

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT No. 4/2001

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

**RE: COUNCILLOR PETER KEMPER, URALLA
SHIRE COUNCIL**

STATEMENT OF FURTHER DECISION

Dated: 27 August 2004

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INTRODUCTION

1. In a Statement of Decision dated 7 April 2004 the Tribunal determined that Councillor Kemper had breached the pecuniary interest provisions of the *Local Government Act 1993* in respect of meetings of the Uralla Shire Council held on 23 February, 23 April, 30 April and 24 September 2001. Reference should be made to that Statement of Decision and this Statement should be read in conjunction with it.
2. Following upon that Decision Councillor Kemper and the Director-General, Department of Local Government were invited to make submissions as to what consequences, if any, ought to follow from the Tribunal's Decision of 7 April 2004.

3. By written submission dated 10 June 2004 Mr M.A. Robinson, Counsel for the Director-General, submitted that a substantial disqualification of Councillor Kemper from holding civic office was the minimum appropriate penalty, bearing in mind the matters emphasised in that written submission including the findings already made by the Tribunal and having regard to various factors, summarised as follows,:
- (i) the four breaches were each serious and flagrant breaches of the Act;
 - (ii) the breaches were not isolated but were systematic and planned, demonstrating a course of conduct of deliberate or recklessly careless disregard or avoidance of the pecuniary interest provisions of the Act;
 - (iii) the breaches were intentional or made recklessly;
 - (iv) Councillor Kemper had full knowledge of all the relevant facts at all material times;
 - (v) Councillor Kemper showed no real remorse at any stage of the proceedings and indeed exhibited open defiance;
 - (vi) while Councillor Kemper's references and testimonials are satisfactory, they did not disclose that the authors of them had any real appreciation of the seriousness of the complaints;
 - (vii) Councillor Kemper was an experienced councillor and for a time was Deputy Mayor and that his experience serves only to highlight the seriousness of the breaches with which the Tribunal is concerned.
4. Councillor Kemper in correspondence dated 3 June, 16 June and 7 July put forward lengthy matters for the consideration of the Tribunal. Reference shall here be expressly made to some aspects of those matters. Some of that material sought to criticise, in intemperate language, the Department of Local Government and this Tribunal. Some of

the material sought to allege inaccuracies said to have occurred in the Statement of Decision. Having considered those matters the Tribunal is not convinced that there is any relevant inaccuracy in the Statement of Decision which warrants correction. Councillor Kemper's letter of 3 June concludes with a hope that the pecuniary interest provisions of the *Local Government Act 1993* be crystallised and written in plain English so that the ordinary councillor did not have to engage a full-time QC/barrister in order to carry out their honorary, formal and expected civic duties. The Tribunal shall return to that sentiment shortly.

5. Councillor Kemper's submission of 7 July 2004 and the referenced testimonials emphasise Councillor Kemper's diligence, honesty and integrity. Councillor Kemper emphasises that he followed the general manager's advice concerning s.443(3)(c). He emphasises that he has never sought or received any form of gain from any of the matters before the Tribunal and that at no time did he intend to breach the provisions of the *Local Government Act 1993*. He complains of the lack of clear and authoritative advice on the meaning of the pecuniary interest provisions and complains that councillors should not have to resort to seeking legal advice and wasting precious resources to scrutinise every decision. Councillor Kemper reiterates that in his view he followed the Uralla Shire Council's Code of Meeting Practice to the best of his ability. While Councillor Kemper acknowledges that he is an experienced councillor (as submitted on behalf of the Director-General) he emphasises that he has no experience in dealing with matters such as presently under consideration by this Tribunal. Councillor Kemper urges that no consequences ought to follow from the findings of the Tribunal and that counselling should be provided as a matter of course but that it needs to be backed up by a committed and supportive Department of Local Government rather than a litigious department and he submits that no benefit and indeed some detriment would follow from any suspension of him.

CONSIDERATION

6. The Tribunal accepts that Councillor Kemper is a man of honesty and integrity and of good character. The Tribunal accepts that he is highly motivated in relation to his duties of representing the constituents in the community.
7. The breaches of the pecuniary interest provisions as found by the Tribunal in its decision of 7 April 2004 are clear and serious breaches of the provisions of the Act. The Tribunal accepts that Councillor Kemper may have thought that he had overcome any difficulty in relation to the meeting of 23 February 2001 by his letter of resignation from his employment. As found however at the time of that meeting he was still employed by Brian Eichorn & Co Pty Ltd. In respect of the meetings of 23 April, 30 April and 24 September he was clearly employed at those times as he well knew. Brian Eichorn & Co Pty Ltd clearly had a pecuniary interest in the matters before the Council on those occasions and as an employee of that company Councillor Kemper was deemed to have a pecuniary interest.
8. Not only were the breaches serious, there were four of them and they were spread over the period from February to September 2001. At all times Councillor Kemper was aware of all relevant factual matters and he had ample opportunity to properly acquaint himself with the provisions of the Act and the relevant decisions of this Tribunal.
9. At the time of the meeting of 23 February 2001 the evidence establishes that Councillor Kemper did not have a clear or accurate appreciation of the pecuniary interest provisions of the Act. In his resignation letter dated 22 February 2001 Councillor Kemper referred to "advice received that as an employee I do not have any interest to declare". In a transcript of interview of December 2001 (page 3), he reiterates this position and says that the advice was given to him by the general manager Mr Fulcher. Councillor Kemper puts it slightly differently in an informal interview of July 2001:

"My previous advice from the general manager was that I had no pecuniary interest regarding Lakeview. The general manager told me that unless I was a shareholder of the Co and had a financial interest arising from the commission I had no pecuniary interest. As an employee only I had no interest. I took that advice."

10. Mr Fulcher refers, in a transcript of interview of December 2001, page 5, to a conversation he had with Councillor Kemper where he was talking in terms of a "remoteness test". In other words, "if you were not a shareholder or a director and you did not earn commission then as an ordinary part-time employee you do not have a pecuniary interest". He said "my view was that Councillor Kemper could be protected by the remoteness test as an ordinary part-time employee". On page 4 he puts it in terms of:

"I agree with Councillor Kemper that he had absolutely removed the conflict by his resignation rather than dealing with the matter of an employee in a remoteness test and so I, I made that advice to Council, on the full knowledge of Councillor Kemper's resignation."

11. Mr Fulcher repeats the substance of that in a separate interview of 18 December 2001 and his oral evidence before this Tribunal on 18 March 2003.
12. The fact is that the "remoteness test" set out in s.442(2) in a situation such as that involving Councillor Kemper does not relate to Councillor Kemper's position but rather to that of the employer. If the employer has a reasonable likelihood or expectation of appreciable financial gain and that is not so remote or insignificant within the meaning of subsection (2) then the employee Council Member is taken to have a pecuniary interest in the matter before the Council and no further question of remoteness arises. [See Director-General, Department of Local Government Re Councillor Donald John Fern, Bega Valley Shire Council (PIT No.4/1997, 13 March 1998).]
13. It seems clear that at the time of the meeting of 23 February neither Councillor Kemper or Mr Fulcher understood the relevant principles of this Act as discussed by this Tribunal in Fern's case.

14. On 6 March 2001 Mr Fulcher wrote to the Department of Local Government concerning his understanding of the pecuniary interest provisions. This letter was written, according to Mr Fulcher's evidence before this Tribunal, partly out of his concern about trying to guide Councillor Kemper. The letter is based on the same premise (mistaken) that the remoteness test applied to the employee's position. The Department responded by letter dated 4 April 2001. That letter expressly referred to Fern's decision in the context of the correct interpretation of s.443. It advised that that decision was available on the Department's website which was identified. The letter advised that each case depended upon its own facts and circumstances, that the Department was unable to provide Council with legal advice and that the Council should seek and be guided by its own legal advice should it have any further questions regarding the matter. The letter included a passage as follows:

"By virtue of s.443(2)(a) in the case where a person is employed by an employer who or which has a pecuniary interest then the first person (the employee) is taken to have an interest also. However I draw your attention to the "remoteness" test under s.442(2) which may still be applied to the employee."

Counsel on behalf of the Director-General frankly, and correctly, concedes that the last sentence could have been more appropriately worded by the insertion of the words "by way of its application to the employer only".

15. The evidence is clear that Councillor Kemper read the letter from the Director-General dated 4 April 2001. He acknowledges at a Council meeting of 23 April 2001 that he had received a copy of the Tribunal's decision in Fern's case. It is not clear to what extent he read the decision or applied his mind to its application to his own position. The inference is, from what he said to the meeting of 23 April 2001, that he still did not understand how the section worked and did not understand the decision in Fern's case. Indeed he later said an interview on 12 July 2001:

"I must say that the Department of Local Government is too non-committal in responding to requests for advice. We ask questions and we get such a non-committal answers - that it's useless. Payne's letter was wishy-washy - did not say anything but referred us to the Fern case. Department of Local Government provides no support for councillors."

16. In the Tribunal's opinion it is clear that following the receipt of the Director-General's letter of 4 April 2001 Councillor Kemper did not understand the material which was being proffered by the Director-General and he did not understand Fern's case and he did not understand how the pecuniary interest provisions of the Act applied to a person in his position. He believed, so he said in substance, he still had not received the advice that had been sought. The other alternative was that he knew and understood but intentionally breached the Act. The Tribunal is not prepared to make that finding. Notwithstanding these matters Councillor Kemper took no adequate or further steps to properly acquaint himself with the provisions of the Act so far as they related to him. He could and should have read Fern's case which should have made it patently clear that he did have a pecuniary interest and that his previous understanding of the Act in relation to the "remoteness test" was wrong. If he still did not understand the Act and Fern's case he should have sought further advice, if need be from a lawyer. He evidently did not do this and he evidently did not seek any further advice or guidance to assist him in a proper understanding of the Act. He should have. The breaches of the Act committed after receipt of the said advice were breaches which in this Tribunal's opinion were committed by Councillor Kemper with reckless disregard of his responsibilities. This Tribunal has said on numerous occasions that councillors have an obligation to themselves and to the community to properly inform themselves so as to comply with their statutory obligations of disclosure of pecuniary interests and abstinence from participation. In the present case Councillor Kemper had access to and indeed possession of the relevant decision of this Tribunal and the Act and he believed that the advice from the Department was in his words "useless" yet he did nothing to properly inform himself. He participated in the meetings to the extent which has been found by this Tribunal of 23 April, 30 April and 24 September knowing or believing that he was not properly informed of his position. In the Tribunal's opinion such behaviour is an abrogation of his responsibilities.
17. Councillor Kemper has consistently sought to rely upon the Code of Meeting Practice

adopted by the Council. For reasons set forth in the Tribunal's decision of 7 April 2004 Councillor Kemper did 'not in a substantial manner comply' with this Code of Meeting Practice in a substantial manner. He did not purport to address the Council as a member of the public as permitted by the Code in certain circumstances. 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. The Tribunal is of the opinion that it should have been evident to him that he was not complying with the provisions of the Code.

18. The Tribunal also takes into account that Councillor Kemper has shown no real remorse at any stage of the proceedings for the breaches which he has committed. He has also demonstrated no real appreciation of how the breaches arose or that he has even now taken any steps to properly understand his obligations under the Act. Indeed it is telling of his attitude that on 12 July 2001 when he was interviewed by officers of the Department of Local Government and he expressed the views which are set out above concerning the advice given by the Department that he nevertheless subsequently committed breaches of the Act on 24 September 2001 in circumstances where he knew the Department was making inquiries about possible breaches of the pecuniary interest provisions of the Act. Rather than blaming the Department for the quality of its advice (as he saw it) he would have been better focused to have concentrated on his own legal responsibilities and if necessary, to have sought his own legal advice on his circumstances which arose by virtue of him being an employee of Brian Eichorn & Co Pty Ltd and at the same time, a councillor. The letter of 4 April suggested such a course of action, but Councillor Kemper failed to adopt it.

19. The Tribunal is mindful that there is no suggestion in the present case that Councillor Kemper personally gained any financial or other benefit from his breaches of the Act. That however is a situation which will often arise where a deemed pecuniary interest arises by virtue of the operation of the Act. It is however a matter to be taken into account.
20. Weighing all the above matters the Tribunal is of the opinion that Councillor Kemper's serious breaches of the Act warrant him being disqualified from holding civic office for a period of 12 months. The period of disqualification will be postponed for a short time to enable Councillor Kemper and the Council to re-organise their respective schedules so as to avoid undue disruption to Council's business and Councillor Kemper's affairs as a result of the disqualification.

THE TRIBUNAL'S ORDER

21. The Tribunal's Order is as follows:

The Local Government Pecuniary Interest Tribunal, **HAVING FOUND** that a complaint made by the Director-General Department of Local Government, pursuant to s.460 of the *Local Government Act 1993* that Peter Kemper, being a Councillor of Uralla Shire Council, contravened Chapter 14, Part 2 of that Act in respect to considerations by the Council at meetings of the Council on 23 February 2001, 23 April 2001, 30 April 2001 and 24 September 2001 of questions relating to the purchase and sale of certain real estate has been proved.

Pursuant to s.482(1) of the Act the Tribunal ORDERS that Councillor Kemper be and he hereby is disqualified from holding civic office for a period of 12 months commencing on 1 October 2004 and expiring on 30 September 2005.

The Tribunal's Order will be furnished to Councillor Kemper, the Director-General and the Uralla Shire Council forthwith.

Copies of the Tribunal's Statement of Decision and Statement of Further Decision will be provided to Councillor Kemper and the Director-General in accordance with s.484(1). Pursuant to s.484(3) copies will also be provided to Uralla Shire Council and such other persons as the Tribunal thinks fit.

Dated: 27 August 2004

