

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 6/1997

DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT

RE: COUNCILLOR IVOR JOHN BURRELL,
GILGANDRA SHIRE COUNCIL

STATEMENT OF DECISION

Dated: 29 September 1998

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RE: COUNCILLOR IVOR JOHN BURRELL,
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STATEMENT OF DECISION

THE COMPLAINT

On 8 July 1998 the Tribunal received from the Director-General, Department of Local Government, his Report of an investigation into a complaint made by the Director-General pursuant to section 460 of the Local Government Act, 1993, that Ivor John Burrell then being a Councillor of Gilgandra Shire Council, contravened section 451 of the Local Government Act, 1993 in relation to consideration by the Council at its Ordinary Meeting held on 17 April 1997 of a draft Local Environmental Plan (LEP) then being submitted to the Council for its acceptance as a Draft LEP and a further proposal relating to a rezoning of land owned by Councillor Burrell's brother-in-law, Mr Peter Jackson.

The complaint was made by the Director-General on 4 December 1997 after preliminary inquiries had been made by the Department in consequence of a letter dated 2 June 1997 from the Gilgandra Shire Council's General Manager, Mr P A Mann, to the Director-General drawing his attention to "an apparent or possible breach" of the pecuniary interest provisions of the Act by

Councillor Burrell, as to which concerns had been raised by the then Mayor of the Council and other Councillors.

HEARING

After considering the Director-General's Report, the Tribunal, pursuant to section 469 of the Act, decided to conduct a hearing into the complaint.

The hearing took place in Sydney on 22 September 1998.

The Director-General was represented at the hearing by Dr James Renwick, of counsel, instructed by Ms Sharon Owens, Legal Officer, Department of Local Government.

Councillor Burrell was represented by Ms Sandra Duggan, of counsel, instructed by Councillor Burrell's solicitors, Abbott Tout.

The Director-General's Report of the investigation became Exhibit A in the proceedings and supplementary material provided to the Tribunal by the Department on 15 July 1998 became Exhibit B.

Prior to the hearing the Tribunal had given notice of its decision to conduct a hearing into the complaint to both parties on 15 July 1998 (Exhibit C) and there had been correspondence relating to the proposed hearing (Exhibits D – K).

Councillor Burrell gave evidence and was cross-examined and there was tendered on his behalf a character reference dated 21 September 1998 from the Council's General Manager, Mr Mann (Exhibit L).

The proceedings were recorded. References to the transcript will be by page and line number prefixed by the letter "T".

BACKGROUND

Except for a few points that will be dealt with in due course, the facts were not in dispute. The background to the complaint may, therefore, be recited by the Tribunal without detailed references to the material before it.

The conduct called into question by the complaint occurred at a meeting of the Council held on 17 April 1997 when the Council was considering a new draft local environmental plan for the whole Shire . At that time two rezoning matters which had previously been considered by the

Council were outstanding. One of these related to land owned by Mr Peter Jackson. The other related to land of a Mr Don Kennaugh and is of no concern here.

At a meeting of the Council held on 16 November 1995 the Council considered an application from Mr Jackson to approve a subdivision of his land in DP805131 between Chelmsford Avenue and Castlereagh Highway, Gilgandra. This land was zoned under Council's existing planning instrument part "non-urban 1(a)", part "non-urban 1(b)" and part "future residential area/flat exclusion" under the Council's Development Control Plan. The lot sizes proposed by Mr Jackson's subdivision did not conform with the existing zoning. Mr Jackson's application sought Council's approval to the rezoning of his land to Zone 1(c) which would permit the proposed subdivision. The principal difference this would make was that, as then presently zoned, subdivision into lots below 200 hectares was prohibited, whereas Zone 1(c) would allow subdivision of the land into blocks as small as two hectares.

Mr D J Turner, Director, Works and Technical Services, made a report to the Council on Mr Jackson's application. In relation to rezoning, the report stated that if the Council agreed to the proposed rezoning the process would then have to be driven by Council including all negotiations with the Department, advertising etc.; but the report also stated that the process would take a number of months to complete, with all negotiations and advertising, so that it would be appropriate to consider all aspects of the Shire's town plan at the same time.

At this meeting Councillor Burrell declared that he had a pecuniary interest in the matter and left the Council Chamber.

In his absence the Council passed a resolution as follows:

"983/95 RESOLVED:

- 1. That Council recommend to the Department of Urban Affairs and Planning that the land be rezoned into Zone 1(c).**
- 2. That the subdivision plan be approved in principle provided the land is rezoned 1(c) and provided suitable provisions are made for the passage of stormwater over the land.**
- 3. That a condition of the rezoning to 1(c) be that only land above the 100 years flood contour be permitted to be subdivided in the future.**

4. **That specific covenants be incorporated which only allow building on the land above the 100 year flood line."**

The Council's Minutes record that Councillor Burrell returned to the Chamber having taken no part in the discussion or voting in the matter.

Subsequently Mr Jackson applied to the Council for approval of an amended plan of subdivision of his land. This application came before the Council at its meeting held on 19 September 1996. The report to the Council on this application stated that the Council had already approved in principle the rezoning of the land to Zone 1(c) subject to conditions after approval had been received from the Department of Urban Affairs and Planning.

When the matter came up for consideration, Councillor Burrell declared a pecuniary interest and left the Council Chamber. In his absence the Council resolved as follows:

"576/96 RESOLVED:

1. **That the subdivision be approved subject to approval of the rezoning to 1(c) being approved by the Department of Urban Affairs and Planning.**
2. **That if plans are intended to subdivide Lots 1, 2 and 3 in the future to "residential" block sizes, provision would have to be made at the developer's cost to bring Dudley Street up to the standard of a fully sealed two-way road with provision for cyclists and a properly engineered culvert to accommodate the stormwater presently handled by the floodway across Dudley Street."**

Again, the Minutes record that Councillor Burrell returned to Chamber having taken no part in the discussion or voting in the matter.

At this time and continuing as at 17 April 1997 Council, as to the rezoning of land, was operating under the provisions of the Local Government Act, 1919 and to effect the rezoning contemplated by resolutions regarding Mr Jackson's land an amendment of the Council's Interim Development Order with the approval of the Department of Urban Affairs and Planning would have been required. However, it appears that the Council took no action to procure amendments of the Interim Development Order in relation to Mr Jackson's land because of its proposal to review the planning scheme for the entire Shire by proceeding under the Environmental Planning & Assessment Act, 1979 to procure a new Local Environmental Plan. The

steps to be taken by Council for this purpose are laid down by Part 3, Division 4 of that Act. They involve the adoption by the Council of a draft Local Environmental Plan for submission to the Department of Urban Affairs and Planning for the purpose of obtaining certificates from the Director of that Department to the effect that the draft Local Environmental Plan may be publicly exhibited.

Prior to the Council's meeting of 17 April 1997 a Draft Local Environmental Plan had been prepared with the assistance of the Department of Urban Affairs and Planning for submission to the Council for its acceptance as a draft.

Mr Turner, the Council's Director of Works and Technical Services, made a report to the Council for its meeting to be held on 17 April 1997. His report pointed out that the old Interim Development Order was being replaced by an LEP that no longer required the concurrence of the Department of Urban Affairs and Planning and that anything not allowed by the LEP the draft of which was before the Council would require a new LEP to be prepared and submitted to that Department. His report pointed out, amongst other things, that existing Zones 1(a) and 1(b) were combined in the Draft Local Environment Plan to become 1(r) Rural and that Zone 1(c) was to become Zone 1(s) Small Rural Holdings. His report also contained the following:

- "4. Council has resolved to look at including two subdivision submissions – one from Peter Jackson and one from Don Kennaugh, which would require changing zoning of land from 1(a) and 1(b) to 1(c). ...**

Council will need to determine to include these two areas into 1(s) Zone or leave as 1(r)."

The report concluded with the following recommendation:

- "1. That Council accepts the Draft Local Environment Plan as a draft to be forwarded to the Department of Urban Affairs and Planning.**
- 2. That Council requests a Certificate from the Director of the Department of Urban Affairs and Planning under sections 64/65 of the Environmental Protection Authority Act (sic) certifying that the Draft Local Environment Plan can be publicly exhibited.**
- 3. That Council approves in principle the form of the proposed Development Control Plan."**

It should be observed that although Mr Turner had stated in his report that the Council would need to determine to include the Jackson and Kennaugh areas into 1(s) Zone or leave as 1(r), the above recommendation to Council did not deal with that particular matter.

A copy of the Draft Local Environment Plan which came to be presented to the Council at its meeting on 17 April 1997 was furnished to the Tribunal with the supplementary material, Exhibit B in the proceedings. In clause 5 of the Draft reference is made to "the map" which is defined to mean the series of maps marked "Gilgandra Local Environment Plan 1997". The Tribunal was informed by the Department's investigator that Mr Turner had advised the Department that although the draft makes reference to a map, in fact no map was presented to the Council at the time of the meeting and was not prepared until some date after the meeting. It was common ground between counsel for the parties at the hearing, and the Tribunal accepts, that at the time of that meeting there did not exist a map in which Mr Jackson's land was delineated as being contained in any Zone for the purposes of the proposed Gilgandra Local Environment Plan 1997 as no plan marking out the zones as described in the Draft Local Environment Plan 1997 had yet been prepared.

Clause 4 of the Draft Local Environment Plan 1997 provided that that plan repealed Interim Development Order No. 1 and all other local environmental plans and deemed environmental planning instruments which applied to the area immediately before the day the plan took effect.

In clause 8 of the draft Zone 1(r) Rural and Zone 1(s) Small Rural Holdings are listed as zones "shown on the map" and clauses 9 and 10 describe what development is allowed in those zones. It is agreed between the parties, and accepted by the Tribunal, that the restrictions on and conditions of development under the Draft LEP in relation to Zones 1(a) and 1(b) of the then existing plan would be the same as in Zone 1(r) of the draft plan and, similarly, those for Zone 1(c) of the existing plan would be the same as for Zone 1(s) under the new Draft. Consistently with this, it may be noted that Clause 16 of the Draft LEP provided that a subdivision must not be less

than 200 hectares in the 1(r) Zone and 2 hectares in the 1(s) Zone unless the Council was satisfied as to certain matters then set out.

COUNCIL MEETING 17 APRIL 1997

The Minutes of the Council meeting held on 17 April 1997 under the heading "Director of Works and Technical Services Report" contain the following:

"2. TOWN PLANNING INSTRUMENTS (021300)

SUMMARY

A draft Local Environment Plan (LEP) has been prepared with the assistance of the Department of Urban Affairs and Planning (DUAP) and is submitted to Council for acceptance as a Draft LEP.

195/97 RESOLVED:

- 1. That Council accept the Draft Local Environment Plan as a Draft to be forwarded to the Department of Urban Affairs and Planning.**
- 2. That Council request a certificate from the Director of the Department of Urban Affairs and Planning under Sections 64/65 of the Environmental Protection Authority Act certifying that the Draft Local Environment Plan can be publicly exhibited.**
- 3. That Council approves in principle the form of the proposed Development Control Plan.**

196/97 RESOLVED that Council include the subdivisions of Messrs Jackson and Kennaugh into 1(s) Zoning of the draft Local Environment Plan."

The complaint against Councillor Burrell alleged that his brother-in-law Mr Jackson had a pecuniary interest in the outcome of the matter before the Council constituted by these two resolutions and that, under the legislation, Councillor Burrell was to be taken as having a pecuniary interest which required him to conform to the requirements of section 451 of the Local Government Act which provides as follows:

- "451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.**
- (2) The councillor or member must not take part in the consideration or discussion of the matter.**
- (3) The councillor or member must not vote on any question relating to the matter."**

The complaint alleged that Councillor Burrell made no disclosure to the meeting of his pecuniary interest in the matter and, when the question of his having a pecuniary interest was raised by another Councillor, he declared that he did not have a pecuniary interest in the matter.

In relation to the first of the two resolutions, that is, 195/97, it is further alleged that Councillor Burrell moved or seconded a motion to the effect that Mr Turner's recommendation to the Council in the terms of that resolution be adopted and that it was adopted by the meeting as the Council's resolution.

In relation to the second of the two resolutions, that is, 196/97, it is alleged that Councillor Burrell, still being present at the meeting, did not declare a pecuniary interest in that question although he refrained from participating in any consideration or discussion of the matter and remained silent when the vote passing the resolution was taken at the meeting.

The Tribunal needs to deal separately with each of the resolutions passed at the meeting but, first, reference should be made to the provisions of the Act which describe the nature of a "pecuniary interest".

The Pecuniary Interest

Section 442 of the Local Government Act 1993 provides:

"442. (1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated as provided in section 443.

(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter ..."

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

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

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

**(2) A person is taken to have a pecuniary interest in a matter if:
(a) ... a relative of the person ... has a pecuniary interest in the matter ..."**

The word “relative” is defined in the Act to include the spouse of the sister of a person and thus would include Mr Peter Jackson.

The basis of the allegation that Mr Jackson, and, therefore, Councillor Burrell, had a pecuniary interest in the matters before the Council at its meeting on 17 April 1997 was an allegation that the rezoning of Peter Jackson’s land to Zone 1(c), prior to approval by the Council of the Draft Local Environment Plan, and to Zone 1(s), under the zoning proposed by the Draft Local Environment Plan, for the purposes of the proposed subdivision of Mr Jackson’s land, was calculated substantially to increase the value of that land. It was alleged that this gave Mr Jackson a pecuniary interest in both an acceptance by the Council of the proposed draft LEP and the inclusion therein of his land in Zone 1(s) because a favourable decision by the Council on those matters would give rise to a reasonable likelihood or expectation of appreciable financial gain to Mr Jackson within the meaning of section 442 of the Act.

A preliminary advice on the effects of such rezoning on property values was obtained by the Department's Investigators from the Area Manager, the State Valuation Office, Dubbo, who expressed the view that the proposed subdivision of Mr Jackson’s land would increase the market value of the land content of the site. He stated that the amount of the increase in value could be determined by comparison of sales of property sold under the two sets of conditions as would apply to the subject to land, that is, a subdivisible site as opposed to an unsubdivisible site. He stated:

“From the sales evidence currently available it is considered that the value as a single 55 hectare site with no subdivision potential as opposed to a site capable of subdivision and sale as a number of separate smaller allotments would be substantially different, and although I am unable to quantify the amount of increase without more detailed investigations, it would be expected that the increase would exceed 100 percent.” (Exhibit A, Attachment 12)

Counsel for Councillor Burrell, whilst submitting that the Tribunal should not be prepared to act upon this statement as to the quantum of the increase in value, did not contest that a substantial increase in value would be expected if the land were rezoned, an increase sufficient to satisfy the description “appreciable financial gain” contained in section 442 of the Act.

Councillor Burrell, through his counsel, admitted, for the purpose of the proceedings, that a pecuniary interest within the meaning of the legislation would exist in relation to a decision of the Council to approve the proposed rezoning of Mr Jackson's land to Zone 1(s). However, Councillor Burrell did not admit that any pecuniary interest arose out of the first resolution, 195/97, with respect to Mr Jackson's land.

THE FIRST RESOLUTION (195/97)

At the hearing, counsel for the Director-General informed the Tribunal that, whilst both parties accepted that it was a matter ultimately for the Tribunal to decide, the Director-General had come to agree with submissions made on behalf of Councillor Burrell that no breach by Councillor Burrell of section 451 of the Act could be established in respect of the first resolution. The parties were therefore in agreement in a submission to the Tribunal that the complaint arising out of Council's Resolution 195/97 should not be upheld.

After hearing the submissions of counsel for both parties and considering the material before the Tribunal to which they referred, the Tribunal formed the conclusion that the alleged pecuniary interest did not arise out of that resolution in that a decision by the Council for or against adoption of the proposed Draft Local Environment Plan could not, as it happened, have had any effect on the value of Mr Jackson's land because, in relation to that land, the proposed resolution would not alter the status quo and, therefore, was not calculated to promote or impede the prospects of rezoning Mr Jackson's land. To use counsel's terminology, it was not a "step forward" in the rezoning of the Jackson land, on that matter it was neutral.

The reasons for this conclusion were explained in Ms Duggan's submissions for Councillor Burrell. She pointed out that whilst the Draft Local Environment Plan was designed to update the existing Interim Development Order provisions, it did not of itself effect any change of use in relation to the Jackson land which simply remained under the same zoning description and conditions which applied to it under the Interim Development Order. As mentioned earlier, notwithstanding the provisions of clause 5 referring to "the

map”, there was in fact no map at the time and therefore no basis for claiming that a resolution adopting the Draft Local Environment Plan promoted a change in the zoning of the Jackson land.

In so far as the proposed new LEP would potentially affect the land holding of every Councillor in the Council area because it would apply to the whole of the Shire, section 448 of the Act exempts from the obligation to disclose interests an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument except one that effects a change of the permissible uses of land in which, by reason of a proprietary interest, a person would have a pecuniary interest in the proposal. As the Draft Local Environment Plan, the subject of the first resolution, did not effect a change of permissible uses the exemption from the obligation to disclose applied. Ms Duggan conceded that a pecuniary interest could arise in respect to a proposal before the Council for adoption of a mechanism by which a proposed rezoning previously approved in principle by the Council would be advanced but, she submitted, that would not occur in the present case by virtue of the Council adopting the Draft Local Environment Plan. It would occur in relation to the Jackson land only by virtue of the second resolution, 196/97, which Council tacked on to the first.

As mentioned earlier, counsel for the Director-General agreed with these submissions and the Tribunal formed the conclusion that they were correct. That being so, the Tribunal informed the parties that in its view the Director-General was justified in not pursuing further the allegations that Councillor Burrell had failed to comply with section 451 of the Act in relation to the first resolution. The hearing then proceeded but was restricted to the question whether in relation to the second of the two resolutions, 196/97, there had been any breach of section 451 committed by Councillor Burrell.

THE SECOND RESOLUTION (196/97)

It is not disputed the Councillor Burrell did not declare a pecuniary interest in the second resolution proposed at the Council meeting on 17 April 1997. In retrospect he has admitted that he did have a pecuniary interest in that matter which he should have disclosed. He says that he did not disclose

a pecuniary interest in respect of either of the two resolutions before the Council at that meeting because he believed at the time that he did not have a pecuniary interest in the particular business the Council was then considering. Before coming to the reasons advanced by him for that belief it is necessary to consider the evidence as to what happened at that meeting.

It is not disputed that at some time during the short period in which the business of the two resolutions was before the Council one of the Councillors raised the question whether Councillor Burrell should be participating having regard to his interest in the matter but it is not clear as to when it was that this occurred. Councillor Burrell said in his evidence that his recollection was that it happened after the introduction of discussion on the first resolution and just before the Council came to the second resolution. There is evidence, which the Tribunal accepts, that Councillor Burrell himself either moved or seconded the motion in favour of the first resolution. Councillor Burrell said that he could not recall doing so but did not deny it. He did not deny speaking and voting in favour of the first resolution. He says, however, that because a Councillor had questioned his right to participate he decided to remain silent and not to vote in relation to the second resolution.

It appears from information in the Director-General's Report that it was Councillor Jill Blackman who had raised the question. She told an investigating officer of the Department that she recalled reminding Councillor Burrell of an apparent conflict of interest or pecuniary interest when the matter in question came up because he was speaking about it. She said that it was difficult to recall anything else except that after she reminded Councillor Burrell of his interest he then ceased making comment. (Exhibit Act, Attachment 27).

The Mayor of the Council at the time of the meeting was Carol Stockham and she was in the Chair. Her recollection was provided to the Department's Investigating Officer by letter dated 10 March 1998 which stated as follows:

“When this business was tabled at the meeting I was rather surprised that Councillor Burrell had still not declared an interest in the matter and even more surprised when Councillor Burrell actually moved the first part of the recommendation.

It was at this point that another Councillor, and I cannot recall which one called a point of order and suggested that Councillor Burrell was out of order involving himself in this matter before Council. When I posed the question to Councillor Burrell he indicated that he did not believe that he held any interest in the first part of the recommendation, and that it was that first section which he was moving, and he stated at that time, that he possibly had an interest in the second section and that he would not take part in the second section of the recommendation.

The motion was then seconded and then carried with little or no debate.

I then proceeded with the meeting. Councillor Burrell, to the best of my knowledge did not take part in the second part of the recommendation, which was again carried with little or no discussion. However Councillor Burrell remained in his chair and did not formally declare an interest in the matter.” (Exhibit A, Attachment 21).

Councillor Stockham went on to say that on the following day the General Manager, Mr Paul Mann had indicated to her that he had received a complaint from Councillors regarding Councillor Burrell’s participating in the business in question and felt obliged to report the matter to the Department of Local Government. She said that she also indicated her own concerns and concurred with his decision. There was reason therefore for Councillor Stockham to have retained a recollection of the events and the Tribunal is prepared to accept that Councillor Stockham’s recollection, as quoted above, may be relied upon as a sufficiently accurate account of what took place at the meeting.

Section 451 of the Local Government Act, 1993 provides as follows:

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

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

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

As Councillor Burrell now concedes, his brother-in-law clearly had a pecuniary interest in the adoption by the Council of the second resolution and it follows that Councillor Burrell was obliged by section 451(1) to disclose to the meeting a pecuniary interest in that matter. His failure to do so constituted a breach of that provision of the Act.

The Tribunal accepts the evidence before it that Councillor Burrell did not take part in the consideration or discussion of the second resolution. Counsel for the Director-General does not contend otherwise. However, he raised the question whether, notwithstanding Councillor Burrell's silence when the vote was taken, Councillor Burrell should be found to have voted on the second resolution in contravention of subsection (3) of section 451.

DID COUNCILLOR BURRELL'S SILENCE CONSTITUTE A VOTE CONTRARY TO SECTION 451(3)

Dr Renwick submitted that though Councillor Burrell remained silent when the vote was taken he may be found to have voted on the motion on either of two grounds:

1. The evidence established that the Gilgandra Shire Council had a practice at meetings of first taking a vote on the voices, the chairperson calling for ayes and noes and, if no councillor voiced dissent, declaring the motion carried, or carried unanimously. Councillor Burrell was fully aware of this practice and, accordingly, must be taken to have known that if there was no dissent and he remained silent when the vote on resolution 196/97 was taken on the voices he would be counted as having voted in favour of that resolution.
2. Alternatively, if he is not thus to be taken to have voted in favour of the resolution, he is to be taken by his failure to vote as having voted against the resolution by force of clause 23(1) of the Local Government (Meetings) Regulation 1993 which provides as follows:

"A councillor who is present at a meeting of a council but who fails to vote on a motion put to the meeting is taken to have voted against the motion. This subclause does not apply to a councillor who does not vote because he or she has a pecuniary interest in the subject matter of the motion."

It was submitted that Councillor Burrell, having failed to notify the meeting that he was abstaining from voting because he had a pecuniary interest in the subject matter must be taken, as a matter of law, to have voted against the motion.

In relation to the first of these grounds Councillor Burrell told the investigators that the resolution in question was passed unanimously: Exhibit A, Attachment 14, page 5/29. In his evidence to the Tribunal he said that his recollection was that the chairperson, "Just said carried and we went on with the Business Paper." T35/8.

In the Tribunal's view, there is more involved here than the question whether a councillor might be deemed to have voted because of a local procedural practice at meetings or as a matter of law under the Regulation. The question whether the Councillor in question voted on a matter in which there was a pecuniary interest must be considered in the context of section 451 and the objects of the pecuniary interest provisions of the legislation. In the opinion of the Tribunal, it would produce an unsatisfactory result and would not advance the objects of the legislation to construe the expression "must not vote on any question" in subsection (3) of section 451 as contemplating a breach of the provision not only by a deliberate act but also by a notional or imputed act of voting, particularly if the notional or deemed vote was shown to be in fact contrary to the will and intention of the Councillor. The Legislature is unlikely to have so intended. In the Tribunal's opinion, subsection (3) of section 451 is to be construed as contemplating a conscious and deliberate act of voting on a question.

This does not mean that silence when the vote was taken could never amount to an act of voting on a matter within the meaning of section 451(3). It would depend upon the Councillor's then state of mind. If it were proved that a Councillor knew that silence would in the particular circumstances be counted as a vote one way or the other on a matter and chose to remain silent, intending or being aware that silence would be so treated, it may be open to a Tribunal to find that the silence constituted a deliberate vote; but in the absence of such a state of mind it would, in the Tribunal's view, be difficult to conclude that silence constituted a vote for the purposes of subsection (3) of section 451.

It should be said, however, that it would be unwise for a Councillor who knew or suspected that he might be considered to have a pecuniary interest

in a matter before a meeting to fail to declare his interest but resort to silence in the hope of avoiding a contravention of section 451 but having his silence counted as a vote especially if either his vote would be crucial to the outcome or there were grounds for suspecting his motives in remaining silent on the vote after failing to disclose the pecuniary interest.

If the Tribunal's view of the proper approach to the meaning of section 451(3) is correct it is necessary to examine the evidence in the present case, in particular Councillor Burrell's evidence to the Tribunal at the hearing.

There is no dispute that he remained silent, as he says. The question is, why did he do so?

The matter was raised with Councillor Burrell by the investigators when they interviewed him. He had told the investigators that the resolution was passed unanimously and that he did not vote. The interview then proceeded:

Mr Day: When you say you didn't vote and it was passed unanimously was your vote counted?

Cr Burrell: No.

Mr Day: Were you counted as having voted?

Cr Burrell: Well I don't know I didn't vote.

Mr Day: Why did you not vote on it?

Cr Burrell: Well I – I didn't vote because after the Meeting – after we'd gone into the paper a little bit and what – having heard of course what this other Councillor had said, I thought well I'll abstain from in it, I'll abstain from the lot if you think that way – so I just abstained from having any discussion whatsoever on it. And also from voting. And it's been an understanding, you know, I think it's been a wrong understanding, though that if you did have a pecuniary interest you could still sit in on the Meeting, and just as...

Mr Day: Well that's ---

Cr Burrell: Abstain from everything.

Mr Day: You can. You're not required to leave the chamber unless the Council resolves ---

Cr Burrell: And that's been a bit airy fairy, because none of us knew whether it was really right or whether it was wrong.

Mr Day: Yes.

Cr Burrell: And I thought, oh well I'll just sit here and saying nothing and vote – not vote.

Mr Day: Not vote. Okay. (Exhibit A, Attachment 14, page 5/34-p6/15

... ..

Mr Day: Right. You indicated that you – you didn't vote on matter at the Meeting, and that you didn't take part in any discussions.

Cr Burrell: Yeah. That's right, yeah.

Mr Day: And yet there's no record in the Minutes that you abstained from voting.

Cr Burrell: No.

Mr Day: And my understanding was, that it was passed unanimously and I'm thinking that they may have counted you as voting, voting for the resolution ---

Cr Burrell: Well they would have unless I indicated that I abstained from voting, but ---

Mr Day: Right. And did you?

Cr Burrell: No, I didn't.

Mr Day: Right.

Cr Burrell: Because I'm a logical sort of a fellow and if it's going to – if it's passed unanimously it wouldn't have made any difference what I'd have said.

Mr Day: No.

Cr Burrell: Would it?

Mr Day: No, it wouldn't.

Cr Burrell: And then you're straining at a gnat and swallowing a cat, that's what you're doing.

Mr Day: Well I'm just thinking of the procedural difficulty that arises because you didn't declare an interest and you didn't vote.

Cr Burrell: That was probably my naivety.

Mr Day: Yes.

Cr Burrell: Really, in it all? You know, like, I'm only a bushie really.

Mr Day: yes.

Cr Burrell: And probably I was a bit naïve.

Mr Day: yes. Well I'm concerned more with the way that it was recorded by the staff of Council. It may give rise to an issue in relation to whether your vote in fact should have been counted with the negative, if you haven't declared an interest and you didn't in fact vote and you were present at the time the vote was taken, so that's ---

Cr Burrell: Well I think that happens a lot in Council where they say “those in favour please say aye” and there’ll be an aye. A lot of people don’t even lift their head from the book.

Mr Day: Mmm.

Cr Burrell: From their paper. Haven’t said a word.

Mr Day: Mmm.

Cr Burrell: But their vote would be taken as though, I suppose, they said aye.

Mr Day: Yeah.

Cr Burrell: And against. And if nobody says against. And when he says against and nobody ---

Mr Day: So then it’s recorded as an unanimous vote.

Cr Burrell: It just goes down as a unanimous vote, and I just abstained from all of it, like, the discussion plus the voting.

Mr Day: Right.

Cr Burrell: But I perhaps should have indicated that I did abstain from voting.” (Exhibit A, Attachment 14, pages 7/45-9/13)”

The matter was further pursued with Councillor Burrell in the witness box. He gave the following answers to his counsel:

“Q. After the councillor raised that issue with you, did you form an opinion as to whether or not you had a pecuniary interest that should be declared?

A. Well, it got me, started me thinking about it and that was when I thought I’d better be careful here and that’s when I abstained from taking any part in the second part of that – the motion.

Q. Now, in so far as you abstained from voting, on the second part of the motion, did you have any opinion as to whether or not your silence would be counted as a vote?

A. No, I don’t think I gave that a thought to tell the honest truth. All I said was just said, “Well, look, perhaps I shouldn’t take part in any of this.” (T37/32-47)

When cross-examined by counsel for the Director-General the following evidence was given by Councillor Burrell:

“Q. What I want to put to you is that the correct thing to have done was to declare an interest at that point and to announce your intention to abstain from voting; you agree with that, don’t you?

A. Yes, that’s correct.

Q. You certainly knew it wasn't enough to privately intend to abstain but not to actually express that to the meeting?

A. I know that now, I didn't at the time.

Q. Are you saying, though, that you thought it was adequate at the time to think to yourself, "Well, I intend to abstain, but not to express that"?

A. Well, I didn't give it a lot of thought, to tell you honestly. The meeting got through it quickly as there was no discussion. I found myself in that position where I sort of just thought the best thing for me to do was to keep quiet." (T47/58-48/19)

Councillor Burrell impressed the Tribunal as a truthful witness who endeavoured to give honest evidence to the best of his recollection. He was frank and co-operative with the investigating officers who interviewed him and the Tribunal is satisfied that his answers to the investigators and at the hearing may be relied as to his true state of mind at the time of the meeting. His evidence as to his abstinence from participation on the second resolution is corroborated by the information given to the investigators by Councillor Stockham and Councillor Blackman. The Tribunal concludes from the evidence that it was never in Councillor Burrell's mind to exercise a vote on the second resolution or that by remaining silent he might be considered to have voted in favour of the motion. The Tribunal is satisfied that his intention in remaining silent was to abstain altogether from participation of any kind, including voting, on that part of the Council's business. For the Tribunal to count his silence as the equivalent of a vote for the purposes of section 451(3) of the Act would produce a result contrary to Councillor Burrell's own will and intention at the time, a result that would be purely artificial.

In putting his submissions for the Director-General, Dr Renwick drew particular attention to a question and answer quoted above from Councillor Burrell's interview where Mr Day asked, "And my understanding was that it was passed unanimously and I'm thinking that they may have counted you as voting, voting for the resolution ..." And Councillor Burrell replied, "Well they would have unless I indicated that I abstained from voting, but ..." Dr Renwick submitted that this answer could be interpreted as an admission that Councillor Burrell had intended that if he remained silent and abstained from voting he would nevertheless be counted, on the voices, as having voted for

the resolution. The Tribunal would not place that interpretation on the form of Councillor Burrell's answer. In the Tribunal's opinion, the other statements made and evidence given by Councillor Burrell on the subject strongly suggest that it would be wrong to infer such an admission from Councillor Burrell's answer. The inference which the Tribunal would draw from the answer is that Councillor Burrell was explaining to Mr Day why what Mr Day was putting to him would be the case, namely, that "they may have counted (him) as voting" for the resolution. He is not to be understood as saying that was the correct thing for them to have done or that that was the result that he intended by abstaining from voting.

For these reasons, the Tribunal finds that Councillor Burrell did not commit a breach of section 451(3) of the Act by remaining silent when the vote was taken on the second resolution at the meeting on 17 April 1997.

ACTION UNDER SECTION 482

As the complaint against Councillor Burrell that he committed a breach of section 451(1) of the Act by failing to declare a pecuniary interest in the matter of the second resolution at the meeting on 17 April 1997 has been proved, the question for the Tribunal is whether any, and if so what action should be taken under section 482 of the Act, the relevant provisions of which are:

- "482. (1) The Pecuniary Interest Tribunal may, if it finds a complaint against a councillor is proved:**
- (a) counsel the councillor; or**
 - (b) reprimand the councillor; or**
 - (c) suspend the councillor from civic office for a period not exceeding 2 months; or**
 - (d) disqualify the councillor from holding civic office for a period not exceeding 5 years."**

Councillor Burrell's explanation to the Department, the investigators and the Tribunal has consistently been that at the time of the meeting in question he did not believe that he had a pecuniary interest in relation to the rezoning of his brother-in-law's land because he considered and believed that Council had already decided in favour of the rezoning of the land as well as the form of subdivision proposed by Mr Jackson and that what was taking place at the

meeting on 17 April 1997 was merely the mechanical step of slotting the Council's existing rezoning approval into the new form of local environmental plan which the Council was adopting. He told the investigators that both the Jackson and Kennaugh developments had been approved by the Council at previous meetings months before, "And my understanding of this particular meeting or this particular business that came before Council was that it was just mandatory or normal for that to be included in the Draft Local Environment Plan ... the rezoning, or the development – subdivision development.": Exhibit A, Attachment 14, page 3/42-48. When it was put to him that Council's previous resolution had been to approve the subdivision application "subject to the land being rezoned", he told them that he thought it was already approved and, he said, "I wasn't thinking of it being subjected to anything really ... I just thought it was approved and it was just a matter of time before it was passed and that it automatically was included in the Draft Local Environment Plan.": Exhibit A, Attachment 14, page 3/50-4/8. He also told the investigators that his understanding at the meeting was not that it was being decided by the Council whether to approve the subdivision, because that had already been done, and he thought that at the meeting it was just going into the Draft Local Environment Plan as a matter of normal procedure: Exhibit A, Attachment 14, page 7/12-24.

Councillor Burrell gave evidence to the same effect before the Tribunal. After referring to the two previous occasions on which Council had dealt with his brother-in-law's application for the Council's approval to subdividing and rezoning his land, he said that there was no question in his mind on those occasions that he had a pecuniary interest in the matter which he had to declare and which he did declare. He went on, "On the third occasion, I was sort of satisfied in myself that the matter had been dealt with, that the land had been rezoned, firstly, in principle, and secondly, it was rezoned. And I – as I stated before, on the third time on 17 April I think it is, I was – we were just doing something that would normally take place and that the real matter of rezoning wasn't the matter at hand at all. All it was was getting the DLEP together to give it to – to send it to DUAP." T38/52-T39/3.

The second resolution before the Council proposed that Mr Jackson's subdivision be included in Zone 1(s) of the Draft Local Environment Plan. This was no routine matter. Whilst the Council had previously approved rezoning of the land to Zone 1(c), no steps had been taken to effectuate such a rezoning by obtaining an amendment of the Interim Development Order with DUAP approval and there would be no Zone 1(c) in the proposed new Local Environment Plan, only an equivalent zone designated Zone 1(s). Thus the step proposed by the second resolution was a substantive step forward to bring about the rezoning to which Mr Jackson aspired.

Counsel for the Director-General submitted that as the Council's previous approvals had been given in terms that they were subject to rezoning of the land which had not occurred and as Mr Turner's report to the Council for the meeting on 17 April 1997 was to the effect that the rezoning had not yet been processed, it was not easy to accept that Councillor Burrell could have been mistaken as to the purpose or the importance for Mr Jackson of the second resolution.

In the Tribunal's view, that is fair comment but in the end the question to be decided on this aspect of the matter is whether the misunderstanding claimed by Councillor Burrell was genuine.

Having considered all of the evidence, the Tribunal accepts Councillor Burrell's explanation of his conduct. He had no hesitation in disclosing and declaring a pecuniary interest when the subdivision and rezoning proposals of his brother-in-law came before the Council in 1995 and 1996. It would therefore be incongruous with his former attitude and behaviour on the matter for him to fail to act in the same way at the meeting on 17 April 1997 unless he was under some misunderstanding as to the nature of the business being conducted on that occasion. The Tribunal has already found that Councillor Burrell was an honest and truthful witness and, while there were reasons in the evidence to question his claim to have misunderstood the action being taken at the meeting concerning his brother-in-law's land, the Tribunal is satisfied that he was genuinely mistaken as to the significance of the business in hand and, when another Councillor questioned his conduct, he

adopted the precaution of deliberately abstaining from further participation in case the other Councillor was right. It was not until afterwards that he came to appreciate that the other Councillor was right and that, as well as abstaining from further participation, he should have declared a pecuniary interest.

When the mayor, Carol Stockham, wrote to the Department giving her recollection of the events she said at the end of her letter:

“I was disappointed that Councillor Burrell acted in this manner and I believe that his participation was unethical. I certainly do not condone Councillor Burrell’s action. However, knowing this Councillor as I did, I also believed that his involvement in the business was due to his ignorance of the Pecuniary Interest Legislation rather than a matter of personal gain.” Exhibit A, Attachment 21.

The Council’s General Manager, who had also disapproved of Councillor Burrell’s failure to declare his interest, certified in his character reference furnished to the Tribunal (Exhibit L) that he had known Councillor Burrell for 11 years, both as a well respected member of the Gilgandra community and Chairman of the Gilgandra Hospital Board and also as a Councillor from 1994. He described Councillor Burrell’s commitment to the welfare of the Gilgandra community as beyond reproach and has stated that as a member of the Council, Councillor Burrell had maintained an awareness of public duty and carried out his role as a Councillor with integrity.

Councillor Burrell told the Tribunal that he had taken deliberate steps to make himself better acquainted with the requirements of the law and the obligations of councillors in respect of disclosure of interests and assured the Tribunal that there would be no repetition of the conduct complained of in the future. He expressed regret for his breach of the Act and was most concerned that he might be considered by those members of the Gilgandra community who had supported and voted for him to represent them on the Council to have let them down by not declaring a pecuniary interest when his brother-in-law’s financial interests were involved in a matter before the Council. He assured the Tribunal that that was never his intention. It was obvious to the Tribunal that Councillor Burrell values his integrity and has a

strong interest in performing community service for the welfare of the citizens of Gilgandra.

Ms Duggan submitted that in all the circumstances it would be sufficient if the Tribunal were to deal with Councillor Burrell's breach by simply counselling him as to his obligations. Counsel for the Director-General submitted that the breach called for more than counselling and warranted at least a reprimand.

The Tribunal has to take into account that, on the face of the matter as it appeared before the Council meeting from the form of the Council's previous approvals of the Jackson application for subdivision and rezoning, Mr Turner's report to the meeting and the form of the resolution in relation to the Jackson land proposed at that meeting, a strong perception was liable to arise in the minds of other councillors and observers that Councillor Burrell had a pecuniary interest which he ought to have disclosed. Such a perception would have been well justified in the opinion of the Tribunal. His failure to declare his interest was liable to be perceived as undermining public confidence in the integrity of the exercise by councillors of their responsibilities. On the Tribunal's findings as to the genuineness of Councillor Burrell's misunderstanding and intentions, these perceptions would have been wrong in fact; but it behoves a councillor to make himself or herself sufficiently well informed and knowledgeable about the nature and effect of business before the Council involving their own or relatives' financial interests to avoid such misunderstandings or such perceptions arising. A councillor who fails to take such steps may be inviting a period of suspension or disqualification. However, having regard to the submissions of counsel for the parties and the circumstances of the present case, the Tribunal will order that Councillor Burrell be reprimanded but it will be expressed as a serious reprimand.

FINDINGS AND ORDER

1. The Tribunal finds that Councillor Burrell did not have a pecuniary interest within the meaning of the Local Government Act 1993 in relation to the matter before the Council on 17 April 1997 with respect

2. to its acceptance of the Draft Local Environment Plan which resulted in Council's resolution No. 195/97 and, consequently, committed no contravention of section 451 of the Act. The complaint against Councillor Burrell in this respect is dismissed.
3. The Tribunal finds that Councillor Burrell had a pecuniary interest within the meaning of the Act in relation to the matter before the Council at the above meeting with respect to the inclusion of the land in Mr Peter Jackson's proposed subdivision in Zone 1(s) in the Draft Local Environment Plan which resulted in Council's resolution No. 196/97 and that Councillor Burrell contravened section 451 of the Act in relation to that matter by failing to disclose his pecuniary interest in the matter to the meeting and that in this respect the complaint against Councillor Burrell has been proved. The Tribunal further finds that Councillor Burrell did not contravene section 451 of the Act in relation to that matter in any other respect.
4. The Tribunal orders that Councillor Burrell be and he is hereby severely reprimanded for his failure to declare a pecuniary interest in relation to the matter before the Council at its meeting on 17 April 1997 with respect to the proposal to include the land contained in a subdivision proposed by his brother-in-law, Mr Peter Jackson, in Zone 1(s) of the Draft Local Environment Plan before that meeting which resulted in Council's resolution 196/97 in favour of the proposal.

In accordance with section 484(1) of the Act the Tribunal will furnish a copy of this Statement of Decision to Councillor Burrell and the Director-General together with a copy of the Tribunal's Order. Pursuant to section 484(3) the Tribunal will also provide a copy of the Statement of Decision and

Order to the Gilgandra Shire Council and such other authorities or persons as the Tribunal thinks fit.

DATED: 29 September 1998



K J HOLLAND Q.C.
Pecuniary Interest Tribunal