

**LOCAL GOVERNMENT PECUNIARY  
INTEREST TRIBUNAL**

**PIT No. 3/2001**

**DIRECTOR-GENERAL, DEPARTMENT OF  
LOCAL GOVERNMENT**

**RE: COUNCILLOR BRIAN EICHORN, URALLA  
SHIRE COUNCIL**

***STATEMENT OF DECISION***

Dated: 7 April 2004

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**INTRODUCTION**

1. The Tribunal received, in December 2002, a report from the Director-General, Department of Local Government, of an investigation into a complaint, dated 10 December 2001, by the Director-General pursuant to s.460 of the *Local Government Act 1993* that the Mayor, Councillor Brian Eichorn, being a councillor of Uralla Shire Council, had committed breaches of Chapter 14, Part 2 of the *Local Government Act 1993*.
2. The terms of the complaint by the Director-General were as follows:

"It is alleged by the Director-General, Department of Local Government, that contrary to Chapter 14, Part 2 of the *Local Government Act 1993*, the

Mayor, Councillor Brian Eichorn:

(a) participated at a Council Meeting held on 23 February 2001 in the debate, consideration and voting on a matter before the Council concerning a proposal to purchase Lakeview during that part of the Council meeting when the Council suspended standing orders;

(b) participated at the Council Meeting held on 24 September 2001 in the discussion of the sale of Lakeview, prior to declaring a pecuniary interest and leaving the council meeting during that part of the meeting when the Council suspended standing orders

(c) participated at a Council Meeting held on 28 September 2001 after declaring a pecuniary interest in the Council's consideration of a Report dealing with "expressions of interest for the provision of marketing advice for Lakeview; and

(d) any other matter that may come to attention."

3. As matters transpired, there was no matter which fell to be considered by this Tribunal under subparagraph (d) of the complaint.
4. Having considered the Director-General's Report, the Tribunal determined to conduct proceedings into the complaint and on 31 July 2003, issued a Notice of Decision to Conduct Proceedings, which detailed the alleged breaches of the *Local Government Act 1993* and furnished particulars of the alleged contraventions.
5. Following certain correspondence with Councillor Eichorn, and a Preliminary Directions Hearing, the proceedings into the complaint were heard by this Tribunal on 18 and 19 December 2003. Submissions were received on 19 December 2003, together with, pursuant to leave granted, a Supplementary Written Final Submission from Councillor Eichorn dated 14 January 2004. While the Director-General objected to the Tribunal receiving one of the annexures to that written submission, on the grounds of relevance, the Tribunal has determined to receive the annexure and to take its contents into account.

## **BACKGROUND**

6. Councillor Brian Eichorn was first elected to Uralla Shire Council in December 1992 and

has continued as a councillor since that time. He was Deputy Mayor between September 1993 and September 1994. He was Mayor between September 1995 and September 1997. He was voted in as Mayor again in September 1999 and maintained that position to the date of the hearing of these proceedings. As a councillor, he served on a large number of committees, which are detailed in the Director-General's Report.

7. On 23 November 1987 a company changed its name to Brian Eichorn & Co Pty Limited. The shareholders and directors of the company included Councillor Eichorn's wife, Beverley Eichorn, and their son, Rodney Eichorn. While there is some discrepancy between the records produced by the company and the returns lodged with ASIC, if Councillor Eichorn were a director and shareholder of the company, the Tribunal is satisfied that those relationships ceased as at 31 August 1988 when, according to the company's records, he tendered his resignation as a director of the company and when it was resolved to approve the transfer of certain shares said to have been held by him to his son, Andrew Eichorn.
8. The company resolved to change its name to Rod Eichorn Estate Agencies Pty Limited on 18 June 2001.
9. Councillor Eichorn ceased to have any personal involvement with the agency in about 1994.
10. Since 15 May 2001 the name "Property New England" has been a registered business name and it was owned by Rod Eichorn Estate Agencies Pty Limited and that company has carried on business under that business name.
11. Subject to what is said below, as at the date of the meetings the subject of the complaint (23 February 2001, 24 September 2001 and 28 September 2001), Beverley Eichorn and Rodney Eichorn were the directors of Rod Eichorn Estate Agencies Pty Limited. They, and Andrew Eichorn, held the whole of the issued capital in the company. Beverley Eichorn resigned as a director on 31 August 2001 and Shona Eichorn was appointed as a director on that day. Beverley, Rodney and Andrew Eichorn continued to hold the whole of the issued capital of the company. Rodney Eichorn was the principal and Licensee of

the agency.

12. The property "Lakeview" was a property situated in Uralla and, as at February 2001, was owned by K.C., E.D. and R.K. Roberts Pty Limited.
13. While the full details are not before the Tribunal, it is clear that a Mr T. Allen had a proposal to locate a Wool Plant on the Lakeview property and for that purpose he wished to buy it. As at February 2001, it appears that Mr Allen required short term financial assistance to purchase Lakeview, pending funds being made available to him from his banking and financial sources. The documentation and evidence before the Tribunal points to the importance to the Shire of the Wool Plant proceeding, involving, as it would, a very significant capital expenditure and the creation of a large number of jobs within the Shire.
14. On 23 February 2001 there were before the Council, in substance, proposals that the Council provide the short term financial assistance to Mr Allen. One such proposal for assistance was by the Council itself purchasing the property "Lakeview" in the name of the Uralla Shire Council, on the basis that, in substance, Mr Allen be the nominee for the property and that he agree to enter into a separate "Put Option" contract to indemnify the Council against any loss resulting from the transaction. It was a proposal that involved the Council drawing a cheque in the sum of \$100,000 for the deposit on the purchase.
15. The vendor's agent on the proposed sale was Brian Eichorn & Co Pty Limited.

#### **The meeting of Council - 23 February 2001**

16. On 21 February 2001 notice was given of an extraordinary meeting of the Council to be held on 23 February 2001 for the purpose of dealing with "recent developments concerning the proposed Wool Plant". It was the only item of business listed on the Notice.
17. The Minutes of the meeting show that shortly after the commencement of the meeting it

was moved by Councillor Howlett and seconded by Councillor Filmer, "That Council suspend standing orders to allow informal discussion". The motion was passed.

18. The said Mr Allen and the Director of Building and Environmental Services left the room. The transcript of the Council's discussions, while the standing orders were suspended, is before the Tribunal. The discussions concerned the said proposals and the purchase of Lakeview. Also discussed was the proposal that the Council enter into a contract with the property owner and that Mr Allen indemnify the Council against any loss resulting from the transaction and in particular the Council's risking of the \$100,000 deposit.

19. Councillor Eichorn took an active part in the discussions. He is recorded as saying:

"So whatever decision you make, gentlemen we want Ted Allen to be able to put a signature on the contract today and exchange."

and:

"I know it has been a tough decision to make. I'm confident the right decision will be made and Mr Ted Allen will be setting up business here. I know that the debate has been brisk and in some case a bit frustrating but it is important that we get each other's feelings."

20. Following the resumption of standing orders, Councillor Eichorn said:

"Thank you. The item on the agenda, Councillors, is as per the Business Paper and I wish now to declare a pecuniary interest in this matter as my family have interests in the company that is involved in this proposed transaction. I ask the Deputy Mayor to take the chair."

21. Councillor Eichorn took no further part in the consideration or discussion of the matter before the Council.

22. The Council resolved to "provide temporary security to Mr Allen for the proposed Wool Processing Plant by purchasing the property Lakeview, in the name of Uralla Shire Council on the position that Mr Allen be the nominee and agree to enter into a separate

"Put Option" contract to indemnify Council against any loss resulting from the transaction". The General Manager was authorised to negotiate, together with the Council's solicitors, the details of the contract and to sign all associated contracts. Authorisation was given for the drawing of the deposit cheque.

23. The contract was subsequently entered into on 23 February 2001 (and the deposit cheque drawn) and Brian Eichorn & Co Pty Limited was shown as the vendor's agent. The agency received a commission estimated to be in the vicinity of \$20,000. (The purchase price of the property was shown in the contract as \$1,165,650.00).

## **CODE OF MEETING PRACTICE**

24. Uralla Shire Council had adopted a Code of Meeting Practice which both supplemented and incorporated the provisions of the *Local Government (Meetings) Regulation 1993*. At the date of the meetings in question, the relevant Code was dated May 2000.
25. Councillor Eichorn, in the matters before the Tribunal, relies upon, in particular, clause 14 of that Code of Meeting Practice. It provides:

### **"14. DISCLOSURE OF INTEREST**

Council recognises that Section 451 of the Act requires a councillor who has a pecuniary interest in a matter before the Council to disclose that interest and then not take part in the consideration or discussion of the matter nor to vote on any question relating to the matter.

This Code further requires that a councillor must leave the meeting room once he or she has declared a pecuniary interest in any matter before the Council (subject to the affected Councillor having the right to ask Council to let him or her address the Council, as a member of the public, prior to leaving the meeting room). These requirements also apply to staff. Councillors or staff members may return to the meeting once the particular issue in which they have declared an interest has been dealt with.

This code extends the requirements of Section 451 of the Act beyond solely pecuniary interests to general conflicts of interest. It notes that a conflict of interest arises when Councillors or employees, in doing their jobs, are influenced or seen to be influenced by their personal interests. In such cases, Councillors and staff should declare that interest and then follow the procedures that apply to pecuniary interests.

Both the disclosure and the nature of the interest shall be recorded in the Council minutes and in a separate register.

*(Section 455 of the Act states that "A Councillor or member of a Council Committee must not, if the Council so resolves, attend a meeting of the Council or Committee while it has under consideration a matter in which the councillor or member has an interest required to be disclosed under this Chapter".)*

## **CODE OF CONDUCT**

26. By March 2000 the Council had adopted a Code of Conduct which dealt with the responsibilities of councillors, members of staff and delegates, and covered a range of responsibilities of honesty, care, diligence and conflicts of interest. There is contained in that Code the substance of a Guideline from the Director-General, Department of Local Government, on the pecuniary interest provisions of the *Local Government Act 1993*.

## **Pecuniary Interest Provisions**

27. As at 23 February 2001 the relevant provisions of the *Local Government Act 1993* were as follows:

Section 442 of the *Local Government Act 1993* provides:

- "442. (1) For the purpose of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person ... ..
- (2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448."

Section 443 of the *Local Government Act 1993* provides:



- "443(1) For the purpose 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) any person with whom the person is associate as provided in this section.
- (2) A person is taken to have a pecuniary interest in a matter if:
- (a) the person's spouse ... or a relative of the person ... has a pecuniary interest in the matter."

The dictionary to the *Local Government Act 1993* defines "relative" so as to include a lineal descendant of the person or the person's spouse.

Section 451 of the *Local Government Act 1993* provides:

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

**Council's Meeting of 24 September 2001**

28. By resolution of 23 July 2001 the Council had resolved to call expressions of interest in relation to the provision of marketing advice to the Council as to the most effective method of offering Lakeview for sale. Expressions of interest were received from five organisations, including Rod Eichorn Estate Agencies Pty Limited, T/as Property New England, and David Nolan Rural and Project Marketing.
29. Mr Bell, the Acting General Manager, produced, for the proposed meeting of the Council of 24 September 2001, a report dealing with the expressions of interest for the provision of marketing advice for Lakeview. He recommended, amongst other things, that the Council appoint David Nolan Rural and Project Marketing as agent to sell Lakeview in accordance with the proposal put forward by that organisation. He also produced a supplementary report which referred to a Supreme Court case of *ANZ ats Jeogla* which involved Mr Nolan (the recommended marketing agent). This report said the case raised a number of issues that needed to be investigated and it recommended that the appointment of an agent to sell Lakeview be deferred to October.
30. A closed session meeting of the Council was held on 24 September 2001. Councillor Eichorn was the Chairman of the meeting. The Chairman said that the next item dealt with Lakeview, that it was important that the issue be discussed and that he would be "declaring an interest when you consider this as an item of business". The Council then resolved to suspend the standing orders to allow for informal discussion. The Mayor asked that the recording tapes be turned off. No one present dissented from that proposal. Councillor Eichorn has said the reason had to do with protecting the Council from potential litigation (inferentially defamation). The Tribunal accepts that evidence. Considerable discussion took place regarding the next item, namely the expressions of interest for the provision of marketing advice for Lakeview, following which the recording tapes were turned back on. The Council then resolved to resume standing orders.
31. According to the Minutes of the closed session meeting, it was then moved by Councillor Eichorn "that the Acting General Manager consult with Council's solicitors to clarify certain points in relation to recent information that he had been given concerning the

property "Lakeview"". Those are, in substance, the words which the tapes of the meeting reveal he said.

32. Councillor Eichorn then declared a pecuniary interest and he left the meeting. The Minutes record that the reason for that declaration and him leaving was that his family had an interest as one of the tenderers. The Deputy Mayor then took over the chair.
33. The evidence of Councillor Eichorn, Councillor Kemper and others suggested that the said resolution that was passed, and as recorded in paragraph 31 above, was an error in that the resolution did not refer to the property Lakeview but in fact referred to a company called Jeogla Pty Limited. That company had owned certain real estate and stock and one of the Banks had appointed a Receiver. The Receiver moved to sell the assets and engaged the services of certain estate agents, one of whose representative at the time was Mr David Nolan, who was one of the five entities lodging expressions of interest in relation to Lakeview. Proceedings in the *Jeogla* case were taken against the agents, alleging that they had failed to properly obtain the best return on the sale of the company's assets. Some of the allegations had been established. The Council's solicitor had acted for the Plaintiff in the *Jeogla* case and that solicitor was advising the Council as to which agent ought be appointed to market "Lakeview". It was in this context that Councillor Eichorn considered that enquiries ought to be made and when the tapes were off, he says he expressed that view and the reasons for it. In a letter to the Director-General, Department of Local Government of 1 November 2001, Councillor Eichorn said that it was because of these concerns that he proposed that Council suspend standing orders to allow general discussion. During the period when standing orders were suspended, he said he did nothing more than advise Council of his concerns, which may or may not affect some of the tenderers who were proposing to sell Lakeview. He made no suggestions of preference for any particular agent and simply wanted Council to make appropriate enquiries with solicitors to ensure that the Council made the correct choice of agent for the marketing of Lakeview. A transcript of an interview with Councillor Eichorn also refers to the fact that the Council was previously unaware that its solicitor had acted for Jeogla Pty Ltd.
34. Councillor Eichorn says that prior to the discussion of his concerns he had advised

Council that he would be declaring a pecuniary interest when the actual substance of the debate turned to appointing an agent. That evidence is borne out by the tapes. He says that he was simply proposing that in the interests of Council it would be prudent to obtain appropriate legal advice. The Tribunal has before it a transcript of those parts of the meeting of 24 September 2001 when the tape recorder was switched on.

### **Pecuniary Interest Provisions**

35. As at 24 September 2001 s.442 of the *Local Government Act 1993*, relevantly, was as set out above, as was s.443(1) and the dictionary definition of "relative".
36. Section 451 was the same as set out above but subsections (2) and (3) of s.451 had been altered. The previous provisions had been deleted and in their place a new subsection (2) of s.451 provided:

- "(2) The councillor or member must not be present at, or in the sight of, the meeting of the Council or Committee:
- (a) at any time during which the matter is being considered or discussed by the Council or Committee; or
  - (b) at any time during which the Council or Committee is voting on any question in relation to the matter."

### **Meeting of Council - 28 September 2001**

37. At the meeting of 24 September 2001, in the absence of Councillor Eichorn, it was resolved to defer to 28 September the appointment of an agent to sell Lakeview. The Extraordinary Meeting of Council in Closed Session for 28 September 2001 was called to deal with the Expressions of Interest for the provision of marketing advice for Lakeview and in particular the method of selling the property and the appointment of an agent or agents to do so. Ultimately, in the absence of Councillor Eichorn and in circumstances which are hereafter set forth, the Council resolved to sell Lakeview with certain provisos and to do so by auction. The Council resolved, in the absence of Councillor Eichorn, to appoint David Nolan Rural and Project Marketing as agent in conjunction with P.R. Watson & Co, Armadale and to sell Lakeview in accordance with his proposal,

with a view to auctioning the property prior to Christmas.

38. At the very commencement of the said meeting Councillor Eichorn declared a pecuniary interest in the item because his family members had an interest in Property New England, which had submitted an Expression of Interest. Councillor Eichorn asked the Deputy Mayor, Councillor Howlett, to conduct and close the meeting as he, the Mayor, would not be returning. The Minutes of the Council meeting for 28 September 2001 then record the following:

"Before leaving the meeting Cr Eichorn made the following statement:

1. That this meeting was charged with conducting the business of Council in the best interests of Council.
2. It was imperative that Mr Allen be given every opportunity to acquire the property.

In his professional opinion he stated that it was important that if Council ruled to dispose of this property, it do it in a manner that would achieve the greatest result. That the property should be placed on the market in such a way to allow Council the maximum amount of negotiation with any interested party - by private treaty or by tender but cannot do it by going to auction first and then going to the other options later.

#### **POINT OF ORDER**

Cr Filmer called for a Point of Order as he was concerned that the Mayor should not go on any further regarding the method of disposal as he could be making comments which could be regarded as pecuniary interest.

The Mayor replied that he was entitled to make a statement so long as it did not include talking about the method of sale.

*The Mayor left the meeting room and the Deputy Mayor, Cr B. Howlett, took the Chair."*

39. A transcript of the Council proceedings at its meeting on 28 September 2001 reveals that the Council Minutes accurately record the substance of what Councillor Eichorn said, amongst other things, concerning maximising the proceeds of sale with any interested party by private treaty or tender but that one couldn't do that by auction first.
40. Only two of the entities which had lodged expressions of interest were suggesting a sale

by tender; one of those entities was Property New England.

41. As at 28 September 2001 the provisions of the *Local Government Act 1993* concerning pecuniary interests were the same as at 24 September 2001 and as referred to above.

## **HEARING AND FURTHER EVIDENCE**

42. At the hearing a number of documents were tendered, a large number of which, tendered on behalf of Councillor Eichorn, went to the question not of whether there had been a breach of the legislation but to the question of, if there had been a breach, what consequences ought to follow. For example, the evidence in the latter categories dealt with such matters as to the Department of Local Government's knowledge of the Code of Meeting Practice and what was said to be its lack of expression of concern in relation to any of the provisions of it; how the Code of Meeting Practice had in fact been implemented over a period of time and the expressions, by various people, of concern as to the wording of the pecuniary interest legislation so as to render clear advice to all concerned as to the interpretation of the pecuniary interest provisions. Other evidence in this category related to Councillor Eichorn's belief that no breach had occurred and his reasons for such belief.
43. As pointed out by the Tribunal during the course of the proceedings, at this stage, the Tribunal is concerned only with the question of whether the complaints or any of them concerning Councillor Eichorn have been established. In addressing this question of whether or not a pecuniary interest existed, a decision is to be made on the objective facts and circumstances unaffected by personal feelings or opinions. The decision is not based on a subjective judgment based on personal and individual feelings, beliefs, opinions or perceptions. This approach has been consistently adopted by this Tribunal (*Director-General Re: Councillor Roberts, Hastings Council*, PIT 1/1995, 3 August 1995, pp. 30-32; *Director-General, Department of Local Government Re Councillor Donald John Fern, Bega Valley Shire Council*, PIT 4/1997, 13 March 1998, p.31). The Tribunal is not at this stage concerned with questions which may go to a decision of what, if any, consequences ought flow from a finding that one or more of the complaints has been established. Notwithstanding this position, in order to save possible cost and

inconvenience, some evidence was received, both oral and documentary which dealt with both aspects, potentially, of the inquiry to be made by the Tribunal. At this stage the Tribunal will only address the first question.

44. By letter dated 10 October 2001 Councillor Eichorn responded to the Director-General, Department of Local Government, concerning the meeting of 23 February 2001. In the course of that response, Councillor Eichorn, after saying what information was given to the meeting, said:

"All of these matters needed to be available to Council before it could consider whether or not it wished to become directly involved in the matter and if so, how it should be involved. During these discussions I do not believe that I had any pecuniary interest as no motions were moved for Council to consider, discuss or debate.

Once it became clear that my colleague councillors were reaching a stage where they were ready to move and discuss specific motions, Council resolved to resume standing orders. At that time I immediately declared a pecuniary interest and left the room.

Therefore, I do not believe that I breached s.451 of the Act. As soon as I believed I had a pecuniary interest in the matter I declared that interest and did not take part in consideration or discussion of the matter and did not vote on any question relating to the matter.

... At the February meeting, prior to the specific matter being discussed, I believe that it was my Mayorial duty to introduce Mr Allen to the councillors and ensure that all the relevant factors were presented to the Council before they entered debate and discussion."

45. By letter of 1 November 2001 to the Director-General Councillor Eichorn responded to allegations concerning the meeting held on 24 September 2001. He maintained the firm view that he had not breached s.451 of the *Local Government Act* and while acknowledging that he had participated in part of the meeting, stated that he had not participated in any debate or discussion concerning who should be appointed as Council's agent. He set forth his concerns regarding the tenderers who had been involved in the sale of the property Jeogla. He said that he needed to make some comments to explain his concerns that he had to ensure that Council made the correct decision concerning the selling of Lakeview. It was because of these concerns that he proposed that Council

suspend the standing orders to allow general discussion. During this period he advised the Council of his concerns. He made no suggestions or preference for any particular agent and simply wanted the Council to make appropriate enquiries with its solicitors to ensure that Council made the correct choice. He did not cast aspersions on any firm but simply wanted Council to be aware of the facts so as to ensure that the Council was not exposed to subsequent litigation asserting a lack of appropriate care in selling Lakeview.

46. Councillor Eichorn from his correspondence apparently considered it permissible, in terms of the pecuniary interest provisions of the *Local Government Act 1993*, when standing orders were suspended, to talk about a particular subject matter generally but thought that once it became clear that the councillors were reaching a stage where they were ready to move and discuss specific motions that that was the time not only to resume standing orders but to declare a pecuniary interest. Councillor Eichorn maintained that position in his final submissions to this Tribunal.
47. Councillor Eichorn at the hearing and in submissions made it clear that he maintains that if there is no motion formally before the Council there can be no discussion, consideration or voting such as may constitute a breach of s.451 of the *Local Government Act 1993* (as it was in February 2001) and one cannot be present when any such matter is being considered (s.451 of the Act after April 2001).
48. Oral evidence was given at the hearing by Mr Fulcher, the General Manager of the Council since 1993. He gave evidence concerning the practice of suspending standing orders in the sense of temporarily suspending the rules of debate (but not in any way adjourning the Council meeting) so as to have a freer discussion of complicated issues to try to develop some common understanding or perhaps consensus. When that stage had been reached a councillor would move a motion to resume standing orders and then someone would usually move a substantive motion and debate within the normal code of meeting practice would take place. While the standing orders were suspended the councillors were only permitted to discuss the topic that they were about to deal with as identified in the business papers of the Council. He said that the meeting would identify the subject matter being dealt with, the particular topic that was before the Council, and then before a motion was moved someone would move to suspend the standing orders for



the purposes referred to above. Mr Fulcher has said in a record of interview that in his view suspending the standing orders does not suspend Councillors' obligations under the Act about pecuniary interests and he has expressed that view to Councillors and/or the Council (on unspecified occasions).

49. Mr Fulcher gave some evidence about advice being sought from the Department concerning the Code of Meeting Practice and clause 14 in particular, but it seems to the Tribunal that that matter, if relevant, is only relevant to the second question referred to above.
50. Mr Fulcher expressed the view that the Council believed that its Code of Meeting Practice provided the same right as members of the public had to address the Council, to a councillor, to make an address to the Council after declaring a pecuniary interest in a matter.
51. Councillor Howlett gave evidence, he having been a member of Council since April 1994. He said that the Minutes of the Council meeting of 24 September when it referred to Lakeview, as referred to above, was in fact referring to the Jeogla/ANZ Bank situation and that to the best of his recollection "We never actually discussed Lakeview on that occasion". He says that the matter of expressions of interest for the provision of marketing advice for Lakeview was on the agenda but it was dealt with by way of deferral to a subsequent meeting and that no resolution of substance in relation to Lakeview was discussed at that meeting. He says that he would say that the minutes would accurately record what transpired if the words "Lakeview" were deleted from the resolution concerning consultation with the Council's solicitors and the word "Jeogla" were substituted.
52. The Tribunal is of the opinion that the totality of the evidence of Mr Howlett makes it abundantly clear that this "amendment" makes no difference to the substance of what was being discussed or the substance of the complaints before this Tribunal. The item of business before the Council was the expressions of interest for the provision of marketing advice for Lakeview. One of the agents who had expressed interest was an agent who had been involved in the Jeogla/ANZ matter. Council's solicitor advising on the

expressions of interest had acted in that litigation. Councillor Eichorn was concerned that the Council have before it all relevant information concerning this agent and the Jeogla/ANZ matter. The purpose was so that the Council could ultimately resolve which agent ought to be preferred in relation to the Lakeview matter, in the sense of a decision on that subject matter being made with the Council fully informed of the circumstances of the Jeogla matter. So much is clear.

53. Councillor Eichorn gave evidence which totally supports the Tribunal's findings concerning what was being discussed, relevantly, at the Council meeting on 24 September 2001 in relation to an agent who had been previously involved in the Jeogla/ANZ sale and the Tribunal's conclusions about the substance of the matter and the "amendment" and its significance. He also gave evidence concerning his view as to the obligations of elected members of Local Government in abiding by the *Local Government Act*, Code of Conduct and the Code of Meeting Practice.

## **SUBMISSIONS**

54. The parties made oral submissions at the hearing on 19 December 2003 and on that occasion Councillor Eichorn handed up a written submission. Pursuant to leave granted by the Tribunal, Councillor Eichorn furnished a supplementary final submission dated 14 January 2004. This last document contained annexures, a number of which could accurately be described as new evidence. One document was the minutes of the Council meeting of 9 January 2004 which purported to amend the Council minutes of 24 September 2001 by substituting the word "Jeogla" for "Lakeview" as referred to above. As the Tribunal has said, even if this change were made to the resolution it does not, in the Tribunal's opinion, alter the substance of what was being discussed and nor does it alter the substance of the complaints before this Tribunal.
55. There was certain other correspondence annexed to the supplementary final submissions and notwithstanding objection from the Department, the Tribunal does not believe there is any matter contained in the annexures which could in any way prejudice the Department or require any response from it and the Tribunal has taken account of the annexures to those supplementary final submissions.

## CONSIDERATION

### A. Pecuniary Interest

56. It should be emphasised that there is no suggestion that Councillor Eichorn himself had any direct pecuniary interest in any of the matters before the Council. Rather the allegation is that he is taken to have such an interest within the meaning of s.443(2).
57. Councillor Eichorn's wife and two sons held the whole of the issued capital of Rod Eichorn Estate Agencies Pty Limited. Within the meaning of s.443(1), (2)(a) his sons were relatives of Councillor Eichorn. There is evidence before this Tribunal, as one would expect, that from time to time that company paid dividends to the shareholders. It is not suggested by the evidence, that certainly after he ceased to be a shareholder in 1988, that any dividends were paid to Councillor Eichorn but **if** Councillor Eichorn's wife and/or sons had a pecuniary interest in a matter before the Council then Councillor Eichorn is taken to have a pecuniary interest in that matter by virtue of s.443(2) of the Act. Councillor Eichorn understood that this was how the *Local Government Act 1993* operated, in his particular case, as demonstrated by the terms of the various declarations that he made from time to time and as referred to above.

### B. Suspension of Standing Orders and Lack of a Formal Motion

58. As recorded in paragraphs 46 and 47 above, Councillor Eichorn emphasised that while standing orders were suspended and there was no formal motion before Council there could be no relevant discussion/consideration upon which a breach of s.451 could be founded.
59. As one would anticipate the suspension of standing orders of a meeting does not operate in any way to adjourn or suspend the meeting itself. What is involved, as was explained by Mr Fulcher, is merely the suspension of the rules of procedure so as to facilitate a more free and open discussion unbounded by the technicality of those rules. The meeting continues and the meeting continues to discuss, consider and deliberate upon the item of

business which is then before the Council albeit that no-one at that point of time has formulated any precise motion or resolution. The subject matter of the item of business is nevertheless open for general discussion, consideration and deliberation.

60. The proposition advanced by Councillor Eichorn involved the argument that unless and until there was a formal motion before the Council there could be no relevant consideration or discussion for the purposes of s.451(2) of the Act because, inferentially, there was no "matter" which could be discussed or considered in which anyone could have a pecuniary interest.
61. The Tribunal rejects that broad and general proposition. As a matter of construction of s.451(2), such a general proposition is not warranted. The prohibition in s.451 (both before and after the 2001 amendments) is not limited in the manner contended for. Indeed, the section speaks in the widest terms of "any matter with which the Council is concerned". There is no warrant or justification, as a matter of construction, for limiting the discussion or consideration of the "matter" to discussion and consideration that takes place in the context of a formulated motion or resolution. Indeed the section, by framing another prohibition in terms of "on any question relating to the matter" or "on any question in relation to the matter" clearly, as a matter of construction, is not limiting "discussion of a matter" to "discussion of a question in relation to the matter". The restricted construction contended for by Councillor Eichorn is rejected.
62. While the broad proposition is rejected in the sense that a "matter" can be considered and discussed by Council without there being any formulated resolution or motion, it is still necessary to identify the "matter" which is being discussed and considered. In any particular case the absence of a formulated motion **may** mean it is more difficult to answer the question of whether a Councillor had a pecuniary interest in the matter. Each case, however, will depend on its own facts.

### **C. The Code of Meeting Practice**

63. Section 360 of the *Local Government Act 1993* permits the Council subject to certain restraints to adopt a Code of Meeting Practice. Uralla Shire Council did so and clause 14

is set out in paragraph 25 above. Councillor Eichorn relies upon it.

64. To the extent to which clause 14, in its first paragraph, implies some temporal relationship between disclosing a pecuniary interest and "then" not taking part in the consideration or discussion of the matter nor voting on it, such temporal relationship does not, in the Tribunal's opinion, reflect what were the provisions of s.451(1), (2) and (3) of the *Local Government Act 1993*. In other words, as a matter of construction of that section, if a councillor had a pecuniary interest in a matter he had substantially three cumulative obligations; one of disclosure, one of non-participation in consideration and discussions, and one of not voting. The mere fact that a councillor had not disclosed an interest (when he ought to have) did not permit him to take part in the consideration or discussion of a matter. To this extent the use of the word "then" in the first paragraph of clause 14 as set out above portrays a gloss on the legislation which is not justified.
65. The second paragraph of clause 14 provides that the councillor must leave the meeting room "once" he or she has declared a pecuniary interest in the matter. Absence from the meeting room was not of course a requirement of s.451 of the Act until the amendments were made that came into force on 1 April 2001, which required that a councillor who had a pecuniary interest must not be present at or in sight of the meeting of the Council at any time during which the matter was being considered or discussed by the Council or at any time during which the Council was voting on any question in relation to the matter. To the extent to which the second paragraph of the Code of Meeting Practice again suggests (after April 2001) some temporal connection between declaration of pecuniary interest and leaving the meeting room then that suggestion is not justified by the legislation, in the sense that the councillor's obligation to absent himself from the Council meeting applies, whether or not he has complied with the obligations of declaration of pecuniary interest.
66. The second paragraph of clause 14 relating to the councillor leaving the room is expressed to be subject to a qualification in the following terms:

"Subject to the affected Councillor having the right to ask Council to let him or her address the Council, as a member of the public, prior to

leaving the meeting room".

67. There are a number of considerations involved in this provision. The first, of course, is that the Code of Meeting Practice can in no way alter, modify or affect the statutory obligations of a councillor under s.451 of the *Local Government Act 1993*. To the extent that this provision of the Code of Meeting Practice might envisage a councillor taking part in the discussion of the matter in which he has a pecuniary interest by addressing the Council, then such, in this Tribunal's opinion, was prohibited by s.451(2) of the Act prior to its amendment in April 2001. After that amendment, such a consideration was contrary to the amended s.451(2) which prohibited a councillor from being present at or in sight of the relevant meeting at the relevant time (whether he took part in the discussion or not).
68. The second aspect of the said provision of clause 14 is that as a matter of construction it seeks to give to the councillor a right to ask the Council for permission to address the Council. On any view of it that was not done in any of the instances now before this Tribunal. While it is said that the Council was in its procedures somewhat free and easy in its approach, nevertheless, as a matter of construction of clause 14 of the Code of Meeting Practice it was not complied with, on any view of the facts. The Council was not asked for the relevant permission. On the contrary Councillor Eichorn asserted (28 September 2001) "I am entitled to make a statement".
69. Thirdly, the said phrase of clause 14 envisages the councillor addressing the Council "as a member of the public". It does not envisage a councillor continuing to sit at the meeting table and it envisages no more than an address to the Council. It certainly does not envisage participation by the councillor in discussions with other Council members such as would take place if the councillor was participating in the meeting itself. Further it envisages all this taking place after declaring an interest, not before.
70. A review of what transpired in the instant case reveals that Councillor Eichorn did not purport to "address the Council, as a member of the public". On each occasion he was, as a councillor, participating in the Council meeting discussions and conveying in the course of that participation a view which he had concerning the matter under

consideration by the Council. He was doing so as a councillor attending a Council meeting and indeed as Mayor and chairman of the meeting. On no occasion did Councillor Eichorn comply with this aspect of the Code. Further on two occasions he did so before declaring an interest, not after.

71. To the extent to which Councillor Eichorn seeks to rely on clause 14, the Tribunal is of the opinion that, factually, he is unable to do so. On each occasion he did not comply with its provisions.

### **Meeting of Council - 23 February 2001**

72. There is no doubt, in the Tribunal's opinion, that the matter before the Council at this meeting was a question of whether the Council would, on a temporary basis, fund the purchase of the Lakeview property and, if so, how. That was the very purpose of the meeting and the purpose of the report from the Director of Corporate Services to that meeting.
73. Brian Eichorn & Co Pty Limited was the estate agent involved in the proposed transaction as the vendor's agents and it clearly stood to gain a not inconsiderable commission in the event of the funding being approved and the sale going ahead. Councillor Eichorn's wife and two sons were the sole shareholders in the company. This Tribunal is of the opinion that Councillor Eichorn's wife and his two sons had a pecuniary interest in the matter before the Council on 23 February 2001 in the sense that they had a reasonable likelihood or expectation of appreciable financial gain or loss. Councillor Eichorn did not submit to the contrary. That being so, Councillor Eichorn was taken by s.443(2) to have had a pecuniary interest in that matter. It was not suggested that any such interest was remote or insignificant, within the meaning of s.442(2). In the Tribunal's opinion it was not.
74. The Tribunal is of the opinion that Councillor Eichorn had a pecuniary interest in the matter before the Council on 23 February 2001 such that he was obliged to comply with the obligations imposed on him by s.451. To the extent to which Councillor Eichorn conceded at the meeting of 23 February 2001 that he had a pecuniary interest because

"his family have an interest in Brian Eichorn & Co Pty Limited, real estate agents, who are involved in the proposed transaction", then such admission in the Tribunal's opinion, was clearly correctly made.

75. At the relevant time of the meeting on 23 February 2001 the "matter" being considered by the Council was the proposed wool plant property purchase and the Council's funding, one way or another, of that purchase. So much is clear from the Council minutes, the report from the Director of Corporate Services and the transcript of the proceedings prior to the resumption of standing orders.
76. As discussed above, the suspension of standing orders had no relevance to s.451 of the *Local Government Act*. What was occurring was the continuation of a meeting of the Council, albeit that the procedural rules of debate and discussion were suspended. As the evidence shows that was clearly the understanding of the effect of suspension of the standing orders. As a matter of the law of meeting practice this understanding of the effect of suspending the standing orders was plainly correct.
77. While the standing orders were suspended there is no doubt, in this Tribunal's opinion, that Councillor Eichorn took part in the consideration and discussion of the matter then before the Council meeting. The transcript of his participation continues for some six pages and his participation was extensive. During the course of the discussion he made the statements referred to above in paragraph 19.
78. Contrary to the provisions of s.451, Councillor Eichorn took part in the consideration and discussion of the matter then before the Council.
79. As the Tribunal has said, the Code of Meeting Practice cannot, as a matter of law, be contrary to or modify the impact of the *Local Government Act* and the obligations it casts upon Council members. Be that as it may, in the case of this meeting Councillor Eichorn did not ask permission of the Council to address the Council as a member of the public and he was not granted permission by the Council to do so. Further, he did not purport to address the Council as a member of the public. He continued to participate in the consideration and discussion of the matter as a councillor. Further, he did so before



declaring a pecuniary interest. Accordingly, in the Tribunal's opinion, even if the Code of Meeting Practice were otherwise relevant to a consideration of a breach of s.451, Councillor Eichorn did not, on 23 February 2001, comply with the provisions of that Code.

80. To the extent to which it is suggested by Councillor Eichorn that what was taking place was a general discussion on the subject matter, rather than the consideration of an explicit resolution, then such suggestion, in the Tribunal's opinion, in the present case, and for the reasons set out above, does not assist Councillor Eichorn. The matter before the Council that was being considered and discussed was the provision by the Council of financial assistance to enable the property to be purchased in circumstances where Councillor Eichorn's wife and sons' estate agency was the vendor's agent on the sale.

### **Section 457 *Local Government Act 1993***

81. In his written submissions, Councillor Eichorn relies upon the above section which is (and was) in the following terms:

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

Councillor Eichorn seeks to rely on this section by asserting that he believed at the relevant time that he did not have a pecuniary interest and he believed he was not breaching the Act.

82. Section 457 is not directed to a question of subjective belief or knowledge. It is concerned with the situation of a person not knowing some underlying fact that gives rise to a pecuniary interest, not where a person knows all the relevant facts but believes (wrongly) there is no pecuniary interest. The distinction is between knowledge of the facts on the one hand and their legal effect, or the legal conclusion to be drawn from those facts, on the other (see *Director-General, Department of Local Government, Re Councillor Roberts, Hastings Council*, PIT 1/1995, 3 August 1995, page 48. On the facts

of this case Councillor Eichorn's reliance upon s.457 is rejected. He knew all the relevant facts.

### **Council Meeting - 24 September 2001**

83. This Council meeting was considering the expressions of interest for the provision of marketing advice for Lakeview. One of the expressions of interest came from Rod Eichorn Estate Agencies Pty Limited T/as Property New England. There were four other entities that had lodged expressions of interest. Plainly, each of those entities was concerned in the selection of the agent or agents to market Lakeview and in the process leading up to such selection.
84. At the meeting on 24 September 2001 the Council had before it a report from the Acting General Manager recommending the appointment of David Nolan Rural and Project Marketing as the agent to sell Lakeview and a recommendation as to the timing and manner of the proposed sale. The Council also had before it a supplementary report from the Acting General Manager, recommending that the appointment of an agent to sell Lakeview be deferred until October 2001. The report dealt with Mr David Nolan and his involvement in the sale of Jeogla.
85. The Tribunal accepts the evidence of Councillor Eichorn to the effect that his concerns were to protect the interests of the Council in the matter. Nevertheless, the fact is that some information had been received which may impact upon the Council's consideration of David Nolan as one of the parties lodging an expression of interest. Councillor Eichorn was concerned that additional information be obtained so that the Council could make an informed decision concerning which party should be appointed to market Lakeview. The information that might be obtained might be favourable to David Nolan & Co continuing on the same footing as a proponent who had been recommended for approval or it may have resulted in adverse information and the exclusion of that entity from further serious consideration. If the information to be sought was favourable to David Nolan then, in the Tribunal's opinion, there was a distinct possibility of that organisation being selected as the agent to sell Lakeview as the Acting General Manager, in his report, had recommended. If, on the other hand, the advice was not favourable to

David Nolan, then the odds of any of the remaining four agents being selected could be enhanced from 1 in 5 to 1 in 4.

86. The first question which must be answered is whether Councillor Eichorn's wife and sons, as shareholders in Rod Eichorn Estate Agencies Pty Limited had a pecuniary interest in the matter before the Council because of a reasonable likelihood or expectation of appreciable financial gain or loss to them. The second question is whether any such interest was 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 as explained in *Fern's* case (supra), namely the hypothetical question of whether, upon the basis that they were found to have had a financial interest in the question, that interest was so remote or insignificant that, if a reasonable person in their position was faced with having to decide the question, it could not reasonably be regarded as likely to influence any decision they might make. In the context of approaching the question, as *Fern's* case (supra) requires, from the point of view of Councillor Eichorn's wife and sons it is, on the facts of the present case, the Tribunal's opinion that they did not have a pecuniary interest in the question of whether the Council ought to seek from its solicitors the additional information concerning David Nolan. It could not, in the Tribunal's opinion, be said that they had a reasonable likelihood of appreciable financial gain or loss from the matter then under consideration, namely the seeking of additional information.
87. As was said in *Fern's* case (at p.41) the question is not only whether Councillor Eichorn's wife and sons had prospects of financial gain or loss but whether the seeking or not seeking the additional information would be likely to affect those prospects. As was said in *Fern's* case, it is implicit in s.442(1) that a person will have a pecuniary interest in a matter before the Council only if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the person flowing from the Council's decision on the matter. "What is contemplated is a causal relationship between the possible outcomes of the question before the Council and the present or future financial welfare or prospects of the person in question".
88. The Tribunal is not satisfied, in the present case, that there was a causal relationship between the possible outcomes of the question of whether or not to seek further

information from the Council's solicitors and the present or future financial welfare or prospects of Councillor Eichorn's wife and sons. While there may have been, as demonstrated above, a causal relationship depending upon the outcome of the enquiries, in the opinion of the Tribunal it cannot be said that there was a causal relationship on the question of whether or not to make the enquiries in the first place.

89. In the Tribunal's opinion Councillor Eichorn did not breach the provisions of the *Local Government Act 1993* in relation to the said meeting of 24 September 2001.

### **Council Meeting - 28 September 2001**

90. The item of business dealt with at this meeting again was the expressions of interest for the provision of marketing advice for Lakeview. In the Tribunal's opinion it is clear that the aspect of the matter which was to be discussed was the advice received by the Council from its solicitors, following the resolution of 24 September 2001, relating to David Nolan and the Jeogla litigation. There was also to be the question of selection of the agent to be charged with the sale and the method of placing the property on the market.
91. The Tribunal is of the opinion that Councillor Eichorn's wife and sons, as the sole shareholders in Rod Eichorn Estate Agencies Pty Limited had a pecuniary interest in this matter that was before the Council. They had a reasonable likelihood of appreciable financial gain or loss from the selection of the agent to handle the sale of Lakeview. By virtue of the said provisions of the *Local Government Act 1993* Councillor Eichorn was taken to have a pecuniary interest in the matter before the Council.
92. At the commencement of the item of business, Councillor Eichorn declared a pecuniary interest in the matter because his family members had an interest in Property New England, who had submitted an expression of interest in marketing the property. This declaration by Councillor Eichorn was clearly correct.
93. Nevertheless, Councillor Eichorn, whilst still acting as Chairman of the Council meeting, addressed the councillors on the matter before the Council and in particular the most

appropriate method of marketing the property. He was present at the meeting of the Council when it was considering the said matter. That was a breach of s.451(2)(a) of the *Local Government Act 1993*.

94. For the reasons set out above, on the present facts, it matters not that there was then before the Council no specific motion. Within the meaning of s.451 it is clear that there was a matter before the Council, as described above, and it was being considered and discussed by the Council and when it was being so considered and discussed, Councillor Eichorn was present. He was not entitled to be.
95. As the Tribunal has already said, to the extent to which Councillor Eichorn was intending to exercise his "rights" under the Code of Meeting Practice, then that Code cannot modify or be inconsistent with the obligations under s.451.
96. Further, however, Councillor Eichorn was not in fact doing or purporting to do what clause 14 purports to authorise. He did not seek the permission of the Council to address it. Contrary to the assertion made by Councillor Eichorn at the meeting, he was not "entitled to make a statement", by virtue of clause 14 of the Code of Meeting Practice. What he was by that Code entitled to do was ask the Council for permission to do so. He did not. Further, he did not address the Council "as a member of the public". He was participating in the Council meeting as a councillor and indeed he was participating whilst still acting as Chairman of the Council meeting (before he handed over the proceedings to the Deputy Mayor). Further, it could be said he went beyond merely making a statement. He became involved in discussions. Even if the Code were otherwise relevant to a breach of s.451, Councillor Eichorn did not comply with that Code.
97. The Tribunal is of the opinion that Councillor Eichorn breached the provisions of s.451(2)(a) at the meeting of 28 September 2001. For the reasons set out above, on the facts, s.457 provides no defence to Councillor Eichorn. Regardless of his beliefs of the legal consequences, he knew all the relevant facts.

## **CONCLUSION**

98. For the reasons and to the extent set out above the Tribunal is of the opinion that Councillor Eichorn has breached the provisions of the *Local Government Act* in respect of the meetings of the Council held on 23 February and 28 September 2001 concerning questions relating to the purchase and sale by the Council of the property known as "Lakeview" and to that extent the complaint has been established.
99. As indicated during the course of the hearing, the Tribunal intends to afford both Councillor Eichorn and the Director-General, Department of Local Government, an opportunity to adduce further evidence and/or make further submissions (either orally or in writing, or both) as to what consequences ought to follow the Tribunal's findings against Councillor Eichorn. The possible consequences are those set out in s.482(1) of the *Local Government Act 1993*.
100. The Tribunal DIRECTS both Councillor Eichorn and the Director-General, Department of Local Government, to advise the Tribunal in writing, within fourteen days of the date of this decision, the course of action which they wish to pursue in relation to evidence and/or submissions on the last mentioned question. The Tribunal understands that, after recent elections, Councillor Eichorn is no longer a member of the Council. The above requested advice ought to take this matter into account. The Tribunal will then consider that material and issue the appropriate directions.
101. In accordance with the provisions of s.484(1) of the Act, the Tribunal will furnish a copy of this Statement of Decision to Councillor Brian Eichorn and the Director-General.

DATED: 7 April 2004

