that if the return failed to reach the Register it was somehow the fault of the General Manager, Mr Walsh.

Councillor MacKenzie's evidence was that in this year and previous years his general practice was to request someone to obtain for him from the Council's Rates Department a computer printout of his property holdings. This, he said, was because he had too many property interests to list by hand on the form. He said that when obtained, the computer printout would be attached to the back of the standard pecuniary interest form which was a printed form on large stiff coloured paper. He said that he would later sign the form and the computer printout and that would constitute his return. In their evidence, Mr Walsh, Mr Neely and Mrs Kime confirmed that from time to time Councillor MacKenzie had requested and been provided with a computer printout and the requisite forms. However, an examination of the Register (Exhibit H) revealed that none of the returns signed by Councillor MacKenzie prior to the year 1990/1991 had a computer printout attached to it. In every

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case a list of his property interests had been typewritten, signed by him and attached to the return form. Thus it would appear that the computer printout was used to provide the information for the typed list but, contrary to Councillor MacKenzie's assertion, was never itself attached to his return.

He was first questioned about the 1990/1991 return on 4 August 1992 when he was interviewed by Inspectors Brophy and Hartigan (Attachment "R", Exhibit A). There can be no doubt that at that time neither the return for 1990/1991 nor 1991/1992 was on the Register and that Councillor MacKenzie's attention had been drawn to that fact. He was asked whether he had a reason for not putting in a statement of his land holdings and he gave an answer which quite clearly was related to the return for the year 1990/1991. He said:

"No - no. No reason at all ... I've signed the bloody form - which is now missing. I give it ... (he was interrupted to identify the year and stated that it was 'last year' (1990/1991)) my ex-secretary knows the facts. If you want to ask her one day in private - ... because in years gone by all I've said to Walshie and Neely: Just get me a computer printout with it and pin it on to this. Because one form won't hold my things ... and I'm not saying that skiting ... so I give him the form and I said get me a computer printout, and he said: yeah."

He was asked to identify whether it was Mr Walsh or Mr Neely to whom he was saying that he gave the form and he replied:

"Walshie. And I firmly in my heart believe that's what I said to him. Check it with Margaret. And it didn't happen. So if you want to kick me off the Council for that, kick me off, but I won't hide anything on God's earth."

He was next asked about his missing returns when Janette Ryan telephoned him on 27 April 1994 to seek his response to the Director-General's letter of 21 March 1994 inviting Councillor MacKenzie to show cause why an investigation should not be commenced. Janette Ryan made a computer file note of this conversation which Councillor MacKenzie does not dispute. (T. 142/4, Exhibit G). Councillor MacKenzie told Janette Ryan in that conversation that he had filled out the form, had obtained computer

printouts and given them to the General Manager, **“Who hates him.”** He said the forms were for both years, he had a witness, his secretary at the time, she was willing to give evidence that he filled out the forms and gave them to the General Manager. (T. 142/22). On this version, he had completed the form for the year 1990/1991 and given it to the General Manager for which he had a witness (it was supposed to be Margaret Kime) who was willing to give evidence of those facts. When interviewed in July 1994 he retracted this claim as to the 1990/1991 year by saying that he had not meant to say **“for both years”** and had not meant to say that Margaret Kime could give evidence that he had handed the General Manager the return for 1990/1991 (MacKenzie I. 32.5-33.7).

When his return for that year was raised during the interview, Councillor MacKenzie referred to his previous interview with Mary Brophy. Janette Ryan reminded him that this had occurred in 1992 and that the period they were then looking at was at the end of his second term as Shire President which was 14 September 1991. Councillor MacKenzie’s immediate response to that reminder was as follows:

“Mate I mustn’t have put one in. I know for a fact before I handed the one to Walshie (this was a reference to his claim relating to the 1991/1992 return) there was something in my mind that when I was the President I had one filled in that was on my desk, week in, week out, on my Shire President’s desk. But I can’t truthfully say that I ever remember handing it to anyone. Whether someone picked it up or not I don’t know. And I’m not saying that I didn’t give it to anyone, but I can’t say I did either. But there was one on my desk at that time for a long time. That is not the one I’m talking about that I gave to John Walsh.” (MacKenzie I. 11.7).

This account is not consistent with what he had told Mary Brophy on 4 August 1992 and Janette Ryan on 27 April 1994, namely, that he had signed the form and given it to Mr Walsh, had asked Mr Walsh to obtain a computer printout of his properties and attach it to the form and that this could be checked with Mrs Kime and that Mr Walsh had failed to do as he had been requested. The new version substituted for a claim that he had signed and handed the form to Mr Walsh, an inability to recollect whether or not he handed the form to

anyone. The new version also throws in as a suggestion the possibility that someone may have picked it up from his desk although he does not know one way or the other. The fact that he came up with this new version and made that suggestion is of some significance when compared with the account that Margaret Kime had given the same interviewers the day before Councillor MacKenzie was interviewed.

The new version was repeated and developed a number of times during the questions which ensued in that interview. For example, he said later:

“I think I remember Margaret getting me some and filling it out and me signing it and being on her desk ... I don’t know what happened to it. If I didn’t put it in, I didn’t put it in ... (MacKenzie I. 12.2, .3).

When asked, he said that he could not honestly say that he remembered Margaret afterwards reminding him to put in the return but she may have done so (MacKenzie I. 13.1), the form lay on his desk for weeks (MacKenzie I. 14.6). He afterwards repeated that he could not recall handing the form to anybody and that he could not honestly say that the document may have been passed on to somebody or not. He acknowledged, when asked, that it was his obligation to actually lodge the return and he was asked directly, ***“But you didn’t lodge it?”*** and he answered, ***“I don’t believe I lodged it.”*** (MacKenzie I. 15.10-16.3).

Having given the above version, the interviewers then confronted Councillor MacKenzie with the version he had given the inspectors at his interview on 4 August 1992. He confirmed that what he had told those inspectors related to the return for 1990/1991 and claimed that he had been referring to the return that he claimed was lying on his desk for weeks (MacKenzie I. 21.8-22.2). Then there were the following questions and answers:

“Q. Then you said ‘My ex-secretary knows the facts, if you want to ask her one day in private because in years gone by I’ve said to Walsh and Neely, just get me a computer printout with it and pin it on to this because one form won’t hold my things and

I'm not saying that skiting. So I gave him the form and I said get me a computer printout and he said yes.'?

A. Well that would make me think - that would make you think that I believed at that time that the one before that was on my desk I'd already handed in wouldn't it.

Q. Suggest it?

A. Yes. But I can't say, I can't remember handing it - whether it was handed in by Margaret or handed in by me straight to Jean Bradley or Vivienne (former secretary of Mr Walsh) I dunno, but that's not the one in question I'm talking about I handed to Walshie, that's all I know.

Q. Do you recall that you got a bit of a shock then that it wasn't in? That the form, the return wasn't in?

A. I never get shocked.

Q. When somebody gave you the message about it. You've just got the message about it, we're talking August 1992, what did you think must have been going on about that form that was supposed to have been in?

A. Well to be quite honest here I wouldn't put anything past our former General Manager and I mean that. I wouldn't put past anything (sic), because he disliked me and I disliked him doubly, right. He's got more problems in life than Bruce MacKenzie has and you know whether I thought that I handed it to him but I can't say that I handed it to him. I can't say that I gave that form that was on my desk to John Walsh because I don't remember.

(MacKenzie I. 22.3-10).

He was then reminded that he had told the inspectors, ***"My ex-secretary knows the facts."*** and he interrupted to say:

"Well I must have believed then that the one that was on the desk was handed in one form or another. I must have believed that that was in the Council's safekeeping. To make a statement like that - that it was missing - I would imagine that I would have said, ask her about the facts about the relationship, I would imagine, between the honourable Walsh and myself."

(MacKenzie I. 23.3-5).

Having previously insinuated to the inspectors that his ex-secretary would verify that he had signed the form and given it to Mr Walsh and that if they checked with her she would be able to verify that he had given Mr Walsh the form asking him to attach a computer printout, he sought to suggest by the answer just quoted that he had referred the inspectors to his ex-secretary for a different purpose, namely, the purpose of ascertaining the facts about the relationship between himself and Mr Walsh. When the statement he had made about his ex-secretary to the inspectors then was repeated to him he said:

“Well I must have said that believing or thinking that the one that was on the desk was handed in late but handed in. You’ll have to put your own interpretation on that.” (MacKenzie I. 24.7).

At the hearing, Councillor MacKenzie adhered to his claims that the form had been on his President’s desk for weeks, that he could not say whether he had signed it or not, that he did not know whether the form was completed and that he did not know what happened to it (T. 205/29-41).

When reminded at the hearing that he had told Janette Ryan in the telephone conversation of 27 April 1994 that he had filled out the forms for both years and handed them to the General Manager he said:

“I don’t dispute I said that, no. What I am saying, but after admitting I said that, I can’t swear under oath that I signed them for the both years. But, in my mind, I believe I was catching up for those two years. I can’t swear under oath, as I said, to that effect.” (T. 211/9)

By this somewhat cryptic answer he seems to be saying that when telling Janette Ryan that he had given the General Manager forms for both years he knew in his mind there was only one form but as he believed the form would catch him up for two years it was alright for him to tell her that he had handed him forms for both years even though it was only one form.

When, at the hearing, it was suggested to him that the account he had given to Janette Ryan when interviewed in July 1994 appeared to be inconsistent with what he had told Mary Brophy and Alan Hartigan on 4 August 1992 about the very same document, he said:

“Yes, your Honour. I agree there is an inconsistency. I agree that you have to come to terms with it. But the one on the tape (Interview of 4 August 1992) was at the end of a reasonably long interview and they hit me with the pecuniary interest thing. ... At the end of that they asked me about the pecuniary. There was a form at some time on my desk. Now, I can't honestly say that I know what happened to that form. I agree there is inconsistencies with the tape from Mary Brophy and what I said to Janette Ryan. ... But I didn't believe they were going to ask me about pecuniary interest forms.”

He said that in that respect he was taken unawares. (T. 253/43-254/22).

MARGARET KIME - 1990/1991

Councillor MacKenzie's position as to the 1990/1991 return heavily involved his then secretary Margaret Kime. At that time he was occupying the President's office on the first floor of the Council's building. Margaret Kime's office opened into the President's and his opened into the Council Chamber where Council meetings took place. The entry to Margaret Kime's office was from a hall at the top of the stairs from the ground floor. The General Manager's and his secretary's offices were on the ground floor.

It is to be recalled that Margaret Kime was Councillor MacKenzie's secretary for the two years from 12 September 1989 to 14 September 1991.

She was interviewed on 11 July 1994, the day before Councillor MacKenzie's interview. The essence of her account, which she repeated a number of times was that she had prepared his 1990/1991 return for his approval and signature and it sat on his desk for weeks during which she urged him on several occasions to give it to the General Manager, Mr Walsh, but it still remained on the desk. The last time she reminded him was prior to a meeting of the two of them in the President's office. She left the office and returned to her desk. She observed Mr Walsh after the meeting walking from the presidential office with Councillor MacKenzie's return. When she returned to the President's office the return was no longer on the desk.

For the full force of her evidence to be appreciated it is necessary to quote from the transcript of the tape recording of her interview. The interviewers made it clear that they were concerned with the returns for the

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years 1990/1991 and 1991/1992, Councillor MacKenzie's second term as President having expired before the return for the second of these years was due (Kime I. 5.7, 6.7, 11.2).

When asked to describe the practice with regard to Councillor MacKenzie's returns she said as follows:

“During the time that I was actually secretary, what would happen is I would say to him "Pecuniary Interest forms are being chased up, you know they're overdue" and he would ask me to get a printout of his properties from the rates departments so he could attach them to his return instead of writing them all individually and I remember doing that on a number of occasions. And you know, sort of it was a kind of a joke when I went to the rates department and asked for a list out of the printout, because there was quite a number of properties, and the girls in the rates department would say, "No well you'll have to give us a while because it's going to take a while to print all of those out" and but yes it was a regular course of action that I would go down, get a printout of them, bring them up, usually staple them to the back of the pecuniary interest form and then I would leave it on his desk for him to sign and to write on it whatever he wanted to write on it - I mean I felt that he could at least do that. So that I know that was a normal course of action and I would do that. After he asked me to get a copy of the listings, I normally would do that as soon as I could after that ask the girls to give me a printout from the rates department.” (Kime I. 6.3).

When asked whether she had ever seen him completing a form she replied:

“On the two occasions that I actually worked for him and the forms were due, the form was on his desk. I actually got a printout of the rates information that were relevant to his property, stapled it to the back of the return and placed it on his desk. Now I left it up to him to hand those returns on to the general manager or to whomever he felt that they should go to. I can remember on a number of occasions saying to him, you know, "Would you, you may as well give John the returns, while he's in the office here with you" and it was sort of either they finished the conversation and John didn't take the form off the desk, or whatever it may be, or he's forgotten about it. But at one stage the form sat on Bruce's desk on the corner of his desk in, you know, that anybody that came into the room would have been able to see what it was. I mean they're not small forms, they're sort of large form and, you know, it was clearly evident that the list of properties was attached to it, and it was sitting on the corner of his desk in an area where the pedestrian traffic was through there. And the office was used for committee

meetings, for council meetings, for interviews, for a number of meetings that we had with lots of people, developers whatever, and the form was always there in full view, for whoever came into the office". (Kime I. 7.8-8.2).

She was asked a question about the 1992 period but her answer clearly related to the return for 1990/1991:

"You know I can still see Bruce's yellow pecuniary interest form sitting on the desk in our office and it was there kind of for weeks and weeks after I'd attached the list of properties onto the back of it. IT was there for a number of weeks and I made reference to it on a number of occasions, you know, saying to Bruce, "Why don't you give the form to John", you know while John was actually there and you know for some reason, he didn't take it or whatever. But I mean it was - the presidential desk was quite a big desk, the yellow form was sort of sitting here on the corner of it and I can remember you know, cleaning the desk a number of times and the form was still there, and there was nothing that I could do with it until he signed it. Everything else was completed and ready to sign. I think I may have even dated it, or he, I don't - I'm really not sure now, but I know that it was there for quite some time." (Kime. I. 9.10-10.3).

When asked whether after a return had been signed it came back to her, she said:

"I'd give it to him (for signature) and usually it would sit on the desk for a number of weeks before he would get around to doing anything about it. He wasn't the best person at paperwork or administrative duties and he, not only with that but a number of other things and I felt that this was something that was more of a personal nature, and I have done as much as I could and the form was there on his desk. I had attached a copy of the properties and you know, if it had been a letter or had been a form or something that needed to be sent off or formalised in some way or finished or whatever, then I would probably take it up and say, "Look this has got to go, give it to me I'll finish it and get rid of it", but this was his form and I didn't know, you know or really want to know or push him into doing it because I didn't know if there were any more properties that needed to be added or whatever. I felt that it sort of wasn't a lot of my business." (Kime I. 11.3).

She was then asked if she remembered Councillor MacKenzie ever mentioning that a form had been lost or misplaced or asking her for more than one printout in any one year. She replied:

"It is possible. As I said to you I probably got him a printout on a number of occasions, even at times when he wasn't the president, he may have phoned and said, "Look I need a list", you know I really couldn't comment positively on that, you know. I could have been that I - but I really can't see how it could have got lost. Because Bruce in the two terms that I worked for him, never took the pecuniary interest form out of the office, out of our office. Until it actually went on - never took it home put it that way - because he probably knew that if he did take it home the likelihood of it coming back wasn't great. And I know that the forms didn't go, didn't leave the office, until they were handed on to the destination that they were supposed to go to. They may have been late but they were there and they were in the council building and they were on his desk."

...

"I don't know what's happened to it or whatever, but I know that the form was in this office, the form had never left the building and then I had it on the desk there and I know how many times I actually moved it from one spot to another in the course of a matter of weeks, if not months. And I know that I had made reference to it on a number of occasions when both the general manager and Bruce were in the office and said you know "Why don't you give the form to John to take now" and you know then they'd both sort of leave the office and I'd come in to tidy up and I'd think, God its still here. They haven't done anything with it, and - but it was not for the - for it not being in the office or being misplaced - it was definitely on the desk. And I remember - I don't know whether it was sort of quite into Bruce's term, but - and I don't know what prompted him or what it was that you know that initiated the action, but I can remember John actually walking out of the room with Bruce's pecuniary interest form. Now I don't know what day it was or what time it was or month or whatever, but there was a time when John actually took Bruce's form with him. I don't know if this is the one that's lost or misplaced or whatever, I have never spoken to anybody about a lost form. And I don't know anything about getting another listing for him. It is quite possible but you know, sort of so kind of vague and everything comes flooding into each other. But I know that the form was on the desk - was there for months, probably weeks if not months. And the general manager and all of the other councillors and all of the other heads of departments had used the room on many, many, many occasions while the form was actually sitting on the desk. And perhaps, you know it was kind of even the butt of a number of jokes from some of the councillors, you know that Bruce's form was still sitting there. But you know I can still sort of

see the form sitting on the desk now, it was there for so long.” (Kime I.12.1-13.2).

Again, as to what happened to the form she said:

“I didn't specifically see him handing it to him. I mean we were in separate offices, but I can remember seeing him walking out with the form and when I sort of went into Bruce's office later on, there was no pecuniary interest form there, so I mean it was obvious that though I didn't physically see the exchange of the form from one hand to another, but I would have presumed that that was the form because there was no form in the office. John walked out with the form under his arm.” (Kime I. 17.2).

She was later asked questions about a statement made by Councillor MacKenzie in the letter from him to the Department received in May 1994 in which he claimed that after his interview by Mary Brophy he had requested her to obtain a computer printout of his properties and a form to sign which form he then handed to the General Manager. She was asked whether she could agree with the statement that the completed form was handed to the General Manager. The question related to the 1991/1992 return but her answer clearly related to the period that Councillor MacKenzie occupied the President's office, that is to say, to the 1990/1991 return.

“Well, as I said, I didn't physically see the form handed to him, all I can say is that the form was on Bruce's desk. John walked out of the office with the form under his arm some afternoon, after a casual sort of meeting in the office, and you know I can only assume that the form that he had was the one that was in Bruce's office because the one that had been sitting on the desk for so many weeks wasn't there. So I just presumed that. You know I didn't think there was any need to - hopefully between the two of them, the general manager and the shire president, that I didn't need to check up on him.” (Kime I. 19.7).

Margaret Kime - Evidence at Hearing

At the hearing, the tenor and content of Margaret Kime's evidence about the 1990/1991 return radically altered the impression created by what she had conveyed to the interviewers in July 1994. The statement of evidence that she provided for the hearing presented a pale shadow of the strongly suggestive

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picture she had painted for the interviewers. In numerous respects it either contradicted or was inconsistent with what she had previously said. Her statement is behind Tab 26 in Exhibit B. The following matters of fact relevant to the present issue are to be extracted from that statement.

1. She could not recall whether it was in 1989, 1990 or 1991 that she saw the pecuniary interest form which was on Councillor MacKenzie's desk while he was Shire President. (para. 6)
2. She could not specifically recall saying anything to Councillor MacKenzie regarding the form but she, **"May have mentioned in passing"** that it should be completed. (para. 6)
3. She did not know what happened to this particular form. (para. 6)
4. At one time during Councillor MacKenzie's term as Shire President she overheard him and John Walsh having a discussion in which a pecuniary interest form was mentioned. She could not recall who mentioned it or what was said. She thinks the conversation occurred in her office while she was pre-occupied with other work. (para. 7).
5. She remembers Mr Walsh leaving **"my office"** with a pecuniary interest form:
 - a) She couldn't say for certain that this event occurred during Councillor MacKenzie's term as Shire President;
 - b) She could not recall whether this incident occurred at the same time that the pecuniary interest form was on the presidential desk for a matter of weeks or at a different time. (para. 7)
6. **"On a couple of occasions"** Councillor MacKenzie asked her to obtain a computer printout of his property holdings from the Rates Department but she could not recall the dates when this occurred (para. 4).

She was asked questions at the hearing about the apparent discrepancies between the account given in her statement and her recollections as conveyed to the interviewers.

Her statement in point 1. above was not consistent with the impression that she had conveyed to the interviewers that it was in 1991 that she had seen

the form on the President's desk. When asked about this she said that in fact she had no idea which year the form related to (T. 81/38). She did not know whether that form was **"an overdue form from the year before"** (T. 81/52) and she could not recall whether it was early or late during his term as President (T. 81/53). She could only say that she saw a form on his desk **"During some period that I was there with him."** (T. 82/6).

She had told the interviewers that on numerous occasions she had urged Councillor MacKenzie to complete the form and to give it to Mr Phillips but now she doesn't recall saying anything and only **"may have"** mentioned it in passing (point 2. above). When asked about this discrepancy she said that the uncompleted return being on his desk wasn't a matter of any particular significance (T. 82/11). However, she withdrew the suggestion that she only may have mentioned the matter in passing and corrected, **"may have"** to **"would have"** (T. 94/32).

Her statement that she did not know what had happened to the form she had seen on the desk (point 3. above) contrasts markedly with the clear impression she conveyed to the interviewers that it was her belief that the form had been picked up by Mr Walsh because after a long time of being on the desk she had seen the form in the possession of Mr Walsh after which it was no longer on the desk. At the hearing, she also withdrew the impression she had given of a short interval of time passing between seeing Mr Walsh with the form and seeing that it was no longer on the desk. She said that she could not remember whether it was a day or days or how long after seeing Mr Walsh with it that the form wasn't on the desk (T. 89/33). She sought to explain the discrepancy by saying that her perception as to what had happened to the form on the desk changed because there was now some doubt whether the form she had seen in Mr Walsh's possession was Councillor MacKenzie's (T. 95/19, 24).

When questioned about it, she did not adhere to her claim to have overheard a conversation between Councillor MacKenzie and John Walsh in which a pecuniary interest form was mentioned (point 4. above). According to her statement, this discussion was supposed to have taken place while

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Councillor MacKenzie was Shire President in her office while she was pre-occupied with other work. However, in her evidence she said that the discussion might have occurred at a time when Councillor MacKenzie was not the President, may have been a discussion between Mr Walsh and one or more other Councillors or not between Mr Walsh but between another Council officer and other Councillors or just between other Councillors. She admitted that she could be confusing one incident with another (T. 99/41-100/26).

Her statements to the interviewers that she had seen Mr Walsh coming from Councillor MacKenzie's presidential office with the pecuniary interest form under his arm is deprived of its weight and significance and loses credibility when compared with what she said in her statement (point 5. above) and her evidence at the hearing. As quoted above from the transcript of her interview she had stated specifically:

“I can remember John actually walking out of the room with Bruce’s pecuniary interest form. Now I don’t know what day it was or what time it was or month or whatever, but there was a time when John actually took Bruce’s form with him.”

To begin with, her statement claimed that she saw Mr Walsh leaving “**my office**” not the President’s office. As to this discrepancy she said in her evidence that there was no difference because Mr Walsh would have to go through her office after leaving the President’s office (T. 98/23). Then, she said in her statement that she could not say this had happened when Councillor MacKenzie was President; but she withdrew this modification at the hearing as being incorrect and said that it did occur when he was President (T. 96/38-49). However she did not withdraw her statement that she could not recall whether the incident occurred during the time that the pecuniary interest form was on the President’s desk for weeks.

In her interview she had sought to reinforce the suggested link between the form she said she had seen under John Walsh’s arm and the form for Councillor MacKenzie that she had seen on his desk by telling the interviewers that this had occurred after a meeting between the two of them in the President’s office. To repeat from what has been quoted above:

“...the form was on Bruce’s desk. John walked out of the office with the form under his arm some afternoon, after a casual sort of meeting in the office.” (emphasis added).

In her evidence at the hearing the occasion described is entirely different and leaves the question of whose form it was completely equivocal. What she now puts forward as significant is the fact that there was direct access between the President's office and the Council Chamber in which meetings took place. Mrs Kime now says that the event took place on a Tuesday afternoon which was a Council meeting afternoon, there were other Councillors around and she was very busy because things were hectic. This is something that she had not mentioned to the interviewers. Having previously suggested Mr Walsh had come from the President's office after a casual meeting with Councillor MacKenzie she now suggests that Mr Walsh could have come from a meeting of Councillors in the Council Chambers with a pecuniary interest form which had been given to him by another Councillor and may merely have passed with the form under his arm from the Council Chamber through the President's office, then through her office. She suggests that her attention may have been distracted at the time because she was sitting at her desk in her office, **“on the phone”** (T. 87/12, T. 87/28-55, T. 98/15; T. 88/33).

The Tribunal, as to Margaret Kime’s evidence, is left with the position that, whatever she had previously stated about the matter, ultimately her sworn evidence was:

“I don’t know whether it was Bruce’s pecuniary interests form or one of the other Councillors pecuniary interests forms because there were other Councillors that were in the building and around at the time.” (T. 87/20).

She agreed that at the time of giving her evidence she was unable to be sure whether or not it was Councillor MacKenzie's form (T. 88/8-16). When asked to explain how she had come to tell the interviewers that it was Councillor MacKenzie's form that she had seen under Mr Walsh’s arm she said that at the time of the interview she had no reason to doubt that it was his form. However, on her evidence at the hearing, she herself gave a number of reasons for doubt.

It was suggested to her that at the time of her interview she had endeavoured to be protective of Councillor MacKenzie, having served two terms as his secretary when he was President. Whilst not accepting the term “protective” she admitted having felt a sense of loyalty to Councillor MacKenzie when she was being interviewed by Janette Ryan but, she said, **“I don’t think it was overwhelming.”** (T. 101/40).

Conversations with Councillor MacKenzie before being interviewed

According to Councillor MacKenzie conversations took place between him and Margaret Kime before she was interviewed about what evidence she would be able to give concerning the missing returns.

On 12 July 1994 he told the interviewers that when the Council’s court proceedings against him were pending in 1993 he had got in touch with her, not to tell her what to say, but to check what she could remember and what he could rely on from her if she was asked questions (MacKenzie I. 5.6-6.1).

He had previously told the interviewers, when asked when he had last been in contact with her, that she had telephoned him in the week before he was interviewed to inform him that she was going to be interviewed and said that they should talk about it. According to Councillor MacKenzie, he said, **“We haven’t got to talk about that, you just tell the truth”** and that was all that was said. He was asked if they had talked about the returns and he said, **“I think I ran over it, yeah”** (MacKenzie I. 3.9-5.4).

When Margaret Kime had been interviewed the day before she had been asked whether there had been any discussion between her and Councillor MacKenzie about being a witness in the Council’s proceedings against him and she denied it (Kime I. 23.5). She repeated this denial at the hearing (T. 104/49-105/40; T. 107/14). She also denied having telephoned him before her interview, the statements he attributed to her in that alleged conversation and that he had ever gone over with her the events relating to his alleged failure to lodge returns or ask her what recollection she had of them (T. 106/25-50).

Although he heard her evidence, Councillor MacKenzie expressly declined to ask Margaret Kime any questions at the hearing (T. 108/20-39).

The fact that in the passage from his own interview (quoted above) Councillor MacKenzie made the suggestion to the interviewers that, although he could not remember handing the form that had been on his desk to anyone, someone might have picked it up, suggests that he knew as a result of having spoken to Margaret Kime what she was going to say, or had said, to the interviewers about seeing Mr Walsh with the form under his arm.

The conflict of evidence between them as to whether the discussions alleged by Councillor MacKenzie took place lessens the credibility of their respective accounts of these events.

That credibility is further diminished by the fact that although Margaret Kime's version placed considerable emphasis on the prominence of the pecuniary interest form that lay on Councillor MacKenzie's desk for so long, the fact that it was open for all to see, that there was a lot of traffic past the desk and that jokes were made by passers-by about the form still being there, neither Mr Walsh nor Mr Neely appear to have noticed it. Mr Walsh could not recollect having seen any pecuniary interest form as described by Margaret Kime on the desk (Walsh I. 7.7; T. 41/23, 31). Mr Neely could not recall having seen it or any discussion or laughter about it (Neely I. 4.6-4.9).

BLAMES THE GENERAL MANAGER

Despite the fact that Councillor MacKenzie did not know whether he had even looked at or signed the 1990/1991 return on his desk and did not know what had happened to it and, although he said he did not believe he had lodged it, he was nevertheless prepared to attribute its failure to appear on the Register to misconduct by the General Manager. As quoted above from his interview, he said, ***"I wouldn't put anything past our former General Manager ... because he disliked me and I disliked him doubly."*** Having been reminded that that was what he had told the interviewers, he gave the following evidence:

“Q. You were suggesting, were you not, that you considered it a possibility that he may deliberately have failed to take the necessary steps to see that that return got on the Register; were you not suggesting that?”

A. I possibly was.

... ..

Q. You were suggesting that there was such enmity between the two of you that he would have been capable of destroying or otherwise disposing of your form without putting it on the Register, weren't you?”

A. I possibly was.

Q. Is that still your view?”

A. I think it could happen.” (T. 204/56-3; T. 205/12-20; T. 205/28-47).

He agreed that on several occasions during his interview with Janette Ryan he had endeavoured to make clear his strong dislike of Mr Walsh and his belief that Mr Walsh hated him (T. 206/35-39; T. 206/50-58). He then gave the following evidence:

“Q. So, that suggests to me that you were concerned to make it clear to Janette Ryan that there was extremely bad blood between you and the General Manager?”

A. I don't dispute that.

Q. And it could appear that one reason for doing that would be to make it more credible that he might have destroyed or otherwise disposed of forms that you had handed him to go on the Register?”

A. Well, if that is your impression, that is not mine.” (T. 207/1-13).

Although in this last answer he did not admit what was put to him, it could not, in view of his earlier answers, credibly be disputed that this was the purpose behind emphasising to the interviewers that there was a hostile relationship between himself and Mr Walsh.

I will defer dealing with Mr Walsh's response to Councillor MacKenzie's imputation of misconduct after dealing with Councillor MacKenzie's account of his 1991/1992 return.

RETURN FOR 1991/1992

COUNCILLOR MACKENZIE'S ACCOUNT

When Inspectors Brophy and Hartigan raised the matter with Councillor MacKenzie on 4 August 1992, he admitted that he had not lodged his return for 1991/1992. He said that he had received a message about that and would ***“fix it up”*** (Exhibit A, Attachment “R”).

According to the evidence, the first time that Councillor MacKenzie gave an account of what he had done about this return was when Councillor Bartlett raised the question with him on 23 March 1993 and Councillor MacKenzie replied that he had handed the return to the General Manager a week after the local government inspectors asked that he lodge it. As mentioned already, Mr Bartlett and Mr Neely gave evidence that in conversations with them at that time Mr Walsh denied this allegation and ordered a search to be made for the missing document.

The next occasion was in Councillor MacKenzie's conversation with Janette Ryan on 27 April 1994 when she telephoned him after he had failed to respond to the Director-General's show cause letter of 21 March 1994. On that occasion he had told her that he had filled out the form and obtained a computer printout and given them to the General Manager for which he had a witness, his secretary at the time, who was willing to give evidence that he had filled out the form and given it to the General Manager.

His next account is contained in his undated letter received by the Department of Local Government on 4 May 1994 in which he claimed that the only request made to him to submit the return was by Inspectors Mary Brophy & Co., who requested that he bring his returns up to date. He wrote:

“I immediately asked the then Shire President's secretary, Mrs Margaret Kime to obtain a computer printout of property owned by myself and my company and a form to sign. This was done and the completed form was handed to the General Manager, as I

have done many times in the past. What happened then I can only guess as the relationship between myself and the former General Manager was not good and still isn't. (Exhibit B, Tab 13)

The letter went on to admit he had submitted late returns many times and concluded by stating that if there were any doubts about his behaviour in regards to late lodgment of his pecuniary interests he would welcome an inquiry.

The principal account given by him of his actions with respect to lodging the return is contained in the transcript of the tape of his interview with the Department investigators on 12 July 1994. At the outset of that interview he corrected the statement that he had made in his telephone conversation with Janette Ryan that Margaret Kime was a witness and was willing to give evidence that he had filled out the form and given it to the General Manager. He was being asked about his alleged conversation with Margaret Kime in the week prior to his interview. The following exchange took place.

“Q. Did you talk about the returns?”

A. I think I ran over it, yeah.

Q. What sort of things might you have -

A. Well, when I came out from Mary Brophy, I asked her to go and get it and she went and got it and I filled it in.

Q. And Margaret remembered that?

A. Yeah, but she doesn't remember - she can't say that she seen me hand it to John Walsh because she didn't see me hand it to John Walsh because I handed it to John Walsh near the bubbler, near the water bubbler.

Q. And so you told her you handed it to him - at the bubbler - when you had this conversation?

A; Oh mate, I don't think I did. I just think I just told her that I handed it to him but she knew that before.

Q. Yes. So you were just going over it?

A. Well she knew that when the court case was on cos I run through it with her then.” (MacKenzie I. 4.3-4.9).

Later, in response to questioning, he gave details: The interview with local government inspectors on 4 August 1992 took place in the President's office. When the absence of his returns from the Register was brought to his attention he told the inspectors that he would immediately attend to it. He came straight out of the room into Margaret Kime's office and asked her to obtain a computer printout of the property owned by him and his company and a pecuniary interest form to sign. She obtained the printout and the form. He recalled signing the form, at home, on the weekend. He recalled the form had a computer printout attached to it which he signed. He handed the form to Mr Walsh the following Tuesday or Wednesday (4 August 1992 was a Tuesday, so this would have been Tuesday 11 or Wednesday 12 August 1992). The form was probably not dated. He personally handed the form to the General Manager **“Up in the corridor of the old Council Chambers, five or six paces from the Shire President's door.”** There were no witnesses. **“It's only his word against - my word against him.”** (MacKenzie I. 28.3-29.10). In the course of the interview he repeatedly said that this event occurred on the Tuesday or Wednesday after his interview with the inspectors (MacKenzie I. 25.6, 28.8). In his evidence at the hearing he said that it could have been seven to 10 days after the interview (T. 203/39). If so, it would mean that he had handed the form to Mr Walsh by 14 August 1992 at the latest.

The “Bubbler” Story

At the hearing Councillor MacKenzie was asked for details of his alleged encounter with Mr Walsh at the water bubbler. He said that he had gone to the Council offices for the express purpose of handing in his return form. He claimed that he entered the Council offices on the ground floor with the distinctive yellow form held in his hand and fully visible. He could have gone directly to the offices of Mrs Bradley or Mr Walsh which were on the ground floor nearby but he chose instead to ascend the stairs to the upper

floor and visit Mrs Kime in her office to say good-day. The form was distinctive and would have been visible to her. If she had seen it she would have immediately recognised it for what it was. He said that he talked to her for three, four, five minutes or so. Then he went on his way to go downstairs to Mr Walsh's office and he says that he then happened to bump into Mr Walsh who was heading upstairs at that same time. The bubbler was at the top of the stairs and Mr Walsh would come past it as he came to the upper floor. He says that he handed the form to Mr Walsh near the bubbler as they passed (T. 181/57-185/9).

It has been mentioned earlier that Councillor MacKenzie said that when the Council's local court proceedings against him were pending he had a conversation with Margaret Kime about her recollection and what evidence she could give. At the hearing, he was asked whether he had asked Mrs Kime if she remembered seeing him with the pecuniary interest form in his hand on the day that he said that he spoke to her before handing it to Mr Walsh near the bubbler. He replied:

"No, I don't think I have. I have asked Mrs Kime did she remember me asking her to get a computer printout of my properties and get me a form after I left Horne's office after speaking to the inspectors." (T. 183/10)

He was then asked whether, when he saw Mrs Kime on that day, he told her why he was there at the Council offices. He replied, ***"I don't believe I had any reason to."*** (T. 183/19). It seems somewhat surprising that Councillor MacKenzie would not have told Mrs Kime why he was there and, when he was talking to her about what evidence she could give, he did not ask her whether she could corroborate his account of how he came to hand the form to Mr Walsh. He was later requested to try to tell the Tribunal what he had said to Mrs Kime and what she had said to him in that conversation about her recollections. He replied:

"I believe I would have asked her did she remember at the time obtaining computer printouts and forms for me to fill in and me telling her I have just gone to give them to Walshie. That is all, as simple as that." (T. 211/50)

When questioned on other occasions, Councillor MacKenzie had a number of times made suggestions as to what evidence Margaret Kime might be able to give if she was asked. But this was the first time he had suggested that she would be able to say that he had told her, ***“I have just gone to give them to Walshie.”*** He had omitted to mention that this was one of the things he asked her if she could remember when he gave the answer quoted above (T. 183/10). His suggestion that he told Margaret Kime that he had ***“just gone”*** to give the return form to Mr Walsh was not consistent with the order of events that he described in his evidence of giving the form to Mr Walsh near the bubbler after leaving Margaret Kime’s office. It was also inconsistent with what he had said on other occasions as to the evidence that Margaret Kime could give. In the course of the hearing Councillor MacKenzie admitted that he had given inconsistent accounts about what Margaret Kime could say if she was asked (T. 211/56-215/8). This new suggestion sounds like an invention by Councillor MacKenzie to prop up his bubbler story.

COUNCILLOR MACKENZIE ON GENERAL MANAGER’S MOTIVES

In view of the suggestion he had made that the form might have failed to reach the Register because of bad relations between himself and Mr Walsh, Councillor MacKenzie was asked at his interview what benefit he suggested Mr Walsh might get out of it. Councillor MacKenzie replied that Mr Walsh could get him off the Council. Then he was asked:

“Q. And what benefit is that?”

A. Well the Labories would have a dreamtime if I wasn’t around.

Q. Well what benefit is that to Walsh?”

A. Well they’re his mates.” (MacKenzie I. 48.3-5).

In the course of the interview Councillor MacKenzie had made a number of strong criticisms against Mr Walsh’s performance as General Manager. At one

stage he said that he didn't trust Mr Walsh and that if he, Councillor MacKenzie, had **"had the numbers"** he would have got rid of him (MacKenzie I. 31.5-31.7). When asked what personal gain he thought Mr Walsh could derive from getting him off the Council, Councillor MacKenzie replied, **"Power. He loved the job."**

MARGARET KIME - RETURN FOR 1991/1992

At her interview Margaret Kime was asked about the occasion of the inspectors' visit in August 1992. She remembered the occasion but, as the interview transcript shows, she was greatly confused between that period and the period of Councillor MacKenzie's presidency.

Her recollections as told to the interviewers about events in August 1992 have little evidentiary value because it is difficult to know to which period and return they relate. The passage in the transcript (Exhibit A, Attachment "R" quoted above) in which Councillor MacKenzie told the inspectors in 1992 that he had given the form to Mr Walsh and asked him to get a printout and commented **"check it with Margaret"** was read to her and the interviewer added, **"That was in 1992?"**. Actually, the passage in question related to the 1990/1991 return but Margaret Kime endeavoured to relate it to 1991/1992 return. She said:

"Well perhaps he did and the likelihood of him saying that in front of me. I can't say whether he did or didn't. But I know that it was normally it was - maybe he was just using that as an excuse when he was talking to John. But it was normally my job to get the list of properties. It mustn't have been long after that that he actually lodged it. It must have been within you know a few days, after the inspectors, that he actually lodged the pecuniary interest form."
(Kime I. 14.8).

Then ensued the following:

Q. You can be certain about that?

A. Well no I can't.

Q. Fairly certain though?

A. Fairly - yeah, sort of. I'm sure that that was one of the major things that prompted him to do something about it.

Q. And you recall that he had signed it and given it to Mr Walsh?

A. Mmm.

Q. And that was also fairly close to the time of the inspection.

A. That's right, yes.

Q. Certainly not six months away?

A. Oh no. Oh well I don't think he would have been the President six months away.

Q. So whether it may have been a few days or weeks, but certainly not months?

A. No, probably within a couple of weeks I would dare say, but I don't think he would have - I think it probably was enough to not only jog his memory but make him realise the seriousness of not lodging it on time and you know initiated him to do something about it.

Q. Mr MacKenzie has also said that - he put it in another way that he had obtained computer printouts and given them to the General Manager and the forms were for both years. He had a witness, his secretary at the time? That you may be able to give evidence that he filled out the form?

A. Well no. I can only remember one form. There was only one form that I moved from one section of the desk to another. I mean it was - they're quite large forms, it's not as if it - definitely I only remember that one that year. And it was the only year that he was the president that I would really become involved with. (Kime I. 14.9-15.9).

In the statement of evidence she signed for the purposes of the hearing (Exhibit B, Tab 26) she said, **"I don't recall discussing his 1992 pecuniary interest return with Councillor MacKenzie."** (para. 8).

"I don't recall Councillor MacKenzie asking me to get a blank pecuniary interest return form for him. Had he done so. I would have passed the request on to Wes Phillips or the person in Mr Walsh's office who was responsible for the Register." (para. 9).

However, in giving her evidence she said that it was possible that Councillor MacKenzie had made a request to her to obtain a computer printout in the

second half of 1992 but she couldn't say exactly when that occurred because it was something that was not memorable. She said that if he had asked her, she would have done it for him. (T. 77/1-17). In her interview she said that she could remember obtaining a printout for him on at least two occasions and said:

"I may even have got a printout for him when he wasn't President. He may have rung me and asked me to get a printout. I may have done it on more than two occasions which is quite possible." (Kime I. 9.8).

She affirmed this statement when giving her evidence (T. 85/42, T. 86/39).

Gay Taylor, (Rates Clerk) said in her evidence that at various times during her period as Rates Clerk, Councillor MacKenzie had requested a printout so that he could determine his rates liabilities. She also gave evidence that sometime prior to the middle of 1993, probably in late 1992, Margaret Kime approached her and said words to the following effect: ***"I would like a property printout for Bruce MacKenzie"*** and she provided her with a printout (Exhibit B, Tab 20).

Mrs Jean Bradley, when interviewed, had said she recalled Margaret Kime asking her for a pecuniary interest form but was not sure when it was. She said, ***"I honestly wouldn't know, except I'd say it was probably 1992 and not 1993."*** (Bradley I. 16.3)

Mrs Bradley provided a statement of evidence for the hearing which contained the following:

"Sometime in late 1992 or early 1993 I spoke to Margaret Kime. This conversation probably occurred in the latter part of 1992. Mrs Kime said to me words to the following effect: 'Can I have a blank pecuniary interest return form?'. I am not sure whether she asked for one form or two forms. At that time she was working for Councillor Horne who was the Shire President. I gave Mrs Kime one or two blank return forms. I think that it was at the same time that Mrs Kime said to me words to the following effect: 'I need to go to the Rates Section to get a printout of properties.' I didn't follow this up, and Mrs Kime didn't get back to me."
(Exhibit B, Tab 18, para. 9).

In her evidence at the hearing, Mrs Bradley said that there was no detailed conversation between her and Mrs Kime as to why the form was required and

she did not remember exactly what was said because she was working at the time. Mrs Kime put her head through the door and said, **“Could I have a form”** or, **“Couple of forms”**. She said she hardly looked up, got up went to the cupboard and handed her one or two forms (T. 57/41-58/3). Mrs Bradley affirmed in her evidence that she could not recall exactly when the conversation took place but the best of her recollection was that it was probably in the latter part of 1992, but which month, she couldn't say. (T. 59/26-36)

On the foregoing evidence it is probably that Margaret Kime obtained for Councillor MacKenzie a blank pecuniary interest form and a printout of the properties in which he had an interest that were listed in the Rates Department of the Council in the latter part of 1992. It is likely that Margaret Kime stapled the printout as given to her to the pecuniary interest form and handed them to Councillor MacKenzie for his attention. As Margaret Kime was no longer Councillor MacKenzie's secretary, she probably did no more than that. Despite a suggestion to the contrary made by Councillor MacKenzie when questioned about the matter, there is no evidence and he later did not continue to suggest that Margaret Kime could throw any light on what happened to the form and printout which he claims she procured for him following the interview by inspectors from the Department on 4 August 1992. As he said himself, it is his word against the General Manager's as to whether or not, as he claims, he ever handed the documents to the General Manager.

EVIDENCE OF THE GENERAL MANAGER

John William Walsh was employed by the Port Stephens Council from 20 July 1970 until 23 July 1993. At first he was employed as the Council's accountant, in 1971 he became Deputy Shire Clerk and in 1981 became the Shire Clerk. In 1986 the official name of the position was changed to Shire Clerk/General Manager. For present purposes he has been referred to as General Manager.

He was interviewed by the Department's investigation officers on 13 July 1994. He made a statement of evidence dated 22 March 1995 for the purpose of the hearing. (Exhibit B, Tab 16). He gave evidence on oath at the hearing. A

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comparison of these three sources shows no material variation in his recollection of the various events.

He had no recollection of seeing any pecuniary interest return form sitting on Councillor MacKenzie's desk when he was Shire President and could not recall coming out of the President's office with a pecuniary interest return under his arm (Walsh I. 9.2-9.7; Exhibit B, Tab 16, para. 8). He considered that it was not likely to have happened because the return would then have appeared in the Register (Walsh I. 19.3; T. 42/32-43/3).

In relation to 1992, he recalled the visit to Port Stephens of the Department's inspectors (Brophy and Hartigan in August 1992). (Walsh I. 12.7). Councillor MacKenzie's claim that after having been interviewed by the inspectors he completed a return and handed it to Mr Walsh "**as he had done in previous years**" was put to Mr Walsh who said, firstly, that he was not aware that Councillor MacKenzie had handed him returns in previous years and, specifically, he did not recall being handed one by Councillor MacKenzie after the visit of the inspectors or at any time in the period 1988-1991 (Walsh I. 13.7; 15.4).

In particular, Mr Walsh said that he did not remember being handed a pecuniary interest form by Councillor MacKenzie near the bubbler at the top of the stairs near the entrance to the President's office. He said that if he had been given the return at that location, as the office of Mrs Bradley, his secretary, to whom he would have given the return was only 30 or 40 feet away from the bubbler, he would have given it to her to place in the Register (T. 45/42).

He said that it was not Councillor MacKenzie's general practice or that of other Councillors to hand their returns to him as there were other people to whom Councillors used to give their completed returns (Walsh I. 13.7, 15.5; T. 35/57; 46/38). Although he had no specific recollection of it, he conceded that it was possible that Councillor MacKenzie might have handed him a return (T. 36/14-19) but he said that in that case he would have given it to his secretary or put it on her desk for filing (Walsh I. 18.10; Exhibit B, Tab 16, para. 12).

At his interview he was shown President Bartlett's memorandum addressed to the General Manager dated 25 March 1993 stating that Councillor MacKenzie had alleged that he had handed his 1992 pecuniary interest return to Mr Walsh a week after being interviewed by the inspectors. Mr Walsh said that his reaction when he received that memo was that Councillor MacKenzie had not handed the return to him and that, if it had been handed to him, it would have been in the Register like all the others (Walsh I. 26.7, 27.3). Asked if he was concerned at Councillor MacKenzie's claim, he said, **"I was concerned that he may be trying to indicate that he had done something that he hadn't."** (Walsh I. 27.5). In his statement of evidence he said that he had told President Bartlett at the time that he denied this allegation (Exhibit B, Tab 16, para. 15).

Possible explanations for a return handed to him by Councillor MacKenzie going astray were explored with him in the witness box. He was asked whether he would have had any reason not to ensure that a return lodged with him by Councillor MacKenzie got on the Register. He said that he could suggest no reason whatever (T. 39/38). He said:

"I believe I would have had a reason to ensure that it was (lodged with the appropriate people to ensure it got on to the Register) as the General Manager of the Council to make sure the records were correct. Secondly, had it been entrusted to me, it would have been a personal requirement that I made sure that it was passed on to the correct people." (T. 39/31).

When the question was specifically put to him, he denied that he had destroyed, lost or mislaid Councillor MacKenzie's returns. (T. 33/15; 43/5-12).

RELATIONSHIP BETWEEN COUNCILLOR MACKENZIE AND THE GENERAL MANAGER

It will be apparent from what has been said already that whenever Councillor MacKenzie was questioned about the missing returns he professed to have had a very bad relationship with Mr Walsh. He has criticised Mr Walsh's performance as General Manager in the strongest terms and appears to have taken every opportunity to make derogatory remarks about him. The language he has employed in expressing his opinions about Mr Walsh and their

relationship appear to display on Councillor MacKenzie's part a deep seated personal dislike bordering on hatred.

His attitude towards Mr Walsh persisted at the hearing. He claimed to have always had a poor relationship with Mr Walsh. He said, ***"I had to have a relationship with him when I was first term as Shire President because I had to have a relationship with him, but I don't believe I have ever in my life had a relationship or been on good terms with John Walsh."*** (T. 186/3). He said that he could live with it when he had to for the first term of his second Presidency, 1989-1990, but after 1990 it got worse. (T. 186/17-37). He was asked whether it would be correct to say that his relationship with Mr Walsh as at August 1992 was ***"absolutely disastrous"*** and he replied, ***"non-existent ... I probably had no time for him, and he probably had no time for me."*** (T. 186/39-47). When asked, ***"So you still today suspect that one possible reason for that 1992 return not getting on to the Register was that the General Manager, Mr Walsh, deliberately failed to see that it got there?"*** and he answered, ***"Yes."*** (T. 205/22).

If the relationship was as bad as Councillor MacKenzie described it and if Mr Walsh reciprocated the depths of feeling displayed by Councillor MacKenzie, one would expect it to have been so manifest that others close to them in their working relationships would have noticed it to a commensurate degree. But that does not seem to have been the case.

Mr Walsh himself appears to have been unaware of Councillor MacKenzie's depths of feeling. He said, ***"I would describe my working relationship with Councillor MacKenzie as quite reasonable"*** (Exhibit B, Tab 16, para. 3), ***"quite good,"*** although sometimes he would have a different point of view from the President of the day, including Councillor MacKenzie. (T. 39/48). He said that he had little occasion to deal with Councillor MacKenzie after he ceased being Shire President in September 1991 (Exhibit B, Tab 16, para. 3).

Although Councillor Bartlett admitted that he had never had a good relationship with Councillor MacKenzie he went on to say:

“I observed that during the time that Councillor MacKenzie was Shire President he had a good working relationship with Mr Walsh. There was some gradual deterioration of the relationship which coincided with a gradual change in the Council ethics, away from a stance of rampant pro-development. Naturally, the recommendations and decisions of Mr Walsh and other Council employees tended to reflect the prevailing Council ethos.”

(Exhibit B, Tab 21, paras. 3, 4).

At the conclusion of his evidence, Councillor MacKenzie asked Councillor Bartlett questions about his own relationship with Mr Walsh. Councillor Bartlett said that he thought they had a good working relationship when he was Shire President and Mayor, a professional relationship. He denied that their relationship was on a personal basis, but agreed that after Council meetings he and a few other Councillors go down to Mr Walsh’s office ***“to have sustenance there.”*** (T. 128/15-41).

Margaret Kime said in her statement of evidence, ***“I know that Councillor MacKenzie and Mr Walsh had no social relationship but I observed them to have a reasonable working relationship.”*** (Exhibit B, Tab 26, para. 11). Previously, when interviewed by the investigating officers, she had been a little more expansive when asked to comment on the relationship between Councillor MacKenzie and Mr Walsh. She said:

“Well I don’t think they had any great respect for each other. I don’t know personally if there were any problems outside Council, I can’t comment on that. But, you know, it was sort of probably more - the first term that I worked with Bruce as President, there didn’t seem to be a great deal of animosity between the two of them. But the last term as President, just from the kind of comments that I overheard, or comments that were made to me by him, was that he didn’t hold him in any great high regard and probably felt that he wasn’t doing as good a job as he could have been.”

When asked whether that was an account of Councillor MacKenzie's opinion of Mr Walsh, she went on:

“That’s right. And I think it was vice versa, I don’t think that John held Bruce in any great high esteem. He probably felt that some of the things that he did were kind of a bit cowboyish for somebody who held a position as the Shire President. Yes I think

there was a bit of animosity there, particularly the second term as the Shire President. I don't think that they got on well together."

She was asked whether she had ever witnessed Mr Walsh doing anything to hinder Councillor MacKenzie in his duties as Councillor or Shire President and she replied, "**No, no I haven't really, or vice versa.**" (Kime I. 22.8-23.3).

Mrs Bradley said that she had no direct dealings with Councillor MacKenzie so could only speak from her observations of Mr Walsh. She overheard some telephone conversations between them and says that Mr Walsh always spoke in a civil manner and she never heard Mr Walsh criticising Councillor MacKenzie or any other Councillor. (Exhibit B, Tab 18, para. 15).

Whatever the truth may be as to the intensity of Councillor MacKenzie's feelings towards Mr Walsh, the evidence does not support Councillor MacKenzie's claims and insinuations that Mr Walsh reciprocated those feelings with an equal degree of intensity. I would conclude that Councillor MacKenzie has greatly exaggerated in describing Mr Walsh's attitude towards Councillor MacKenzie and has done so with a view to promoting the idea that Mr Walsh was capable of and likely to ensure that his pecuniary interest returns did not get on the Register so as to harm or cause detrimental consequences to ensue for Councillor MacKenzie.

Neither the evidence nor the probabilities provide sufficient reason to suggest that Mr Walsh might have deliberately lost, mislaid or destroyed either of the returns. He had no sufficient motive for doing so and good reason not to do so. Even if the thought had entered his head he could never have expected to get away with it, not once, much less twice.

On Councillor MacKenzie's version, he had handed his 1991/1992 return to Mr Walsh by 14 August 1992 at the latest. If, as I believe, Councillor MacKenzie would have at least glanced at Mrs Bradley's memos of 24 August and 12 November 1992 to see whether they were trash or not, he could not have failed to realise that the Council officer keeping the Register

was asserting that the return he claims to have handed to Mr Walsh had not reached the Register. If he had in fact handed that return to Mr Walsh as he claims, he could be expected to have kicked up a fuss about its absence from the Register and made a complaint about neglect or misconduct by Mr Walsh. On the other hand, if he had not handed the return to Mr Walsh, he would be expected to ignore these memos consistently with his hostile attitude towards lodging pecuniary interest returns. Councillor MacKenzie does not now admit receiving or knowing the contents of either of these memoranda. The most likely explanation for this is that he could not afford to admit receiving them or reading them because he would then have to explain why, especially after the memorandum of 24 August 1992, just 10 days after he claims to have given Mr Walsh the return, he did not respond to the memo in the way that would be expected of him if, in fact, he had given Mr Walsh that return.

“PHANTOM” RETURN DATED 13 APRIL 1993

On 13 April 1993, a pecuniary interest return form, with a computer printout attached to it by stapling, mysteriously appeared on Mrs Bradley's desk. These original documents are contained in Exhibit B, behind Tab 9. The form and printout both bear Councillor MacKenzie's signature in blue biro ink. His name is handwritten on the form together with the date **‘13/4/93’** alongside his signature. In the section for listing real property interests, appear, hand printed, the words **“See ATT Sheet”**. Other sections on the front of the form are struck through with parallel lines. All handwritten material is in the same biro ink as the signature. The space for the period to which the return related, which appears on the form between the spaces for name and signature, is left blank. It could not have been overlooked by the person who wrote the name and signature on the document. This suggests that the omission of the period to which the return purported to relate was deliberate. Councillor MacKenzie acknowledged that the signatures and handwriting were his (MacKenzie I. 39.8; T. 189/6).

The form itself had crease lines and indentations all over it. The colour appeared somewhat faded and varied as if partly sun-bleached. It certainly did not look like new. The attached printout, on the other hand, although folded because it was longer than the form, appeared relatively new as if it was in the condition in which it would have emerged from the printer.

The printout contained internal evidence, which was confirmed at the hearing by the evidence of the Rates Clerk, Gay Taylor, that it had been generated in the Council's Rates Department between 24 March and 1 April 1993 and could not have come into existence at any earlier date. (Taylor Exhibit B, Tab 20, para. 3; T. 115/43-116/34). This evidence was not disputed by Councillor MacKenzie.

Mrs Bradley was shown the original form with the printout stapled to it when interviewed on 12 July 1994. She was asked whether she recalled Councillor MacKenzie handing it in. She replied:

“That arrived on my desk. I know distinctly because at this time I think there'd been some discussion about legal proceedings being taken, and I had been asked at one stage would I check the register again to make sure he hadn't filed one, which I had done. ... Then some time later, again I wouldn't remember what date it was, but I remember I came in one morning, after a council meeting, because I remember, and on the middle of my desk was this return. Because I remember saying, where did this come from, going around saying, did you put this here, did you put this here, and everyone saying no, I don't know. In fact, I think I said to John Walsh, did you put this here, and he hadn't been at the council meeting the night before, and he said no, and I think, from memory, Jim Neely eventually said it had been given to him and he'd left it on my desk. But that's a vague recollection. So either Jim Neely put it there, and maybe he'll remember that, whether he did or not, or someone put that on my desk. But it appeared on my desk. Just laying in the middle, as I said, my desk was empty when I went home every night, there was never anything on it. So that was just laying in the middle of the desk when I came in the following morning.” (Bradley I. 14.2-14.7).

Mrs Bradley confirmed this account in her statement of evidence (Exhibit B, Tab 18, para. 13) and her oral testimony at the hearing (T. 62/27-68/34). She said that the return had arrived on her desk on the date it bears or within the following day or two. (T. 62/51).

Mrs Bradley said that she believed that the pecuniary interest form which turned up on her desk was the same form that she had sometime previously given to Margaret Kime at her request for Councillor MacKenzie. (T. 63/33-68/1). It was put to her that this would suggest that Margaret Kime's request for the form would have been made around April 1993, the date on the form; but she rejected this suggestion. She replied:

“That is not my recollection. My recollection was that it was the latter part of 1992. I don't know why, but I just have a recollection it was probably the latter part of 1992. Could have been early 93, but my feeling was it was the latter part of 1992.” (T. 68/6).

She agreed that there was a connection in her mind between the two events, Margaret Kime's request and the form arriving on her desk, but she said her recollection was that there was a time gap between the two events and her abiding recollection was that Margaret Kime's request was made in the latter part of 1992 even though she could not be ***“absolutely certain.”*** (T. 68/13-34).

Mrs Bradley's recollection that the request for the form was made in the latter part of 1992 is supported by Gay Taylor's evidence that Margaret Kime's request to her for a printout of Councillor MacKenzie's properties was made ***“probably in late 1992”*** (Exhibit B, Tab 20, para. 2) and evidence by Margaret Kime that she normally went to Gay Taylor if she wanted a printout (T. 79/10-20). It is further supported by an answer given at the hearing by Margaret Kime. Her attention was drawn to the fact that the printout attached to the return dated 13 April 1993 showed that it was generated in March 1993 and she was asked whether it might not have been obtained by her as her employment with the Council did not actually end until 2 April 1993 (Exhibit C; Phillips T. 52/43-53/45). She said, ***“I can't recall doing it as late as that.”*** However, she conceded that it was possible because she had difficulty remembering dates a couple of years back (T. 78/7-17). The period had been a hectic one for her as she had given notice of her resignation on 19 March 1993 to take up other employment and was engaged in clearing up.

She was absent from the Council offices on a number of days taking outstanding leave and unused flexitime before 2 April 1993 (T. 75/52-76/37).

Margaret Kime had been shown the return form dated 13 April 1993 and the printout attached to it when she was interviewed on 11 July 1994. Her attention was drawn to its condition with the observation that it looked as if the form had taken **“a bit of a beating.”** She said:

“A bit dirty. It’s quite possible that he could have taken it home. It looks like it’s sort of been on the floor of the car or -- So this is consequently an additional form that somebody’s given to him? You don’t know?”

She was told that that’s what the interviewers were trying to find out and she went on:

“No. That I can’t help you with. I wasn’t at Council at that time and I don’t know whether somebody has actually given him a replacement form.” (Kime I. 21.6-21.8).

As to the printout attached to the form she said that it was not the printout that she would have obtained for him (Kime I. 22.3).

At the hearing Mrs Bradley was asked specifically about her statement to the interviewers that she had a **“vague recollection”** that it was Mr Neely who told her that the return in question had been given to him and he had left it on her desk. She twice repeated that it was only a **“vague recollection.”** She was asked if she could explain how she had come to mention Mr Neely’s name in this context. She replied:

“I probably asked him because if Mr Walsh wasn’t at the Council meeting of the evening before, Jim Neely at that stage was the acting General Manager, and I would speak to Jim Neely probably several times a day and probably the next time he came into the office I might have said, ‘I have got this return, did you put it there?’. That is a vague recollection. But if he was acting General Manager it is possible it could have been taken to him.”

She then gave the following evidence:

“Q. I take it that recollection, vague though it is, persists to this day?”

A. It persists, but it is vague. I can't be absolutely positive and tell you an exact day of the week. My recollection is that it was the night after a Council meeting and it was Jim Neely who said it had been given to him, but it is a vague recollection." (T. 66/52-67/15).

A copy of the minutes of a Council meeting held on Tuesday 13 April 1993 was tendered (Exhibit D). They are authenticated by the signatures of Councillor Bartlett as Shire President and Mr Walsh as General Manager. Amongst those recorded as present are Councillor MacKenzie, the General Manager (Mr Walsh) and the Manager, Corporate Services (Mr Neely). If, as appears to be the case, Mrs Bradley's vague recollection is based on a false assumption that Mr Walsh was not present at the meeting but Mr Neely was present as acting General Manager and, for that reason, it was possible that Councillor MacKenzie's return could have been taken to Mr Neely, her evidence of having this recollection is entitled to little weight unless corroborated.

Mr Neely swore that he had no recollection of any conversation with Mrs Bradley on the subject of how the form came to be on her desk (T. 140/22). He categorically denied that the return had been handed to him by Councillor MacKenzie and that he had taken it to her office and left it on her desk (T. 138/39-139/19).

Mr Walsh, when interviewed, said that the only thing he could say about a background to the return dated 13 April 1993 was that Mrs Bradley had made a comment to him that Margaret Kime had asked her for a blank form but he did not know whether that comment was related to the form that showed up (Walsh I. 22.5). He denied that Councillor MacKenzie had lodged that return with him (I. 24.1). He was unable to throw any light on how the document had come to arrive on Mrs Bradley's desk. His evidence was that the first he knew of it was when someone, probably Mrs Bradley or Mr Phillips, told him on 13 April 1993 or soon after that date that it had turned up there and he expressed surprise that it had done so (T. 44/21-54; T. 45/8-18).

Councillor MacKenzie's Version

If anyone was able to explain how and why this odd return could have come into existence and found its way on to Mrs Bradley's desk, it was Councillor MacKenzie. He had written on it and signed and dated it. However, when it was shown to him during his interview by the investigators he became coy and facetious and gave evasive answers.

He admitted that the signature was his. As the interview proceeded:

"Q. Could you tell me the background to your signing the form on the 13th of April?"

A. No.

Q. Is that the form that you signed after Mary Brophy's reminder to you in August?"

A. No. Cos the one that Mary Brophy asked me to sign was handed in about within a week of me seeing Mary Brophy.

Q. What's the background to that one then?"

A. I don't know.

... ..

Q. The form, the ordinary return, doesn't state the period to which it refers. The area here is blank. Do you recall filling out a form and being not sure what to fill out?"

A. Mate that's my name, that's my signature, that's my writing, and that date must have been the day.

Q. Did you receive a letter from the General Manager or the Mayor saying that you hadn't completed forms for two years and to attend to it very quickly?"

A. I can't recall. I'm like Alan Bond. No not like Alan Bond, I'll take that back. No, I can't recall why I signed that. That's a mid-term sort of one I put in, isn't it?" (MacKenzie I. 34).

And so it went on. He denied receiving President Bartlett's letter of 25 March 1993 requesting him to file the two missing returns by 30 March 1993. He

denied that the return that he signed on 13 April 1993 was in response to that letter. He gave a nebulous hint that Jim Neely might have had something to do with it. He said:

“The only rapport I had with anyone in the building of any sense in that time in management was Jim Neely. Whether Jim Neely said to me, put a form - sign the bloody thing - I don’t, I can’t recall, you’d have to ask him. Go on, he’s in there - talk to him about it.” (MacKenzie I. 35.6).

When asked again who gave him the blank form he said it was Margaret Kime or Jim Neely. When asked who would have given him the form and printout because Margaret Kime may have left the Council by then, he replied:

“I don’t know. Someone would have got me that - I’ve never gone and got a printout, someone would give it to me wouldn’t they.”

He was then asked ***“Who did you ask to get you the forms?”***. He replied: ***“I don’t remember, it wouldn’t have been Jean Bradley.”***. The questioning went on:

“Q. So you can’t recall who gave you the form?”

A. No I cannot.

Q. Do you recall completing it, filling it out?”

A. Well I must have, unless I was drunk because I signed it. That’s my signature.”

Q. Do you recall whether you completed it here at home or at the Council?”

A. No I can’t say.” (MacKenzie I. 36).

At this point in the interview it was suggested to him that the form dated 13 April 1993 was the form that he said Margaret Kime had obtained for him at his request after his interview with the local government inspectors in August 1992. His attention was drawn to its ***“crumpled”*** condition and he interjected with laughter saying, ***“Well it’s been in my car for weeks.”***. The interviewer said, ***“It’s grubby, it seems to have been in the boot of the car or***

something like that - and we thought -" and Councillor MacKenzie again interjected with loud laughter saying, **"He knows me!"**. (MacKenzie I. 36.8). The interviewer persisted with questions suggesting the form was one that Margaret Kime had got for him in 1992 which he had then put aside until someone had suggested to him in March or April 1993 that he had better put a return in, whereupon he used that same form in April 1993, to which he replied, **"No, I dispute that."** (MacKenzie I. 37).

His attention was then drawn to the fact that the printout attached to the form was dated 23 March 1993 and was in a different condition from the form which **"Looks like it has even been in the sun?"**, to which Councillor MacKenzie replied, **"It's grubby, ha ha ... bleached, ha ha."** (MacKenzie I. 38). At this stage, his attitude towards being questioned about the return dated 13 April 1993 appeared to be that it was a riddle for the interviewers to try and solve. He described the return as follows:

"Yes. This is a phantom one, isn't it. It's in the middle of nowhere in a sense. But it has got my signature on it."
(MacKenzie I. 38.8).

Of course, the question which cried out for an answer from Councillor MacKenzie was why did he sign it? When earlier he had rejected the suggestion that it was because of the Shire President's memorandum he found himself without an explanation, saying, **"I can't account for why this on the 13th"**, afterwards going on to suggest that it might have been Jim Neely's idea. He repeated this reply when he was asked to whom he had given the form after he signed it. He said, **"Mate I don't remember who I give it to but I give it to someone because it's there and it's my signature, but I can't honestly say why I've done it at that time on that date."**

The interviewers gave Councillor MacKenzie every opportunity to provide them with an explanation, then, having failed to obtain it, asked, **"But who else should we speak to? How do we get to the bottom of this?"** (MacKenzie I. 42.8), to which he gave a series of evasive answers indicating

finally that he would admit nothing except his handwriting and signature, saying:

“I can’t say where I signed, or what, whether I had it in or out, sunbaking at the beach and it got bleached or what, I can’t say that. But it’s my writing and that’s that.” (MacKenzie I. 44.5).

Councillor MacKenzie gave his evidence at the hearing after having heard the evidence of all other relevant witnesses on the subject of the return dated 13 April 1993. Their evidence had left it still unexplained. It was again his opportunity to fill the void. At the outset he said, ***“The last return I can remember putting in was after the local government inspectors Brophy and her offsider said to me, ‘You haven’t put one in’.”*** (T. 177/13), but not long afterwards in the course of an answer he referred to the return dated 13 April 1993 and said, ***“As far as I am concerned, I submitted two returns within six or seven months.”*** When asked to identify them, he said that the first was the one he claimed to have handed to Mr Walsh near the bubbler in August 1992 and, as to the other, he said:

“ The return six or seven months later is when I was prompted by a Councillor, I couldn’t believe that I hadn’t - it hadn’t been submitted, and I made the comment at that time that I have already put one in. So I checked with Jim Neely, and I know Jim Neely was vague this morning, but I checked with him and he checked with John Walsh, and it wasn’t it, or it wasn’t in the records, and Jim Neely procured for me another form with another computer printout or computer printout typed out. I signed it in the Council meeting, but I can’t say the Council was on that day, but on the Council meeting I handed it in, which I did most times. I either handed it to John Walsh or Jim Neely at the Council meeting and it wasn’t as grubby as we are looking at today. It might have been a bit grubby, but it wasn’t as bad as it is now.” (T. 181/38).

With the flood of recall contained in this passage of evidence, Councillor MacKenzie professed to be able to remember relevant points on which he had told the investigators that he was unable to assist them. He was able to say what prompted him to put the return in, who obtained the form and printout for him, where he was when he signed it, to whom he gave

it after he signed it, where he was at that time and the condition the form was in.

In the context, the **“Councillor”** who **“prompted him”** must be a reference to Councillor Bartlett and the meeting on 23 March 1993 at which Councillor Bartlett spoke to him about the missing returns. He is still not admitting the receipt of the President's letter of 25 March 1993.

He is claiming that Jim Neely procured both the form and the printout for him and this now excludes Margaret Kime whilst supporting the recollections of Mrs Bradley and Gay Taylor that it was probably in 1992 not 1993 that Margaret Kime asked them for a form and printout for Councillor MacKenzie.

On the involvement of Mr Neely, though he claimed that the form and printout both came from Mr Neely, he was vague and inconsistent about when it happened, varying from possibly around about 23 March to three or four weeks, or two weeks, or a week and 10 days of Councillor Bartlett speaking to him: but he finally settled on **“probably”** 23 March 1993 (T. 189-191). He said that the request to Mr Neely came about after Mr Neely had made a search for the missing return without success and it was at that time that he believed Mr Neely suggested to him that he should put another return in (T. 191/26; T. 197/45-198/16).

When asked to explain the delay from 23 March to 13 April, he replied that he could not offer any great explanation and said:

“I have no stories to tell about that except, you know, that it happened. It never happened intentionally.” (T. 188/189).

He said he believed that he had the documents at home in his car, **“probably in the back seat for two or three weeks,”** before he got it out and took it to the Council meeting where he signed it (T. 189/6). As he had not put forward any reason for lodging the 13 April 1993 return, it was suggested to him that he did so because he had failed to lodge the returns in question and now that it looked as if he might be in trouble he decided to put in a return so as to be able to say, **“Well, I did put in a return but I put it in late and I got no**

advantage from it,”. At first, he rejected that suggestion even as a possibility (T. 198/42-53). Later on, he was reminded that there was a hue and cry going on in March 1993 about his returns not being on the Register and it might be supposed that he put in the return of 13 April 1993 as an evasive tactic. He answered, **“Well, you might say that.”** He was invited to say why, if that suggestion were made, it would be wrong and he said:

“Well it is possibly not wrong but if you remember Councillor Bartlett’s statement, when he mentioned to me the night of that meeting, I said to him straight away, ‘I’ve put one in. I gave it to John Walsh.’ So if you are thinking it is evasive action, I will probably have to agree with you but I still, I am still saying that I gave John Walsh a copy within seven or 10 days after the local government inspectors’ interview of 1992.” (T. 203/22-41).

He denied the proposition that, even if he had obtained a form and a printout following his interview with the inspectors on 4 August 1992, it would have been consistent with his attitude towards putting in returns that he had not done any more about it (T. 204/1).

When it was put to him, Councillor MacKenzie claimed that the story of the 13 April 1993 return that he had given in the witness box was not a recent invention as he had always been aware of how that return came into existence (T. 199/12-30). He was asked to explain why, if that was true, he had pretended to be ignorant of the circumstances and had failed to tell the full story of that return when he was interviewed in July 1994. He replied that he might have been **“blasé”** on that day and possibly did not take the interview seriously enough (T. 200/1-18).

Mr Neely - Return 13 April 1993

If Councillor MacKenzie’s story is true, one would expect corroboration from Mr Neely and could expect Mr Neely to have a good recollection of the events. March/April was an irregular time for pecuniary interest returns. As a senior officer, Mr Neely was a **“designated employee”** under the old Act and was himself required to put in pecuniary interest returns, so he knew when they were due and all about them.

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He had been directed by the General Manager to do a search for Councillor MacKenzie's missing returns and was aware that there were complaints and that Councillor MacKenzie had alleged that he had given his 1991/1992 return to Mr Walsh who had denied the allegation. He thus had every reason to remember if he had initiated or was otherwise involved with the 13 April 1993 return to the extent claimed by Councillor MacKenzie.

Mr Neely said in evidence that he could not specifically recall ever obtaining from Mrs Bradley a pecuniary interest form for Councillor MacKenzie; but he said that it would be a possibility because over a period of time he had obtained computer printouts for him and may well have also got him a return form (T. 137/54-138/7).

Specifically in relation to 13 April 1993, he said that, although it was certainly possible, ***"I don't think I would have given it to him subsequent to the time when I became involved in looking at that Register in March 1993"*** (T. 138/11). He had carried out his search of the Register on 26 March 1993. It was then put to him that if he had obtained a form and suggested to or advised Councillor MacKenzie to put it in, it would be logical to expect him to collect it after it was signed and deliver to where it was supposed to go. He replied, ***"That sounds logical but I am confident I did not do that."*** (T. 138/39). It was after this that he gave his evidence mentioned earlier categorically denying that Councillor MacKenzie had handed the return to him and he had taken it to Jean Bradley's office and left it on her desk (see above). He then explained why he was so sure:

"Why I am confident about that is because that is at the time subsequent to me being involved and looking at the Register. Had I received a form from Councillor MacKenzie after that time, I would not just take that form and deliver it on Jean Bradley's desk. I would clearly go to the General Manager and give him a copy, give him the form."

He was asked, ***"Why would you have done that?"*** and he answered, ***"Because of the importance and the severity, the importance of the issue, and because I didn't have direct involvement in keeping those records."*** (T. 139/12-25).

Mr Neely's attention was drawn to the minutes of the Council meeting of 13 April 1993 which showed him and Councillor MacKenzie as being in attendance and it was suggested that it had to be a possibility that Councillor MacKenzie may have given him the return at that meeting. His response was to say that although anything is possible, ***"I don't recall it and I believe that had I been handed that, I can't imagine that I would not recall it because of the importance of it."*** (T. 140/30-43).

In answer to questions by Councillor MacKenzie, Mr Neely said he could recall Councillor MacKenzie saying the words, ***"I have already handed one to Walshie"*** at some time prior to the return coming on to Mrs Bradley's desk. Councillor MacKenzie then asked Mr Neely, ***"Would it be possible that we had a conversation like, you know, 'get me another one and I will get it in'?"*** and Mr Neely replied, ***"No. I mean, I don't recall that, no, I don't recall that."*** (T. 140/47-141/2).

As mentioned already Mr Walsh denied that Councillor MacKenzie had lodged the return with him and was unable to throw any light on how the document had got to Mrs Bradley's desk.

It thus appears, on the evidence, that there is only faint support from Mr Neely of Councillor MacKenzie's claim that Mr Neely obtained the pecuniary interest form and the printout for him, and there is no support from either Mr Neely or Mr Walsh for Councillor MacKenzie's claim that he handed the form to one or either of them at a Council meeting and that, by inference, one of them was responsible for the document appearing on Mrs Bradley's desk.

THE 1992 COMPUTER PRINTOUT FOUND LOOSE IN THE REGISTER

There is a particular piece of evidence that has to be considered in relation to the origin of the yellow pecuniary interest return form dated 13 April 1993 and the question whether that form was or might have been, not, as Councillor MacKenzie claims, a form procured for him by Mr Neely in March 1993, but, as appears possible, a form procured for him by Margaret

Kime in 1992 and thereafter retained in his possession until it came to be utilised as his 13 April 1993 return.

When Janette Ryan and Robert Bellamy were conducting the interviews on 11 and 12 July 1994 they inspected the Council's Pecuniary Interest Register and found no loose papers in it. However, on 20 September 1994 they attended the Council for further interviews and again inspected the Register. This time they discovered a one page document loose in the front of the Register. It was a computer printout of properties in the name of Councillor MacKenzie and his companies bearing his signature. Janette Ryan made inquiries of the Council officer in charge of the Register but no explanation could be obtained as to the nature and origin of the document (Exhibit B, Tab 23, paras. 3-5).

The original document is in evidence (Exhibit B, Tab 11). For reasons to be seen later it will be referred to as the 1992 printout to distinguish it from the printout attached to the 13 April 1993 return which will be referred to as the 1993 printout. The document consists of a single sheet of white computer printout paper containing a list of Council rated properties, their addresses and rate assessment numbers under the name and address of the rated owners, they being listed as Mr Bruce MacKenzie and two companies in which he held an interest, Grafill Pty Ltd and Blue Mountains Development Corporation Pty Ltd.

The document is the worse for wear. It is faded and soiled. It appears to have been splashed with water leaving water marks on parts of the surface. It has creases and indentations as if it has been lying around with other articles resting on it. It has two distinct pairs of staple holes, each at a different angle at the top. At the foot of the list is Councillor MacKenzie's signature in blue biro indistinguishable in shade and strength of colour from the signature on the 1993 computer printout.

Gay Taylor's evidence proved as follows: the document had been produced in the Council's Rates Department; it was a printout from the alphabetical list of names on the Council's computer terminal identifying rate

assessments against names; it did not purport to identify all properties owned because one assessment could cover a number of properties; it would have been printed out not to serve as a list of properties to be attached to a pecuniary interest return but as a reference list to enable the assessments and the properties contained therein to be screened up on the computer with a view to producing a further printout of properties in a form suitable for attaching to a pecuniary interest return such as the 1993 printout; the first printout would then have served its purpose and could be discarded or handed out with the second printout; and, there was internal evidence that the printout here referred as the 1992 printout had come into existence prior to the 1993 printout.

An investigation officer of the Department, Gregory Cousley, had analysed the 1992 printout and ascertained that it was an accurate list of property assessments relating to Councillor MacKenzie as at 1 July 1992 and that the probable time frame in which this printout had been produced was between 1 July and not later than 1 December 1992. Mr Cousley made a statement of his analysis for use at the hearing (Exhibit B, Tab 22). As Councillor MacKenzie did not dispute his analysis or desire him to be called as a witness he did not give oral testimony but his analysis is part of the evidence before the Tribunal. (T. 222/21-40).

There are a number of points on which the Tribunal looked to Councillor MacKenzie for an explanation. They included the following:

1. The pecuniary interest form dated 13 April 1993 and the 1993 printout are in appearance and condition clearly of a different age and history, the latter obviously much more recent than the former.
2. The 1992 printout is obviously more ancient in appearance than the 1993 printout and is proved to have been produced not less than nearly four months earlier.
3. The appearance of the 1992 printout and the pecuniary interest form dated 13 April 1993 is so similar that it is more likely than not that they are of the same age and have suffered the same history.

4. Each of the two pairs of empty staple holes in the 1992 printout has an identical matching pair at the top of the pecuniary interest form but at different spacing between the pairs on each form - indicating that the former has been stapled to the latter and afterwards detached on two occasions. However, an identical matching pair of staple holes also appears in the 1993 printout - indicating that on two separate occasions both of these printouts were together attached to and afterwards detached from the pecuniary interest form at the same time. It would appear that after the two printouts were detached on the second occasion, the 1992 printout was put aside and the 1993 printout was reattached to the pecuniary interest form in the position where it now is by two other sets of stapling at the top.
5. The 1992 printout would have been out-of-date and out-of-place being attached to a return dated and lodged on 13 April 1993 whereas the 1993 printout was then current and appropriate if it was to be used as a list of properties. This provided a reason to detach the 1992 printout before lodging that return.
6. Another reason for detaching the 1992 printout could be that, as it would be relevant only to a return lodged for 1991/1992 and looked to be about the same age as the pecuniary interest form that was going to be used in 1993, it might show or suggest that the pecuniary interest form itself was one that had been procured in 1992 and not used but retained in Councillor MacKenzie's possession until lodged on 13 April 1993. This would support the theory that Councillor MacKenzie never did hand a 1991/1992 return to Mr Walsh at the bubbler as he claims.
7. How did the 1992 printout come to be loose in the Register?
Councillor MacKenzie agreed that it was his signature on the 1992 printout and that he had signed it for the purpose of putting it with a pecuniary interest return but he would not concede that, as this printout never reached the Register, it would mean that the return for which it was obtained also never reached the Register (T. 194/48-

196/5). He said that he could not account for the origin of this printout (T. 194/52) and could not explain how it came to be loose in the Register. He said ***“I never put it there*** (T. 196/33-55) and ***“It is not a plant by myself”*** (T. 223/57-224/54).

8. Councillor MacKenzie was unable to account for the appearance of the printout or of the pecuniary interest form but he suggested that it could have been caused by having been left in his car between the time Mr Neely gave it to him and the date he lodged it, 13 April 1993. He also suggested that the condition of the documents could have been caused by rough handling by the Independent Commission Against Corruption or local government inspectors because he thought that it had been handled a lot of times. He said ***“But I can’t give any great truthful answer of why it is like that.”*** (T. 216/16). Councillor MacKenzie could offer no explanation for the difference in the condition of the pecuniary interest form dated 13 April 1993 and the 1993 printout attached to it (T. 218/42-45). He denied that the 1993 printout had been obtained by him and become attached to a pecuniary interest form already in his possession because, he claims, they were both given to him at the same time (T. 221/6, 21, 26). It may be observed here that if that were so it becomes even more difficult to explain how the two documents came to be in such different conditions.

As to the appearance of the pecuniary interest form itself, Councillor MacKenzie suggested that this could have come about between the end of March when the form was secured for him and 13 April 1993 when he lodged it during which time it had been in the back seat of his car (T. 221/56-222/18).

His attention was drawn to the sets of staple holes in the pecuniary interest form and he was asked whether he knew how they had come to be in the document. He answered, ***“I could not, in a truthful manner, answer you how I ever knew that they became in that document.”*** (T. 216/8).

He was aware that the staple holes in the pecuniary interest form and in the 1992 printout indicated that this printout had been twice attached and detached from the pecuniary interest form. However he said that he was unable to account for its attachment or detachment or for the attachment of the 1993 printout to the form, nor was he able to remember ever seeing the 1992 printout attached to the form (T. 218/58-219/4). He claimed that he could not recollect ever having attached the printouts or detaching them himself (T. 218/47) and said that he had never physically used a stapling machine for the purpose (T. 220/32), and that the 1992 printout had never been detached while the documents were in his possession (T. 220/43).

As can be seen from the foregoing, Councillor MacKenzie's evidence left in its wake a number of riddles about the return dated 13 April 1993 and the 1993 printout attached to it as well as the 1992 printout. Many questions remained unanswered or not answered satisfactorily. These riddles were of his own making and as the other evidence and his answers left nowhere else to go for explanations, Councillor MacKenzie has to bear the responsibility for such mysteries and unexplained events as remain because he is the one person who should have had the answers.

PROPERTY INTERESTS THAT RETURNS FOR 1990/1991 AND 1991/1992 WOULD HAVE DISCLOSED

Councillor MacKenzie sought to attribute any shortcomings on his part in relation to pecuniary interest returns to his lax attitude to paperwork generally and his dislike of having to make public disclosure of his financial interests.

He constantly asserted that in spite of these shortcomings he had never used his position as Councillor to enhance the value of his properties (T. 175/20, 31). He said that he had had 15 years of inquiry into his personal life and property holdings (T. 175/6). ***“But”, he said, “I don’t hide a thing and anybody that knows me, I believe they will at least say that I am open and straightforward. So I am here probably under sufferance***

because I have been subpoenaed. I don't enjoy being here because, as I said, I have been looked at for the last 15 years." (T. 176/28). Towards the end of his evidence he denied that any failure to lodge returns was for his own personal gain. He said:

"I believe I represent the ratepayers in a true and proper manner. My dealings with Council have been true and above board, your Honour. I have not used my position, as Shire President or a Councillor, to rezone, make money or anything else." (T. 256/33).

In the light of these assertions it was proper to look at what property interests would have been disclosed by the missing returns that had not been previously disclosed in the returns from Councillor MacKenzie that were on the Register.

It turned out that during the two years in question, which included one year when he was President, Councillor MacKenzie had been engaged in buying and selling land, developing, subdividing and building, all within the Port Stephens Council's area. Some of the dealings were between himself and the Council in relation to lands owned by the Council or by himself. In respect of one transaction whilst he was President he agreed, with the benefit of hindsight, that he had had a serious conflict of interest at the time but he denied that he was then aware of it (T. 240/39, T. 241/55, T. 242/4).

Whilst strongly objecting to Councillors being under an obligation to furnish public returns of their pecuniary interests, Councillor MacKenzie claimed that he had no objection to Councillors being required to disclose their interests at Council meetings (T. 177/27). If the obligation on Councillors to disclose conceded here by Councillor MacKenzie was the only one it would not have served the public interest in disclosure of Councillors' financial interests in relation to Councillor MacKenzie's land transactions during the two years in question. His applications to the Port Stephens Council for consent to development, subdivision and building in relation to his own lands were not dealt with at Council meetings. They were dealt with, as were applications of a like kind by other land owners, by officers of the Council pursuant to delegated authority. The result was that within the

Council's practice and procedure, no public disclosure of Councillor MacKenzie's private financial interests in relation to these dealings would occur.

Councillor MacKenzie said in evidence that in all of these transactions he was only exercising his rights as an ordinary citizen and seeking no more than his entitlements and was following the same procedures as were open to any other land owner. He claimed to have obtained no advantage from the fact that he was the Shire President or a Councillor at the time and did not use his position to obtain any preferential treatment. Even if this were so, the fact remains that the absence on the Register of returns for the two years in question deprived the rate payers of Port Stephens Council and the public of the opportunity to have access to information regarding Councillor MacKenzie's financial interests to which they were legally entitled.

Particulars of the land transactions referred to above were ascertained by Senior Investigator, Janette Ryan, in an investigation made by her prior to the hearing. The result is reported in her statement of evidence (Exhibit B, Tab 23 and the documents in Exhibit B, Tabs 24 and 25). The properties included those owned or part-owned by Councillor MacKenzie and those owned by Grafil Pty Ltd, the company in which he held an interest.

Janette Ryan also gave evidence in the witness box as to each of the parcels of the land and the transactions relating to them that were relevant to the periods which would have been covered by the two missing returns (T. 142/51-153/19).

She was questioned by Councillor MacKenzie (T. 153/25-157/24). His questions led to further evidence being obtained concerning meetings of the Council's Development Assessment Panel through which Development Applications were processed (Michelle Leanne Clarke, Corporate Clerk, Port Stephens Clerk, Exhibit K, T. 162). Councillor MacKenzie tendered a document to support his statements about one of the properties (Exhibit 1).

It is not necessary for present purpose to recount the details of the properties and transactions. It is sufficient to state that the evidence

disclosed that there were eight parcels of real estate of substantial value that, consistently with disclosures made in his previous returns, should have been disclosed in returns by Councillor MacKenzie for 1990/1991 and 1991/1992.

They were:

- Portion 111, DP 752451, Butterwick Road, Woodville purchased by Councillor MacKenzie and his son in July 1990; Transfer date 5 December 1990.
- Lots 31, 32, 33 and 34 DP 814187, Giggins Road, Heatherbrae, which were created by subdivisions of Lot 3, DP 735721 (this Lot before subdivision was disclosed in Councillor MacKenzie's 1989/1990 return), owned by Councillor MacKenzie.
- Lot 1, DP 625543, 33 Richardson Road, Raymond Terrace, purchased by Grafil Pty Ltd in April 1991.
- Lot 7, DP 813264, Abundance Road, Medowie, purchased by Grafil Pty Ltd on 5 December 1991 (Contract date 6 April 1991).
- Lot 945, DP 813726, 10 Hastings Drive, Raymond Terrace, purchased by Grafil Pty Ltd in March 1992.

Reference has already been made to the applications to Council relating to these lands that were dealt by officers of the Council under delegated authority. Janette Ryan had discussions with senior officers of the planning and engineering sections of the Council who informed her that they believed that there were no planning issues or matters relating to roadworks, drainage or engineering works before the Council during 1990-1993 which had the potential to enhance the value of the undisclosed properties in which Councillor MacKenzie had an interest that are listed above (Exhibit B, Tab 3, page 5).

Councillor MacKenzie was cross-examined by Ms Murrell on the undisclosed properties and the transactions in relation to them detailed in Janette Ryan's evidence. He did not dispute the facts relating to the properties which she had reported in her statement of facts or described in her evidence (T. 226/8-227/14; T. 230/32-243/13).

Whilst the evidence did not establish that the non-disclosure of the above properties in the years in question resulted in financial gain to Councillor MacKenzie, they did result in gaining for him the privacy that he desired in relation to his financial affairs and some protection from the risk of possible questions, criticisms and even investigations in relation to his land dealings. When this was suggested to him he claimed that there was no substance in the suggestion because, “... **once I want to do anything it is sort of shouted from the rooftops and I don't think it is any secret anything that I do, within the building and outside of it.**” (T. 177/41).

SUMMARY OF REASONS

Some of the comments and observations made in the course of this Statement of Decision on questions such as credibility, probability, acceptance of evidence and the like in relation to particular matters will not be repeated in this brief summary of reasons, but it should be understood that they have been taken into account by the Tribunal in arriving at its conclusions and findings.

As mentioned earlier, the standard of proof laid down by the new Local Government Act for a finding by the Pecuniary Interest Tribunal is the civil standard of the balance of probabilities. As a contravention of the legislation by a Councillor may have serious consequences, although not of a criminal character, the cogency of the evidence relied upon should match the seriousness of the allegations being investigated: **Briginshaw v Briginshaw** (1938) 60 CLR 336. The Tribunal will apply this consideration to the present complaint.

The probabilities are that if the missing returns had come into the hands of the General Manager, Mr Walsh, they would have reached the Register. It was his duty to see that they did. He had responsible Council officers in charge of maintaining the Register to whom he could entrust the task of placing in the Register the pecuniary interest returns received from Councillors. They were Mr Phillips and Mrs Bradley. I find them to be

reliable witnesses. I accept their evidence that the returns were never on the Register and that they personally never received them.

It was reasonable then to look to Councillor MacKenzie for an account of the action taken by him or on his behalf to duly lodge the returns as it was his legal obligation and personal responsibility to lodge them.

As to the 1990/1991 return, apart from asking his secretary, Margaret Kime, to provide him with a form and a computer printout, his own evidence did not establish that he personally did anything to lodge it.

He has told contradictory and inconsistent stories about it on three occasions before giving evidence, namely, in the telephone conversation he had with Janette Ryan, his letter to the Director-General and his interview with the investigators. To the investigators he was evasive about detail and attempted to steer inquiries away from himself towards Margaret Kime on the question of what might have happened to the form.

When he gave evidence at the hearing he said there was a return on his desk but he would not swear that he ever examined, perused or signed it. He did not claim that he or Margaret Kime handed it to Mr Walsh. His affirmative evidence was that he personally did not lodge it.

Margaret Kime swore that she did not lodge it either and that she never saw it physically pass into Mr Walsh's hands. However, she attempted to make out to the Department's investigators a strong circumstantial case for concluding that the form had passed from Councillor MacKenzie's desk into Mr Walsh's possession during Councillor MacKenzie's presidency. That case fell to pieces at the hearing when she had to give sworn evidence. Her story then bore only a superficial resemblance to the one she had told the investigators leaving any suggestion from her evidence that Councillor MacKenzie's form passed from his desk into Mr Walsh's hands as either invention or pure speculation.

There is a distinct possibility on the evidence that the story she told the investigators was a result of collaboration between herself and Councillor

MacKenzie. It is also possible on her evidence that she told the story in a misguided attempt to be protective of her former boss.

Her story about the form being prominent on the President's desk for a long period was not supported by two persons who might be expected to have noticed it, Mr Walsh and Mr Neely. Mr Walsh had no recollection of ever picking up or being handed a form from Councillor MacKenzie's desk and was confident that if he had done so it would have been on the Register.

The Tribunal is led to the conclusion that the evidence of Councillor MacKenzie and Margaret Kime in relation to the 1990/1991 return is so unreliable that no inference can be drawn from it that a pecuniary interest form and printout obtained for Councillor MacKenzie for that period was completed and signed by him and came into Mr Walsh's possession.

As to the 1991/1992 return, it is not possible on the evidence to place any confidence in Councillor MacKenzie's story that he personally handed a return for that period to Mr Walsh near the bubbler or anywhere else.

The evidence does establish, on the probabilities, that Margaret Kime obtained a pecuniary interest form and computer printout and gave them to Councillor MacKenzie in the latter part of 1992 sometime after he had been interviewed by the local government inspectors on 4 August 1992; but I do not believe that Councillor MacKenzie ever completed the form and handed it to Mr Walsh as he claims and I reject his evidence that he did so.

The claim that he did so probably originated in his response to President Bartlett's assertion at the Council meeting on 23 March 1993 that he had failed to lodge his return. It was probably a spur of the moment defensive reaction to an allegation of a misdemeanour by a Councillor whom he disliked, a response that Councillor MacKenzie has since had to live with and attempt to shore up with later embellishments.

The immediate reaction by Mr Walsh was a denial which led President Bartlett to direct a fruitless search for the missing returns and afterwards legal proceedings against Councillor MacKenzie for an offence against the old Local Government Act.

After the matter became a complaint by the Director-General under the new Act, Councillor MacKenzie became obliged to elaborate his claim that he had handed the return to Mr Walsh.

One of his elaborations was the bubbler story which was first put forward to the investigators and afterwards further developed at the hearing.

He appears to have hoped at one time that Margaret Kime would support his story but she did not do so and he afterwards abandoned that suggestion.

The evidence revealed improbabilities and inconsistencies in the story but he adhered to it. One advantage in adhering to it was that it meant that there were no other witnesses to the handing over of the return so it was just his word against that of Mr Walsh.

I believe that Councillor MacKenzie greatly exaggerated the nature and extent of the disharmony he alleged to have existed between himself and Mr Walsh and that he did so to give credibility to the idea that deliberate misconduct by Mr Walsh, born of malice towards Councillor MacKenzie, was responsible for the absence of his returns from the Register. On the evidence, the suggestion is highly improbable. The evidence disclosed no sufficient motive for such conduct, no credible prospect of advantage to Mr Walsh and no reason for Mr Walsh to believe that such conduct, if indulged in by him, would go undetected or unpunished. The fact that the suggestion was made and then persisted in right into the hearing does not enhance Councillor MacKenzie's own credibility.

The credibility of his claim that he had handed his 1991/1992 return to Mr Walsh and did so by 14 August 1992 is also undermined by a number of other considerations:

1. Putting in the 13 April 1993 return was the act of a guilty person seeking to make belated amends or divert hostile legal consequences for a failure to have lodged returns when they were due.
2. Councillor MacKenzie's original pretence that he was unable to explain its origin, his evasion of questions about it, his ingenuous

suggestion that it was a puzzle for the investigators to solve for themselves all give rise to a suspicion that he could not afford truthfully to explain this return without exposing himself to the risk that he might reveal his failure to lodge the 1991/1992 return. If the furnishing of the 13 April 1993 return was innocent and well motivated there would have been no reason for him not to come clean about it to the investigators.

3. A possible reason for his reticence would be that he had used for the 13 April 1993 return the pecuniary interest form that Margaret Kime had got for him in 1992 which he had not handed to Mr Walsh but simply retained. The worn condition of the form was consistent with his having had it for a long time. The contrasting condition of the 1993 printout showed that the form was a lot older and had a different history from that printout, yet he swore he had received them both together. He sought to attribute the condition of the form to its having been in the back seat of his car, but only from late March 1993 which was just a short time before he lodged it. But this did not account for the different and newer condition of the 1993 printout. The discovery of the 1992 printout and the similarity of its worn condition to the condition of the form itself postulated that the two documents had probably co-existed prior to 1 December 1992 and had a common history, in which case the form could not have been obtained in March 1993 as Councillor MacKenzie claimed. The matching staple holes meant that the 1992 printout had prior to 13 April 1993 been attached with the 1993 printout to the pecuniary interest form, but later discarded, possibly because it was not only then out of date but because its condition might suggest that the form was as old as the 1992 printout and this could be because the form was the one that he had received from Margaret Kime and was falsely claiming to have given to Mr Walsh in 1992.

4. Councillor MacKenzie's personal credibility as a witness is severely thrown into doubt by his radical change of position at the hearing in relation to the return dated 13 April 1993 whereby he then professed to be able to tell the Tribunal the full story that he had previously told the investigators that he was unable to tell.
5. On the evidence there are so many loose ends that no final conclusions as the origin and purpose of the 13 April 1993 return can be reached and this is because the one person who knows, and must be expected to know all of the facts and circumstances, has not been prepared to reveal them when given the opportunity to do so. This means that adverse inferences against Councillor MacKenzie may be more readily drawn by the Tribunal from other evidence relating to the 1991/1992 year and the return dated 13 April 1993.

As to both of the missing returns, Councillor MacKenzie's self-proclaimed dislike and disregard for paperwork and his objections against Councillors having to put in pecuniary interest returns provide a basis for an inference, that if, his returns failed to appear in the Register it was more likely than not that he had either deliberately refrained from lodging them or simply neglected to do so.

His resentment against invasion of his privacy and the irritation he expressed that his financial affairs and property transactions had been scrutinised, investigated and put on public view over some years provided both a motive and a personal inclination against lodging these returns. In these circumstances, the inference just mentioned is far more likely to be correct than the inference that he sought to propagate, namely, that the returns were missing because of malicious misfeasance on the part of Mr Walsh.

For the reasons stated above and in the course of this Statement of Decision, I do not regard Councillor MacKenzie as a reliable witness and I am unable to accept his account of his actions in relation to the lodgment of his returns for the years in question. As I have already said, I do not regard

Margaret Kime as a reliable witness on those matters. Where the evidence of Councillor MacKenzie and Margaret Kime is in conflict with other witnesses who gave evidence, I prefer the evidence of those witnesses, none of whose truthfulness or general reliability I have reason to doubt.

CONCLUSION

The Tribunal's conclusion is that the Director-General's complaint against Councillor MacKenzie has been proved. The Tribunal finds that:

1. Councillor Bruce MacKenzie failed to comply with section 46B of the Local Government Act 1919 in that he, being a member of the Port Stephens Council on 30 June 1991, did not, within three months after that date, or at all lodge with the Clerk of the Council an ordinary return as required by that section.
2. Councillor Bruce MacKenzie failed to comply with section 46B of the above Act in that he, being a member of the said Council on 30 June 1992, did not, within three months after that date, or at all lodge with the Clerk of the Council an ordinary return as required by that section.

The Tribunal therefore finds that, in the above respects, Councillor MacKenzie contravened Division 9A of Part 4 of the Local Government Act 1919.

USE OF COMPUTER PRINTOUTS FROM COUNCIL'S RATES DEPARTMENT

An incidental comment should be made about Councillor MacKenzie's practice of using a computer printout from the Council's Rates Department as the source of information as to real estate in which he had interest or, as he claimed, for the purpose of attaching a printout to the return.

A pecuniary interest return requires a statement to be made of the address of each parcel of real property in which the person had an interest at any time during the return period. The evidence in the present matter brought out that a computer printout of a person's properties as listed in the

Rates Department of a Council may not be sufficient for this purpose. It serves to show only interests in properties as at the date of the printout. It would not disclose properties in which an interest had been held during the return period but which had been disposed of at the date of the printout.

By way of example, Councillor MacKenzie suggested at one stage that his alleged return for 1991/1992 (and, presumably also the return date dated 13 April 1993) was to serve as a “**catch-up**” for past periods, but he acknowledged that the 1993 printout attached to the return dated 13 April 1993 failed to reveal that he had had interests in Lots 31, 32 and 33 in Giggins Road and Lot 2 in Butterwick Road, all of which he had disposed of in the two years for which there were no returns, with the result that they did not appear in the 1993 printout (T. 225/58-227/15). He put this down to the fact that he was just following past practice with the approval of the Council’s management. He said that had been told that a printout would do and never that it would not do, so he accepted that it was sufficient (T. 227/17-35).

Other evidence supported him in this and I accept what he says; but attention should be drawn to the latent inadequacy of using computer printouts from the Rates Department in case other persons are using them for their returns.

THE QUESTION OF PENALTY

There remains the question of what action the Tribunal should take regarding Councillor MacKenzie in consequence of its findings against him. I have already referred to the range of options given to the Tribunal by section 482(1). This question may for convenience, but certainly not for accuracy, be referred to for present purposes as the question of “**penalty**”.

As Councillor MacKenzie was not represented at the hearing and was disputing the contraventions alleged against him I did not consider that it was appropriate to invite him to make submissions on the question of penalty. A lawyer would understand the convenience of making contingent submissions on penalty prior to any finding of guilt when guilt was in issue. However, a non-lawyer might feel, although wrongly, that the case against him had been pre-judged if he was asked to address the Tribunal on penalty before he had

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been found by the Tribunal to have committed any contravention and before he had been told of any findings made against him: see *Hall v New South Wales Trotting Club Ltd* (1977) 1 NSWLR 378; *Malone v Marr* (1981) 2 NSWLR 894; J R S Forbes on *Disciplinary Tribunals* (1990) page 122, paras. 12.95 and 12.96.

The Tribunal therefore proposes to give Councillor MacKenzie and the Director-General an opportunity to make submissions, if they wish, on the question of penalty now that the Tribunal's decision and findings will be furnished to the parties.

It would be convenient to all concerned if the submissions, if any, could be made in writing but Councillor MacKenzie indicated at the hearing that he had a preference for oral submissions. If he wishes to make oral submissions, they would be limited to the question of penalty of course, the Tribunal will not deny him the opportunity.

I propose to arrange for personal service of this Statement of Decision to be effected on him, together with a Notice to the effect that he may, if he wishes, present oral or written submissions on penalty in relation to the findings against him, provided that, if they are to be oral, he informs the Tribunal to that effect within seven (7) days to enable a date to be fixed and arrangements to be made to hear his submissions and, if they are to be written, he furnishes the written submissions within fourteen (14) days, both periods to be counted from the date of personal service.

Unless sufficient reason is shown to the contrary, the hearing, if any, to receive oral submissions will be conducted in Sydney.

A copy of this Statement of Decision will be furnished to the Director-General with similar directions.

DATED: 8 May 1995



K J HOLLAND Q.C.

Pecuniary Interest Tribunal

