LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT No. 4/2001

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR PETER KEMPER, URALLA SHIRE COUNCIL

STATEMENT OF DECISION

Dated: 7 April 2004

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STATEMENT OF DECISION

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 Councillor Peter Kemper, 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:

> "A complaint is hereby made by the Director-General, Department of Local Government pursuant to section 460 of the *Local Government Act 1993*, that:
> Clr Peter Kemper of Uralla Shire Council, did contravene Chapter 14,

Part 2 of the *Local Government Act 1993*:

PARTICULARS OF GROUNDS OF COMPLAINT

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

(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;

(b) participated at a Council Meeting held on 23 April 2001 in the Council's consideration of a proposal to purchase three properties at Uralla, prior to leaving the Council Meeting without giving a reason;

(c) participated at a Council Meeting held on 30 April 2001 prior to declaring a conflict of loyalties and leaving the Council Meeting;

(d) participated at the Council Meeting held on 24 September 2001 in the discussion of the sale of Lakeview, prior to declaring a conflict of interest and leaving the Council Meeting; and

(e) 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 (e) 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 Kemper, 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. A letter was subsequently received by the Tribunal from Councillor Kemper dated 20 February 2004. That letter sought to deal with a letter from the Department of Local Government dated 11 February 2004 which had been sent to the Tribunal. The latter letter, while including Councillor Kemper's name in the heading, in fact was sent as a submission in another

matter by another person and had been sent to the Tribunal pursuant to leave granted by the Tribunal on 19 December 2003. No such leave had been sought or granted to Councillor Kemper. Notwithstanding the Tribunal shall take account of Councillor Kemper's said letter.

BACKGROUND

6. Councillor Peter Kemper was elected to Uralla Shire Council in September 1995. He served as Deputy Mayor between September 1995 and September 1996 and again between September 1999 and September 2000. As a councillor he served on a large number of committees which are detailed in the Director-General's report.

7. A company known as Brian Eichorn & Co Pty Limited carried on business as a real estate agency in Uralla Shire and had done so since 1987. On 18 June 2001 the company changed its name to Rod Eichorn Estate Agencies Pty Limited. Since 15 May 2001 the name "Property New England" has been a registered business name and was owned by Rod Eichorn Estate Agencies Pty Limited and that company has carried on business under that business name.

8. There is no doubt on the evidence before this Tribunal that for a period of time and at least until 22 February 2001 Councillor Kemper was an employee of Brian Eichorn & Co Pty Limited. It will be necessary to refer to the evidence in more detail in due course but it is sufficient here to say that by a letter bearing that date and addressed to Mr Rod Eichorn, Brian Eichorn & Co Pty Limited, Councillor Kemper purported to resign "effective from the close of business today". By letter bearing date 23 February 2001 Mr Rod Eichorn, as a director of Brian Eichorn & Co Pty Limited, wrote to Councillor Kemper expressing his "great disappointment" at the receipt of the letter of resignation and requested that he "seriously reconsider your letter of resignation and arrange a suitable time to meet with me to discuss a new employment package that may make you change your mind as to a career in the real estate industry with this firm". The Tribunal will return to the issue of this resignation later.

9. There appears to be no doubt that as from 2 April 2001 Councillor Kemper recommenced

work with Brian Eichorn & Co Pty Limited, said to be on a permanent part-time basis (approx 30 hours per week) for a probationary period of two months. Accordingly, with the possible exception of 23 February 2001, at the time of each of the Council meetings referred to in the Director-General's complaint, Councillor Kemper was an employee of that company. Councillor Kemper does not contend to the contrary.

10. 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.

11. 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.

12. 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.

13. The vendor's agent on the proposed sale was Brian Eichorn & Co Pty Limited.

The meeting of Council - 23 February 2001

14. 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.

15. 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 resolution was passed.

16. 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 and after they were resumed, 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. The transcript records some discussion as to whether Councillor Kemper had a pecuniary interest. Mr Fulcher, the General Manager, said that based on information he had he could categorically say Councillor Kemper did not. The information included Councillor Kemper's letter of resignation.

17. Councillor Kemper took part in the consideration and the discussions during the suspension of standing orders and after their resumption. He voted on the resolution. Councillor Kemper does not dispute what transpired. He maintains he was entitled to take part and to vote. Whether he was, is dealt with below.

18. 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.

19. 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

20. 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.

21. Councillor Kemper, 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

22. 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.

Pecuniary Interest Provisions

23. 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 ... employer of the person ... has a pecuniary

interest in the matter."

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 23 April 2001

24. The Council owned certain real estate upon which was conducted the McMaugh Gardens Hostel. At the request of Mr Fulcher (the General Manager of the Uralla Shire Council) Brian Eichorn & Co Pty Limited produced a report dated 15 March 2001 under the reference of Mr Peter Kemper. He was the author of it. Mr Kemper was also then listed on the letterhead of the company. At this date he was an employee of the company. Councillor Kemper does not dispute that. The report dealt with enquiries made of land owners adjoining the Hostel to ascertain whether they would consider selling their properties to the Council to allow for the future expansion of the Hostel. Councillor Kemper made the enquiries. The report recommended, amongst other things, that Council proceed with the acquisition of 35 King Street, Uralla and, subject to certain conditions, also 33 and 31 King Street, Uralla. The report stated that should the recommendations be acceptable to the Council then the company would be pleased to act as the Council's agents and to commence negotiations with the land owners with a view

to reaching agreement on price.

25. In a subsequent letter/report dated 11 April 2001 from the company to the said General Manager the company, amongst other things, advised that they had been appointed the exclusive agents of the owners of properties 31 to 35 King Street, inclusive. Councillor Kemper was the author of this letter/report.

26. At a closed session of the Council's meeting of 23 April 2001, Councillor Kemper commented at some length on his report and the three recommendations as detailed in the report that he had written for Brian Eichorn & Co Pty Limited. A transcript of part of the meeting shows Councillor Kemper acknowledging that he had written both the said letters (reports) that were addressed by Brian Eichorn & Co Pty Limited to the Council on the subject matter. He did not declare a pecuniary interest.

Councillor Kemper acknowledged in the transcript of the Council meeting that he was an employee of Brian Eichorn & Co Pty Limited but stressed that he didn't have any shares in the company and was not involved in the running of the company. There is also a suggestion made by the General Manager at the meeting that maybe the interest of Brian Eichorn & Co Pty Limited was so remote that that entity likewise did not have a pecuniary interest. The point was made that Councillor Kemper did not receive a commission from his employer. The transcript reveals a lack of appreciation of how the Act operates and in particular whether the "remoteness" test in s.442(2) applies to the employer or the employee. It reveals a lack of appreciation by Councillor Kemper that merely being an employee of a person who has a pecuniary interest can result in the employee being taken to have a pecuniary interest (s.443(2)).

27. In *Director-General, Department of Local Government, Re Councillor Donald John Fern, Bega Valley Shire Council*, PIT No.4 of 1997, 13 March 1998) this Tribunal made it clear that there are two (at least) situations governed by s.442 of the Act. The first is where the Councillor is himself said to have a pecuniary interest in the matter, in which case the question is whether there is such a pecuniary interest and within s.442(2) whether the interest is so remote or insignificant. The second situation is where it is alleged, as here, that the pecuniary interest was that of Brian Eichorn & Co Pty Limited

in which case the question of remoteness is directed to that entity. If the employer has a pecuniary interest which is not so remote or insignificant, then the employee is taken, by s.443(2) to have a pecuniary interest and the question of remoteness in relation to the employee does not arise.

The transcript of the closed session of the Council meeting of 23 April 2001 records the General Manager as referring to a letter received from the Director-General in response to a request seeking clarification of a position in relation to a Councillor who is an employee of a local real estate agent. The letter requesting the advice and the advices are before the Tribunal. The latter refers to *Fern*'s case, although it appears to the Tribunal, and this may become relevant on any question which arises as to what consequences, if any, ought to flow from any breach of the Act, that the letter of advice has misunderstood the decision in *Fern*'s case and this may have contributed to the lack of appreciation as referred to above. If the question arises the Tribunal will seek further submissions from the parties on the question and its significance, if any.

28. As has been said, there appears to be no doubt that as at 23 April 2001 Councillor Kemper was an employee of Brian Eichorn & Co Pty Limited and there is no doubt that he took part in the discussion and consideration of the matter which was then before the Council. The minutes reveal that Councillor Kemper left the meeting prior to the Council resolving to acquire 31, 33 and 35 King Street, Uralla and prior to motions to that effect being moved.

Council's Meeting of 30 April 2001

29. On 27 April 2001 three councillors had given notice of their intention to submit a motion that Council rescind its resolution taken at its meeting held on 23 April 2001 to negotiate to acquire properties 33 and 31 King Street, Uralla, because of the view that commercial in-confidence information concerning the maximum purchase price which Council would offer may have been compromised.

30. At the closed session of the meeting held on 30 April 2001 there was part of the meeting which took place while standing orders had been suspended. Through inadvertence, no

part of the meeting was taped. While such orders were suspended general discussion took place. There was only one matter before the Council, as referred to above. Councillor Kemper was present. Upon resumption of the standing orders Councillor Kemper advised the Council of his intention to leave the meeting room but advised that he wished to make a statement before he did. He then did so. He then declared a perceived conflict of loyalties and advised that he wished to have it recorded that his reason for leaving the Council meeting on 23 April 2001 on the same subject was for the same reason. He then left.

While there is no record of either part of the meeting Councillor Kemper has said that he would have spoken generally of the desirability of expanding the Hostel's facilities.

31. Again, it will be noted that as at the date of this meeting Councillor Kemper was an employee of the real estate company which had advised the Council that it held exclusive agency agreements with the three property owners. Accordingly, if the rescission motion were successful, that estate agency would, it could be confidently expected, lose the commission on the sale of those two properties.

Council's Meeting of 24 September 2001

32. 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.

33. Mr Bell, the Acting General Manager, produced, for the proposed meeting of the Council on 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 *Jeogla v ANZ* and which involved Mr Nolan. The report referred to a number of issues that needed further

investigation. It recommended the appointment of an agent be deferred to October.

34. A closed session meeting of the Council was held on 24 September 2001. Councillor Kemper was present. The Council resolved to suspend the standing orders to allow for informal discussion. The Mayor, Councillor Eichorn, 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. The Council then resolved that the Acting General Manager consult with the Council's solicitors to clarify certain points in relation to recent information that he had been given concerning the property Lakeview.

35. The transcript of the proceedings and the minutes make it clear that Councillor Kemper then indicated to the meeting that he was going to declare a conflict of interest rather than a pecuniary interest and that if the meeting was going to discuss the appointment of an agent, then he would need to leave the meeting but that otherwise he wished to be present. The question of the appointment of an agent to sell Lakeview was then, by resolution, deferred until an extraordinary meeting of the Council to be convened on Friday, 28 September 2001.

36. Councillor Kemper, as revealed by the transcript of the meeting and the minutes, then advised that because of a conflict of interest he would not be attending that meeting but that he wanted to make a statement about the marketing of Lakeview. He addressed the meeting as to the most appropriate method of marketing the Lakeview property and in particular he advocated that the property be sold by way of tender, not by way of auction. There were, as previously stated, five organisations who had lodged with the Council expressions of interest in the marketing of Lakeview. Of those five entities only two of the expressions of interest were suggesting a sale by tender and one of those entities was Brian Eichorn & Co Pty Limited trading as Property New England, Councillor Kemper's employer. He spoke about the property being offered in one parcel. H e spoke about some of the proponent agents not having specified the advertising component of their

fees and the matters specified in the minutes. He then declared a conflict of interest because he was employed by Property New England and left the room.

37. The evidence of Councillor Kemper, Councillor Eichorn and others suggested that the said resolution that was passed, relating to consulting the Council's solicitors, 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 it was considered that enquiries ought to be made.

Pecuniary Interest Provisions

38. As at 23 and 30 April 2001 and 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".

39. Section 457 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."

HEARING AND FURTHER EVIDENCE

40. At the hearing a number of documents were tendered, a large number of which, tendered on behalf of Councillor Kemper, 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. Councillor Kemper also adduced evidence in support of the proposition that at no time had he knowingly breached the provisions of the Act and that he had taken steps and sought advice to ensure that no such breach took place.

41. As this Tribunal has pointed out in *Director-General Re Councillor Roberts, Hastings Council*, PIT 1/1995, 3 August 1995, pp.30-32; and *Fern*'s case (supra) at p.31, as a matter of proper construction of the Act a conclusion, as to whether or not a pecuniary interest existed, is intended to rest on an objective judgment of the facts and circumstances, that is, a judgment based on facts and indicia unaffected by personal feelings or opinions and not upon a subjective judgment which is based on personal and individual feelings, beliefs, opinions or perceptions.

42. 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 Kemper have been established. The Tribunal is not at this stage concerned with questions which 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.

43. Councillor Kemper says that he resigned from his employment with Brian Eichorn & Co Pty Ltd effective 22 February 2001 so that, if there were any doubt before, when he attended the Council meeting on 23 February he was no longer an employee and he could have no pecuniary interest. This issue and the facts are discussed below.

44. Councillor Kemper, in correspondence with the Department of Local Government, has maintained the view that he did not have a pecuniary interest, based solely on the fact that he was an employee of Brian Eichorn & Co Pty Limited "as the remoteness test might apply in that employee/employer relationship". It appears that this correspondence was written under the same mistaken assumption (see paragraphs 26 and 27 above) that the remoteness test set out in s.442(2) in a situation such as that involving Councillor Kemper related to Councillor Kemper's position rather than that of the employer. As a matter of construction of the Act it does not. 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: see *Director-General, Department of Local Government Re Councillor Donald John Fern, Bega Valley Shire Council* (PIT No.4/1997, 13 March 1998). No further question of remoteness arises.

45. 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's evidence is that suspending standing orders has no effect on obligations under the pecuniary interest provisions of the Act.

46. 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, if at all, to the second question referred to above.

47. 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.

48. Mr Fulcher also gave evidence about advice and discussions which he had had with Councillor Kemper concerning whether or not Councillor Kemper may or may not have had a pecuniary interest in relation to matters before the Council in his capacity as an employee of Brian Eichorn & Co Pty Limited.

In substance that evidence was that a day or so before the 23 February 2001 meeting the matter was discussed with Councillor Kemper. Mr Fulcher was not aware of Councillor Kemper's employment status, details of employment, or basis of remuneration. However, there was discussion about what the Act said. He advised that he could not make the decision for Councillor Kemper, who was told "if in doubt, declare".

49. Mr Fulcher, by letter of 6 March 2001 sought advice from the Department of Local Government where a councillor was an employee of a local real estate agency. The Department's letter was dated 4 April 2001. It declined to provide legal advice to the Council but went on to provide some observations in general terms, pointing out each case depended on its own facts. Mr Fulcher concluded that this general guidance did not allow him to draw specific conclusions in particular cases.

50. All this evidence may have some bearing upon what consequences, if any, ought to flow from a breach of the Act but it cannot, in the Tribunal's opinion, bear upon whether or not

Councillor Kemper did in fact breach the legislation at the meetings in question. As set out above that question is to be determined upon an objective view of the facts and circumstances.

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, including that 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. There was concern 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.

SUBMISSIONS

53. The parties made oral submissions at the hearing on 19 December 2003 and on that occasion Councillor Kemper handed up a written submission. In addition, Council at its

meeting of 9 January 2004 has 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 indicated, 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 nor does it alter the substance of the complaints before this Tribunal. As indicated above, the Tribunal also takes account of Councillor Kemper's letter of 20 February 2004.

CONSIDERATION

A. Employment

54. Prior to the letter of 22 February 2001 Councillor Kemper was for a period of time an employee of Rod Eichorn Estate Agencies Pty Limited. By letter of that date he purported to resign, effective forthwith. The evidence is that prior to his letter Councillor Kemper had not discussed his resignation with any officer of the company. The resignation letter was placed, in the evening of 22 February 2001, on a desk in the offices of the company. The Council meeting on 23 February 2001 commenced at 8.00 am. When originally interviewed by Departmental officers Councillor Kemper expressed the view that at the time of commencement of the meeting he understood that his employer would not have been aware of his resignation. As Councillor Kemper subsequently explained, in part this was based upon the fact that there was no prior consultation with the principal of the business at any time as to his intended resignation. To some extent, it was a sudden decision by Councillor Kemper to divorce himself from the business an to make it clear to all that he had done so. The Tribunal concludes from the evidence that while Councillor Kemper, rightly or wrongly, concluded that he may not have a pecuniary interest in the forthcoming matters before the Council he wished to ensure, so far as possible, that no-one could suggest that he did.

55. On the morning of 23 February 2001 and before the meeting commenced, Councillor Kemper advised Mr Fulcher, the General Manager of the Council, that he had resigned from Brian Eichorn Real Estate. He gave him a copy of his letter of resignation. It was based upon what he had been told by Councillor Kemper and the copy of the letter of

resignation that Mr Fulcher advised the meeting of the Council on 23 February 2001 that based on the information he had he could categorically say that Councillor Kemper had no pecuniary interest. So far as Mr Fulcher was concerned, based on what he had been told and the document, Councillor Kemper had removed any area of doubt concerning his pecuniary interest.

56. Mr Rod Eichorn, according to a transcript of interview with him, says that he became aware of the letter of resignation at about 8.00 or 8.10 am on 23 February 2001. Later that day, Mr Eichorn wrote a letter, bearing date 23 February 2001, to Councillor Kemper expressing his great disappointment at the receipt of the letter of resignation and requesting that he seriously reconsider the resignation and arrange a suitable time to meet with Mr Eichorn to discuss a new employment package. As a matter of construction of this letter, it is by no means clear that it was a letter from the employer accepting the resignation as opposed to a letter from the employer seeking to persuade the employee, Councillor Kemper, to change his mind about resigning. When Mr Rod Eichorn was asked in the said interview whether, when he wrote his letter, he was accepting the resignation or whether he was attempting to get Councillor Kemper to change his mind about resigning, his response was "reconsider, yes".

57. After the oral submissions on behalf of the Department of Local Government, in this matter, had been given and it had become evident that on one view of the matter the time of acceptance of the letter of resignation might be important, Property New England, over the signature of Mr Rod Eichorn, Director, wrote a letter to the Tribunal dated 14 January 2004, saying that he had received the letter of resignation at approximately 8.00 am and "as the principal of the company, I accepted the resignation at that time, notwithstanding the amount of notice given". The inconsistencies are evident but it is not necessary for them to be resolved. The letter from Property New England of 23 February 2001 was given to Councillor Kemper after the meeting of Council on that date, when Councillor Kemper returned to the company's office, to tidy up various matters.

58. The evidence is that Councillor Kemper did not receive any termination pay. There is no doubt that he did some work for the company between 23 February 2001 and when, on any view of it, he recommenced his employment on 2 April 2001 on the terms and

conditions, apparently, of a letter from Brian Eichorn & Co Pty Limited to Councillor Kemper of 20 March 2001. It is not clear from the evidence the extent of the work being performed. When initially interviewed, Councillor Kemper said that he was back in the office to tidy things up, on and off, over two to three weeks and that while he could not say how many hours he spent there, an observer would not have noticed anything different about his comings and goings at Brian Eichorn & Co Pty Limited's office before and after he resigned. Mr Rod Eichorn expressed the view that he was only there making a few phone calls and "bits and pieces like that?". The evidence is that Councillor Kemper was not remunerated for any work that he did carry out in that period.

59. Irrespective of what Councillor Kemper may have intended to achieve by his letter of resignation of 22 February 2001, this Tribunal determines that what transpired was ineffective as a resignation as at the time of the meeting that commenced at 8.00am on 23 February 2001. As at the time of that meeting, as a matter of law, Councillor Kemper was still an employee of Brian Eichorn & Co Pty Limited.

60. No employee, as a matter of law, can unilaterally resign his employment to be effective forthwith. In order to validly put an end to a contract of employment the notice required, in the absence of a contractual provision governing the length of notice, must be reasonable. What is a reasonable length of notice in any particular case will involve a consideration of a range of factors, such as length of employment, the importance of the position held, the size of the salary, the nature of the employment and indeed, most of the surrounding circumstances (see Macken McCarry and Sappideen's *The Law of Employment*, 1997, p.164ff.

61. On no view of it could Councillor Kemper's letter of 22 February 2001 be said to have given reasonable notice and accordingly, it was, in its terms, ineffective to put an end to his employment with Brian Eichorn & Co Pty Limited. That being so, there are two possibilities for the legal effect of Councillor Kemper's letter of 22 February 2001. The first possibility is that as a matter of law his letter had no effect at all, in which case, he was still employed by Brian Eichorn & Co Pty Limited at the time of the meeting of 23 February 2001. The second possibility, as a matter of law, is that the letter ought to be construed as an offer by Councillor Kemper to terminate the employment on less than

reasonable notice. If this is the way in which the letter is to be construed, about which the Tribunal has serious doubts, then that offer to terminate the contract of employment on less than reasonable notice can only be effective at the point of time when the offer is accepted and that acceptance is communicated (see *Gunnedah Shire Council v Grout* (1995) 62 IR 150 at 159). Even assuming that the letter from Brian Eichorn & Co Pty Limited dated 23 February 2001 is to be construed as an acceptance of that offer, about which this Tribunal has serious reservations, such was not communicated to Councillor Kemper until after the meeting of 23 February 2001. Accordingly, even on this basis Councillor Kemper was an employee of the company at the time of the Council meeting on 23 February 2001.

62. Counsel, on behalf of the Director-General, submitted in the alternative that the Notice of Termination given by Councillor Kemper was a sham and was accordingly ineffective to terminate Councillor Kemper's employment. Counsel submitted that there were at least six indicia of the purported transaction which would lead the Tribunal to so conclude. Councillor Kemper vehemently objected to the letter of resignation being so described and submitted, in substance, that regardless of its legal effect it could not be categorised as a sham. This Tribunal is not prepared, on the material before it, to conclude that the letter of 22 February 2001 was a sham. The allegation was not, in the Tribunal's opinion, fully explored in the evidence and cross-examination and the allegation was not put to Councillor Kemper in terms which would have made it clear to him what was to be alleged. The Tribunal notes the cogent argument by counsel on behalf of the Department but in light of the Tribunal's conclusion as to the effect of the notice, it is not necessary that this matter be further explored.

B. Suspension of Standing Orders and lack of a formal Motion

63. Councillor Kemper relies upon these matters. Before considering each meeting, something should be said about the general proposition concerning the effect of suspending standing orders and the proposition that if there is no formal motion before Council there can be no discussion or consideration of a matter within s.451 of the Act.

64. 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 for debate. The subject matter of the item of business is nevertheless open for general discussion, consideration and deliberation.

65. One of the propositions advanced by Councillor Kemper 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.

66. 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 Kemper is rejected.

67. 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

68. Councillor Kemper relies upon this Code and says he acted in accordance with it. 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 above. Its meaning and effect need to be considered.

69. 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 did not permit him to, if he had a pecuniary interest, 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.

70. 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.

71. 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".

72. 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).

73. 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.

74. 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 is 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.

75. A review of what transpired in the instant case reveals that Councillor Kemper did not purport to "address the Council, as a member of the public". 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 closest he came to addressing the Council was upon resumption of standing orders at the meeting of 30 April 2001.

Meeting of Council - 23 February 2001

76. 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.

77. 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 Kemper was an employee of the company, for reasons already stated, when this meeting took place. The company had a pecuniary interest in the matter before the Council in the sense that it had a reasonable likelihood or expectation of appreciable financial gain in the event the Council approved such financial assistance. It could not be suggested that any such interest of the company was remote or insignificant, within the meaning of s.442(2). That being so, Councillor Kemper was taken by s.443(2) to have had a pecuniary interest in that matter and for reasons already explained (see *Fern*'s case (supra)) no further question of remoteness arises.

78. The Tribunal is of the opinion that Councillor Kemper 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.

79. Contrary to the provisions of s.451, Councillor Kemper took part in the consideration and discussion of the matter then before the Council and he voted on the resolution.

80. To the extent to which it is suggested by Councillor Kemper 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, is irrelevant. There can be no doubt that "the matter", within the meaning of s.451, that was being considered was the matter referred to above. The fact that the meeting had not progressed to the stage of finally formulating a resolution does not mean, for reasons set out above and as a matter of construction of s.451, that the matter was not being considered and discussed. It clearly was. To the extent such consideration and discussion took place while the standing orders were suspended, that, for reasons set out above, makes no difference. Councillor Kemper did not attempt to comply with the Code for the reason he believed (wrongly) he had no pecuniary interest. In the Tribunal's opinion Councillor Kemper breached s.451(2) of the Act.

Council Meeting - 23 April 2001

81. At this meeting Councillor Kemper undoubtedly, on the evidence, was present at a meeting of the Council which was considering two reports from Brian Eichorn & Co Pty Limited of which Councillor Kemper was the author, recommending the purchase by the Council of the three properties at the recommended prices. This was in circumstances where Brian Eichorn & Co Pty Limited was, according to the letter of 11 April 2001 to the Council, the exclusive agent of each of the property owners in question and in circumstances where Councillor Kemper was undeniably an employee of that company.

82. In the Tribunal's opinion there can be no doubt but that the company had a pecuniary interest in the matter then before the Council and it could not be seriously suggested that that interest was remote or insignificant, within s.442(2) of the Act. If the recommendations were accepted (which they were) Brian Eichorn & Co Pty Limited stood to gain a commission from the vendors. Councillor Kemper was an employee of the company and as such was taken to have a pecuniary interest in the matter. He was

not entitled to be present at or in the sight of the meeting at a time when this matter was being considered or discussed by the Council. He was. (Indeed, he commented at some length on the recommendations in the report of which he was the author). He breached, in the opinion of the Tribunal, the provisions of the Act.

Council Meeting 30 April 2001

83. The matter before the Council was a resolution to rescind the resolution of 23 April so far as it related to two of the named properties. In the Tribunal's opinion there can be no doubt but that Brian Eichorn & Co Pty Limited, the vendors' agent, had a pecuniary interest in this rescission motion in that there was a reasonable likelihood or expectation of appreciable financial loss to that company if the rescission motion were passed and the potential commission lost or, alternatively, a gain if the motion was lost. There was a clear causal relationship between the outcome of the matter and the financial position of Brian Eichorn & Co Pty Limited, Councillor Kemper's employer.

84. In those circumstances Councillor Kemper was taken by s.443 to have a pecuniary interest in the matter and was not entitled to be present at or in the sight of the meeting when that matter was being discussed. He was. He was present when the matter was discussed while standing orders were suspended. For reasons given above, the suspension of those orders and the fact that there was then no motion before the Council is of no assistance to Councillor Kemper. He was not entitled to be present when the question and reasons for rescission were discussed. To the extent necessary the Tribunal infers that took place. Councillor Kemper did not suggest to the contrary, nor did anyone. Upon resumption of standing orders, and the continuation of the meeting, he was still present and made, as a contribution to the discussion and consideration of the matter, a statement. He continued to be present at the meeting. He was not entitled to be. He did not purport to comply with the Code of Meeting Practice (assuming its relevance to a breach of the Act). He did not declare a pecuniary interest (rather something called a perceived conflict of interest). He did not do so before making a statement. He did not seek permission to make a statement. Councillor Kemper breached s.451 of the Act.

Council Meeting - 24 September 2001

85. 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 general sense, in the selection of the agent or agents to market Lakeview and in the process leading up to such selection.

86. 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 and with associated issues.

87. 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 concerning Mr Nolan's role in the Jeogla matter, 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 recommended 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.

88. So far as Councillor Kemper is concerned, there are two aspects of the meeting that gave rise to potential breaches. The first involves the resolution to seek additional

information. The second involves his statement about marketing. Dealing with the first aspect the Tribunal is of the opinion that on the facts of this particular case Rod Eichorn Estate Agencies Pty Limited did not have a pecuniary interest in this matter before the Council which could be said not to be so remote within the meaning of s.442(2). In this respect the Tribunal takes into account the fact that the question of the selection of the agent was proposed to be deferred to a later meeting. The Tribunal also takes into account that there were five agents involved in the expressions of interest. The answer may well have been different if, hypothetically, there had been only two agents involved and it had been demonstrated that the information to be sought in relation to one of them would have been adverse, so resulting in their exclusion from the expression of interest process. The Tribunal also takes into account what the Tribunal said in *Fern*'s case (supra), that there needs to be a reasonable likelihood or expectation of appreciable financial gain or loss to the person flowing from the Council's decision on the matter. In the present case, the matter was the seeking of additional information from the Council's solicitors. As was said by the Tribunal in *Fern*'s case (supra) at p.41: "What is contemplated is a causal relationship between the possible outcomes of the question before the Council and the present or future financial welfare or prospects of the person in question". In the Tribunal's view there was no such relationship.

89. The second aspect involves the statements made by Councillor Kemper to the meeting about marketing and before he declared a pecuniary interest and left the meeting. The fact that the question of appointment of the agent (and associated marketing matters) had been deferred to another meeting (which Councillor Kemper advised he would not be attending because of a conflict of interest) is not to the point. For reasons set out above, the fact that there is no motion before the Council may not prevent a matter being discussed or considered. The fact that a vote on a motion is to take place on a date in the future does not preclude the possibility of that matter being considered and discussed at an earlier meeting, in circumstances where there can be a breach of the pecuniary interest provisions of the Act. The question is whether that took place here.

90. The reality is that Councillor Kemper was addressing the meeting on matters relevant to the selection of the agent and associated marketing considerations. The two could not realistically be divorced. He criticised the extent of fee disclosure (advertising) by some

of the agents in the context of mentioning Property New England. That clearly went directly to the question of selection of agent. He spoke about tender or auction. In light of the varying proposals, that was clearly addressing the question of which agent ought be chosen. He was speaking about the selection of a New England based agent. Notwithstanding that the question of selection of the agent had been deferred to a later meeting, Councillor Kemper correctly recognised and admitted he had a pecuniary interest in that matter because his employer was one of the proponents. Nevertheless, he sought, in the Tribunal's opinion, ineffectually to separate the question of selection of the agent and the question of marketing. His statement addressed various aspects of the matter which had been deferred to a later meeting. Councillor Kemper appreciated that.

91. In the Tribunal's opinion at the instigation of Councillor Kemper this meeting was considering (but not fully discussing and not voting on) material raised by Councillor Kemper relevant to the matter of the selection of an agent, a matter in which Councillor Kemper had a pecuniary interest. He was present, of course, when the Council considered, on this occasion, this matter and he was not entitled to be.

92. To the extent to which the Code of Meeting Practice may have been relevant, Councillor Kemper did not comply with it. He did not declare a pecuniary interest to the meeting prior to making the statement. He did not seek Council's permission to make it. He asserted he was allowed to do so. Of course, to the extent that Councillor Kemper was attempting to comply with the Code in making the statement, it carries with it an acknowledgment that he appreciated he had a pecuniary interest in the matter the subject of the statement. The Code only applied if he had.

93. In the Tribunal's opinion Councillor Kemper breached the Act in respect of this aspect of the meeting.

Section 457 *Local Government Act 1993*

94. In his written submissions, Councillor Kemper 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 Kemper 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.

95. 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 Kemper's reliance upon s.457 is rejected. He knew all the relevant facts.

CONCLUSION

96. For the reasons and to the extent set out above the Tribunal is of the opinion that Councillor Kemper has breached the provisions of the *Local Government Act* in respect of the meetings of the Council held on 23 February, 28 April, 30 April and 24 September 2001 in the manner set out above.

97. As indicated during the course of the hearing, the Tribunal intends to afford both Councillor Kemper 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 Kemper. The possible consequences are those set out in s.482(1) of the *Local Government Act 1993*.

98. The Tribunal DIRECTS both Councillor Kemper 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 will then consider that material and issue the appropriate directions.

99. 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 Peter Kemper and the Director-General.

DATED: 7 April 2004

D.P.F. Officer QC
Pecuniary Interest Tribunal