

# **LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL**

PIT NO 5 & 6/1996

DIRECTOR-GENERAL, DEPARTMENT OF  
LOCAL GOVERNMENT

REPORT OF INVESTIGATION UNDER  
SECTION 462(1) LOCAL GOVERNMENT ACT,  
1993

RE: COUNCILLORS DAVID JOHN REDMOND  
(PIT NO.5/1996) AND THOMAS WHITE (PIT  
NO.6/1996), SUTHERLAND SHIRE COUNCIL

## ***STATEMENT OF DECISION***

Dated: 4 November 1997

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### **THE COMPLAINT**

On 16 May 1996 Councillor Genevieve Rankin, a member of the Council of the Shire of Sutherland, lodged with the Director-General, Department of Local Government, a formal complaint under section 460 of the Local Government Act, 1993 against fellow Councillors David John Redmond and Thomas White. As required by section 460(2), the complaint was verified by a statutory declaration which was dated 16 May 1996. It was accompanied by a letter from Councillor Rankin which contained particulars of her complaint.

The substance of the complaint was that Councillors Redmond and White, each of whom owned and resided in residences in Woronora Heights, took part in Council debate on the question of constructing an access road from Bundanoon Road, Woronora Heights to The Crescent, Woronora. The letter stated that that matter had been debated in the local community for a

number of years and that, "People who purchased the land in Woronora Heights were all subject to a Levy of \$1,500 to be held in trust by the Council for construction of an additional access road to the Woronora Heights subdivision." The letter also said that a "Fire Trail built to Public Road standards had been constructed to provide access to Woronora Heights for emergency purposes."

The letter then went on -

**"At Council's meeting on 13th May 1996, there was a motion on notice from Councillor Redmond in relation to the upgrading of the Fire Trail and calling on Council's engineer to prepare a Development Application for the construction of the road to a standard to allow it to be open for public use. This would involve the use of the Trust Funds. There was also a report from the Works committee on the matter and Councillors White and Redmond had participated actively in the discussion at the Works committee."**

The letter then stated that, at the commencement of the debate, Councillor Rankin had requested the Mayor to ask Councillors White and Redmond whether they owned properties that had been subject to the \$1,500 levy and, if so, whether they intended to declare an interest in the matters before Council. The letter continued:

**"The responses from Councillors Redmond and White were to my best knowledge as follows:**

**CI. Redmond: "I was never subject personally to the levy. It was paid to LandCom by the developers who were subject to the levy.**

**CI. White: I didn't directly pay. \$1500 was paid by the developer when the linen plan went through.**

**However during the debate in which both Councillors Redmond and White fully participated, CI White made the following statement:**

**"We paid for the road in buying our properties..." and something to the effect that Council has "our funds and we want the road built."**

The letter concluded with a request that the Director-General refer the matter to the Pecuniary Interest Tribunal to investigate the pecuniary interest that Councillors Redmond and White had in the matter and to determine the

appropriateness of their involvement in Council's deliberations on the issue as it would shortly be on the Council agenda again.

Councillor Rankin's letter to the Director-General had commenced with a statement that she wished to lodge a complaint against the actions of the two Councillors because she believed that they were "in breach of the pecuniary interest section of the Local Government Act." It must be observed that her letter made it clear that the basis of her belief was that the works proposed by Councillor Redmond's motion would involve the use of the Trust Funds referred in Councillor Rankin's letter and that Councillors Redmond and White had a financial interest in the application of those funds.

In the terms of the letter, there are only two possible reasons put forward for suggesting that the two Councillors had a financial interest in the application of the Trust Funds. The first is in the statement, quoted above, that "people who purchased land in Woronora Heights" were all subject to a levy of \$1,500 to be held in trust. The second is in the fact that the question which she raised with the Mayor at the meeting was whether Councillors White and Redmond "owned properties that have been subject to the \$1,500 levy." According to the letter, as to these alternatives, both Councillors had told the meeting that they had never personally been subject to or paid the levy. They asserted that the levy had been paid by the developers as a condition of subdivision approval by the Council.

## **NOTICE OF THE COMPLAINT**

Before deciding under sections 462 and 463 of the Act whether to conduct an investigation, the Director-General wrote to each of the Councillors on 24 June 1996 to inform them of the complaint.

The letters stated that "in essence" the allegation was that they had a pecuniary interest in the matter before the Council which they had not disclosed "thus constituting a breach of section 451 of the Act."

After setting out the provisions of section 451, the letters went on to define what was alleged to be their pecuniary interest in terms that were more general than those which had been suggested by Councillor Rankin's letter:

**"It has been alleged that the pecuniary interest arose by virtue of your ownership of property in the Woronora Heights Estate and that by**

**dealing with the matter in a particular way, there was a reasonable expectation that there would be an appreciable financial gain to you, i.e. that the value of your property would be enhanced by the proposed road construction and access arrangements.”**

These letters mentioned the procedure involved in reporting an investigation to this Tribunal, enclosed for their information a copy of the relevant provisions of the legislation and invited the Councillors to comment on the allegations before a decision was made by the Director-General to take the matter any further.

In July 1996 each of the two Councillors took the opportunity to respond by letter to the allegations described in the Director-General's letters of 24 June 1996. Each of the Councillors began his letter with a statement that his understanding was that the basis of the complaint was related to his family home and the potential for an increase in its value from “the opening of the Woronora Heights northern access road.”

Following receipt of the Councillors' responses, the Department completed its preliminary inquiries after which the Director-General decided that the matter should be the subject of an investigation under section 462 of the Act. On 14 November 1996 he gave notice of that decision to each of the Councillors and this Tribunal.

## **REPORT OF THE INVESTIGATION**

On 12 September 1997, the Tribunal received from the Director-General pursuant to section 482(1) of the Act his Report of the investigation into the complaint. The Report contains the history of the complaint which has already been summarised above and a full account of the Department's investigation and the information obtained by its Investigating Officers. Copies and extracts of relevant records are included in the Report together with transcripts of taped interviews which the Department's Investigators conducted with Councillors White and Redmond, Sutherland Shire Council's General Manager, John Lawford Rayner, and Manager, Roads and Traffic, Desmond John Hewitt, and a resident of Woronora Heights who was a forming member in 1992 and a former secretary of the Woronora Heights Precinct Committee, Mr Andrew David Marshall.

The Investigators paid particular attention to the question of the potential effect on property values of the opening of an access road from Woronora Heights to the north, which was a principal issue before the Council in which both Councillor Redmond and Councillor White actively participated. Opinions on the value question were sought and obtained from a number of "experts" as well as knowledgeable and interested persons. These are contained in the Report.

By section 469 of the Act, the Tribunal may, after considering a Report presented to it, conduct a hearing into the complaint concerned. By section 470, if the Tribunal decides not to conduct a hearing into a complaint it must provide a written statement of its decision to the person who made the complaint and, if the complaint was not made by the Director-General, to the Director-General. The Tribunal's written statement must include its reasons for the decision.

Before coming to the question whether a hearing ought to be conducted into the complaint in the present case, it is necessary to give a brief account of what has been a lengthy history of a controversial issue, the question of opening a northern access road to the residential area of Woronora Heights, incidental to which there have been issues concerning a Fire Trail, the route and location of which would appear to be certain to form part of any northern access road to Woronora Heights that might be opened. Heading north the Fire Trail section begins at the end of a road called Bundanoon Road and ends where it connects with a road called The Crescent. The Crescent, going north ends at its intersection with Prince Edward Park Road which, continuing towards the north, ends where it connects with River Road. Bundanoon Road gives access to part of the residential area developed at Woronora Heights but there is no public access road further to the north after Bundanoon Road meets the Fire Trail.

## **BACKGROUND TO THE COMPLAINT**

1. The Council's Manager Roads and Traffic, Mr Hewitt, told the Investigators that he had a long involvement with Woronora Heights and possessed the greatest knowledge of anyone presently on the Council regarding the question of opening a northern access road. He

told the Investigators that planning scheme maps going back to the 1960s, before the residential subdivision of Woronora Heights, which became known as the Woronora Heights Estate, took place, showed a proposed road connection from the Woronora Heights plateau northerly to the Woronora Valley. However, at the time when the Woronora Heights Estate residential subdivision was approved there was no northern road link to Sutherland. The only access was from the south through Engadine.

2. The subdivision came about as a result of a decision by the Land and Environment Court in ***Wallis & Moore Pty Limited Re: Sutherland Shire Council*** (10406/81; 10135/82) (Assessor Hanson) on 15 April 1992. The Council had opposed the development of the Woronora Heights Estate unless a northern road link to the Estate was provided. The Court overruled the Council's objection by granting development consent but on conditions that:
  - (a) A northern Fire Trail for emergency access from the north be constructed to public road standards to the Council's satisfaction;
  - (b) A cash contribution be made by developers of \$1,500, subject to future consumer price index adjustment per lot, towards the construction of a northern road link by the Council in such location and subject to such design and conditions as the Council should determine after a proper investigation.
3. On 15 August 1985, Thomas White and his wife purchased the property 7 Falmar Place, Woronora Heights and on 14 October 1987, David John Redmond and his wife purchased 15 Falmar Place, Woronora Heights.
4. In August 1989 the Sutherland Shire Council reviewed its options for providing northern access to Woronora Heights in light of the fact that the State Government had announced its intention to commence construction of a proposed high level bridge over the Woronora River. The Council resolved that the link between Woronora Heights and River Road via The Crescent and Prince Edward Park Road be endorsed as the preferred northern access route from Woronora

Heights. The Council's Director, Technical Services, was requested to prepare designs and report back to the Council on costs and opportunities for funding necessary improvement works on the basis of three stages:

- (i) Drainage upgrading and road construction in The Crescent;
- (ii) Upgrading of Prince Edward Park Road between The Crescent and River Road; and
- (iii) Upgrading the Fire Trail link between Woronora Heights and The Crescent in time for consideration in the 1990 budget.

5. Mr Hewitt told the Investigators that at the time of the review by the Council that resulted in the foregoing resolution there was a growing stream of inquiries and requests from residents of Woronora Heights for the provision of a northern access road. However, according to Mr Hewitt, there were formidable obstacles to implementing the Council's preferred option.

The worst problem was the proposal to route the traffic to the intersection of Prince Edward Park Road with River Road where, in order to proceed, traffic would have to turn into River Road. Mr Hewitt explained that there was major traffic congestion on River Road with a very sharp curve and poor sight distance at the point of this intersection and potentially unstable rock embankments. He described it as a tortuous location with steep gradients on both sides. He said that the installation of traffic lights at the intersection would not be a solution but would create more problems because the traffic in River Road would not see the lights until they were on top of them. He concluded, "There's nothing you can do at River Road."

The proposed new bridge over the Woronora River was an important factor because the new traffic flow arrangements which would be possible with the opening of the bridge would relieve the traffic congestion on River Road and make the proposed northern access intersection with River Road feasible. However, Mr Hewitt told the Investigators that the proposed bridge was a massive construction which, although it had been commenced by the installation of piers,

was likely to take five years to build and could not be expected to be completed before the next century.

Mr Hewitt said that notwithstanding the request in the Council's August 1989 resolution that the Director Technical Services prepare designs and report to the Council on costs and other matters, no work was done to carry out that request because nothing could be achieved until the River Road intersection problem could be overcome. According to Mr Hewitt that particular Council and all succeeding Councils and Council departments considered that it was simply inappropriate to proceed with work for establishing the northern access road between Woronora Heights and River Road via The Crescent and Prince Edward Park Road until the traffic problems at the intersection with River Road could be resolved.

The condition requiring the Fire Trail to be constructed to public road standards, which had been laid down by the Land and Environment Court's decision, resulted in the construction of the Fire Trail that exists between the end of Bundanoon Road and the beginning of The Crescent. Mr Hewitt explained that the intention was to have something superior to the usual Fire Trail which is a dirt track. The idea of "public road standard" was developed by himself and the Council's consultants so as to produce something more substantial and resulted in the construction of a wider and stronger formation sealed with bitumen to enable all weather access. It provided a carriageway of about 8 metres wide and 700 metres long access along which was controlled by three locked gates.

6. The Crescent, which led to the Fire Trail from the north, itself presented an access problem in case of emergency in that it was a very narrow road adjoining deep open drains. Mr Hewitt told the Investigators that he considered that, from a safety point of view, the standard of The Crescent leading to the Fire Trail would be more open to criticism than the standard of the Fire Trail.
7. In January 1994 bushfires ravaged the Como and Jannali area with loss of life and the destruction of properties. Both Mr Redmond and Mr

White, who were not Councillors at that stage, involved themselves in raising public issues as to the safety of the residents of Woronora Heights and their properties in the event of bushfire emergencies. Mr Redmond was a firefighter with the New South Wales Fire Department. On 17 February 1994 Mr White and Mr Redmond made a joint submission to a New South Wales Cabinet Sub-Committee on Bush Fire Management and Control. On 13 September 1994 both of them gave evidence to the Coroner who was conducting an inquest into deaths caused by the bushfires. On 17 October 1994 Councillor Redmond gave evidence to the New South Wales Parliamentary Select Committee on the subject of bushfires for the purpose, as he told the Select Committee, of attempting to secure funds held in trust by Sutherland Shire Council for the purpose of constructing or upgrading a northern access road out of Woronora Heights and for the purpose of ensuring that additional works were carried out on the Fire Trail to limit the number of gates that were placed on the road and to change their locking arrangement. Mr Redmond strongly criticised the adequacy of the access to the Woronora Heights Estate for emergency vehicles and the evacuation of residents. In particular, he criticised the width and number of gates and the fact that the locks on the gates were of a kind that were easily vandalised and made inoperable and were inaccessible to bolt cutters.

8. Local Government elections were due to be held in September 1995. Both Mr Redmond and Mr White became candidates for election representing D Ward which included the Woronora Heights plateau. During the year leading up to the election, Councillor Redmond and Councillor White were active in promoting support from the local residents for opening a northern access road to Woronora Heights.
9. Mr White was a member of the local Progress Association. He also joined the Engadine Action Traffic Committee. Councillor White told the Investigators that he had a strong interest in both the subject of bushfire risks for the residents of Woronora Heights and in the subject of road traffic conditions in the area generally, including Engadine and

Loftus. He told the Investigators that people in the Woronora Heights area believed that in the case of a major bushfire their lives would be in danger in the absence of a northern access road and there could also be loss of property if firefighting and other emergency vehicles could not obtain ready access to Woronora Heights. He contended that access to the south through the Engadine and Loftus area was at risk of being cut off by bushfires and this would increase the risk of injury and property losses on Woronora Heights because of a lack access to the north. He also considered that the existing Fire Trail access was not adequate.

So far as traffic conditions were concerned, Councillor White contended that lack of access to the north which forced traffic to and from Woronora Heights to travel through the Engadine road system south of Woronora Heights had a detrimental impact on residents and motorists in the Engadine area which led him to join the Engadine Action Traffic Committee and make representations on its behalf to the Minister for Local Government requesting ministerial intervention to procure a northern access road for Woronora Heights. His letter to the Minister dated 29 January 1995 stated that in late December 1994 a poll of residents in the Engadine area resulted in 98 percent of those who responded declaring themselves to be in favour of the northern access road being opened.

10. In 1992 the Sutherland Shire Council espoused the setting up of a number of citizens' committees for particular areas called Precinct Committees. There was a Woronora Heights Precinct Committee which in 1995, because of controversy and conflict within the local community on the question of opening a northern access road, decided to conduct a Plebiscite in order to expose the conflicting views and seek to establish whether there was a majority view one way or the other. The Plebiscite was organised by the Woronora Heights Precinct Committee but conducted by Council officers who had been made available to enable the poll to be conducted in a proper fashion

but without the Council being committed in any way by the outcome of the poll.

11. The Investigators interviewed Mr Andrew Marshall who was the Secretary of the Woronora Heights Precinct Committee at the time. He gave them a full account of the Plebiscite. The Precinct Committee had put together a publication headed "Northern Access Road, Plebiscite", and had distributed it to 1,500 residents. This publication referred to the history of the matter before the Council and provided other relevant information together with a list of the arguments for and against the opening of a northern access road that had been received by the Committee prior to the Plebiscite. The published arguments in favour of opening the road mentioned considerations of safety, improved access to facilities, reduction in travelling time and related matters and also included a claim that reduced travelling time could produce cost savings of \$386 per year per car and an assertion that property values could increase for most residents as potential buyers might see the estate as part of the Sutherland Shire if northern access was provided, whereas, without it, potential buyers may shy away from the estate due to its isolation.

In the arguments against the opening of the road, benefits of the isolation were emphasised and it was asserted that increased traffic if the road was opened could disrupt the peace and quiet of the estate and make it less attractive to people looking for a quieter and safer lifestyle, which it was said, could decrease property values. On the matter of the levy payable under the Land and Environment Court decision it was stated, "It's incorrect to say that residents paid \$1,500 each for a northern access road. The contribution (for roadworks providing access to the estate) was to be paid by the developers (including LandCom). The developers then set land prices at the market value (not market value plus \$1,500). The levy was simply one among many that contributed to the developers' costs and not directly to our purchase prices."

The Plebiscite was conducted on 27 May 1995. Nine hundred and thirty six residents voted, 63 percent in favour and 37 percent against the opening of the proposed road.

On 4 June 1995 Mr Marshall addressed a letter to all of the Councillors of Sutherland Shire Council reporting the results of the Plebiscite and stating that the matter of northern access had been one of conjecture and debate dividing the community so that the Council had been able to take the "soft" option of deferring any decision in the hope that the matter would resolve itself. The letter stated, "We now believe that it has been resolved and the time is ripe to begin to formulate a solution to the northern access problem ... .."

On 26 June 1995 the Council's Director, Corporate Services, reported to the Council the results of the Woronora Heights Precinct Committee Plebiscite and also the results of the poll of residents within the central and northern areas of Engadine conducted by the Engadine Action Traffic Committee, which was that 97.9 percent of the 1,867 residents who voted were in favour of the northern access road being opened so as to alleviate traffic congestion in Engadine.

12. Mr Marshall told the investigators that at the time of the Plebiscite Mr Redmond was not a member of the Precinct Committee and had no involvement in the preparation or publication of the Plebiscite document circulated by the Committee to the residents. At that time, Mr Redmond was President of the Woronora Heights Progress Association which was separate and independent of the Woronora Heights Precinct Committee. A separate document, called "Plebiscite Information Kit" and addressed "To the Families of Woronora Heights" was published and circulated to residents just before the date of the Plebiscite. The kit contained a covering letter above the name David Redmond. When interviewed by the Investigators, Councillor Redmond told them that the document had been put together by the Woronora Heights Progress Association and that he had had some input into the entire document.

The main theme of this letter was expressed in the sentence, "The primary and most profound consideration is whether we, as a community, choose to become part of the Woronora environs or remain a satellite suburb of Engadine." The letter asserted that when town planners first designed the estate it was with the intention that residents were to be an integral part of the Woronora community, access to an enormous river system with its many parks and picnicking areas was envisaged, their children were to be walking to school if they chose, shops, a club and a restaurant only a few hundred metres from their homes were seen to be within easy reach, yet today all these facilities are over a 30 kilometre round trip away. The letter went on, "Few people living in Sydney have the privilege of these sort of amenities. Those that do, pay large home prices for them."

Accompanying the letter was a document head "The Issues". It dealt with a number of relevant matters and considerations under various headings which included the heading, "Real Estate Agents" followed by the words, "Have said that home prices in the estate would "rise markedly" if the road was opened, and that home sales were "sluggish" because of the current situation."

13. The Council elections were held on 9 September 1995. Mr Redmond stood as a Liberal and Mr White as an Independent. At the declaration of the poll on 13 September 1995 both were declared elected for D Ward. Mr McDonnell standing as a Labor candidate was also declared elected for D Ward. When interviewed by the Investigators Councillors White and Redmond both said that the key element of their policy platform on which they went to the electorate was the issue of opening a northern road access to Woronora Heights.
14. At the first meeting of the new Council, the Mayor, Councillor Rodden, presented a Mayoral Minute stating that there was a clear indication from the western area of the Shire that the Council had an obligation to provide further access to and from Woronora Heights and the Greater Engadine area. A motion by the Mayor that the General Manager be requested to organise a Councillors' briefing report with a view to the

construction of a northern access road to honour Council's responsibilities to the residents of those areas was passed by the meeting. Subsequently Mr Hewitt as the Council's Manager, Roads and Traffic, put together a comprehensive briefing for Councillors on the subject of the Woronora Heights northern access road. It was dated 25 March 1996.

15. Mr Hewitt's briefing report was tabled at a meeting of the Council's Works Committee on 9 April 1996 which was attended by Councillors Redmond and White.

At the Council meeting of 15 April 1996 it was moved by Councillor Redmond and seconded by Councillor White that the Director-Engineering proceed to prepare a development application for the public road connection from Bundanoon Road, Woronora Heights to The Crescent and subsequently to Prince Edward Park Road, Woronora and that the existing centre fire gate on the Fire Trail connecting Bundanoon Road and The Crescent be removed and that the two remaining gates be altered so as to provide capacity for two vehicles side by side to pass through the gates with a lock system comprising padlock and chain. An amendment to this motion moved by Councillor Rankin was adopted as the Council's resolution, namely that the subject be deferred until the next Works Committee meeting which was to be addressed by all interest groups.

At a meeting of the Council's Works Committee on 6 May 1996, attended by Councillors Redmond and White, a report by the Council's Director-Engineering to provide an up-date to the Council on the current position regarding the provision of a northern access road from Woronora Heights was put before the meeting. It contained a statement that "The current position of Council is, that it would be inappropriate to construct the northern access road, at this time, having regard to the existing traffic conditions at the intersection of Prince Edward Park Road and River Road, Woronora."

## **Council Meeting 13 May 1996**

At a meeting of the Council on 13 May 1996 a Motion on Notice was moved by Councillor Redmond in the following terms:

- “1. That the Director-Engineering proceed to prepare a development application for the public road connection from Bundanoon Road, Woronora Heights to The Crescent and subsequently to Prince Edward Park Road, Woronora.**
- 2. That the existing centre fire gate on the Fire Trail connecting Bundanoon Road, Woronora Heights, to The Crescent, Woronora, be removed and that the remaining two gates be altered so as to provide capacity for two vehicles side by side, to pass through the gates with a lock configuration comprising padlock and chain.**
- 3. That an EIS be carried out by an outside firm.**
- 4. That all of the above be carried out as a matter of urgency.”**

If passed, the effect of this Motion would have been to require preparatory steps to be taken by the Council for construction of the northern access road following the route which had been identified as the Council's preferred option in 1989.

It appears that the references in the Motion to a development application and an EIS resulted from advice given to Councillors Redmond and White by Mr Hewitt that, as the section of the proposed road from Bundanoon Road to The Crescent (the Fire Trail) was zoned 5(e), “proposed local road”, under the Council's zoning plan, any development should have both development approval and an independent environmental impact statement.

The corrected Minutes of this Council meeting record that prior to any discussion of the above motion commencing, Councillor Rankin raised an issue as to the Councillors' pecuniary interest, sought the information from Councillors Redmond and White regarding payment of the \$1,500 levy, and obtained the responses to which she referred in her letter of complaint to the Director-General of 16 May 1996, which has already been quoted above.

A number of amendments to Councillor Redmond's Motion were moved, one of which was passed, became the Motion and was carried, namely:

- “1. That the Director-Engineering proceed to prepare a feasibility study and cost analysis of two proposed roads.
  - (i) The public road connection from Bundanoon Road, Woronora Heights to The Crescent and subsequently to Prince Edward Park Road, Woronora; and
  - (ii) Public road connection from Bundanoon Road to Grande Parade.
2. The two entry gates to the Fire Trail be altered so as to provide capacity for two emergency vehicles side by side to pass through the gates with lock configuration comprising padlock and chain and that the centre gate be appropriately widened and remain.
3. That an EIS be carried out by an outside firm.
4. That all of the above be carried out as a matter of urgency.”

The effect of Council's resolution in the above terms was to delay the progress of work on the proposed access road by requiring that further studies be pursued.

Subsequent to the above resolution being passed, a Rescission Motion was lodged by Councillors Deering, Redmond and White.

Councillor White told the Investigators that he considered that the amendment seeking feasibility studies would, “send this issue back on the merry-go-round” and “the people of Woronora Heights are left with this inadequate Fire Trail.” Councillor Redmond told the Investigators that he considered that the effect of the Council's resolution was to leave the community of Woronora Heights and a sizeable portion of North Engadine in danger during a bushfire period and to delay what he had intended to achieve by his original Motion.

As mentioned above, on 16 May 1996, which was before the next Council meeting, Councillor Rankin lodged her complaint.

### **Extraordinary Meeting Of Council 11 June 1996**

At an Extraordinary Meeting of the Council held on 11 June 1996 the Rescission Motion of which notice had been given by Councillors Deering, Redmond and White following the Council meeting of 13 May 1996 was carried. Councillors Redmond and White then moved a Motion in terms

identical to their Motion which had been defeated at the meeting of 13 May 1996 (quoted above) but with an additional clause as follows:

**“5. That any public road connection for general public use only occur in conjunction with the completion of the medium level Woronora bridge.”**

Councillors Rankin and McDonnell then moved an amendment which was lost, with Councillors Redmond and White participating in the debate and voting. Their Motion was then put and carried on a Division in which they voted in its favour.

The effect of their successful Motion at this meeting was to advance the matter from a mere feasibility study directly to a development application and environmental impact statement, to reject consideration of an alternative route to Grand Parade and to introduce the condition that northern access road to Woronora Heights not be made available to the public until the Woronora Bridge had been completed. The proposed amendment which was defeated at this meeting would have delayed progress in commencing preparatory steps by linking the preparation of the development application with the timetable of the bridge construction.

After the Motion by Councillors Redmond and White had been passed Councillor Rankin lodged notice of a Rescission Motion.

### **Extraordinary Council Meeting 1 July 1996**

Councillor Rankin's Rescission Motion was supported by two other Councillors. It came before an Extraordinary Council Meeting on 1 July 1996 and was lost, with Councillors Redmond and White voting against it.

### **Council Meeting 17 February 1997**

The issue of the northern access road did not come up again at Council or Council Committee meetings until 17 February 1997. At this meeting, Councillor Redmond, seconded by Councillor White, moved the following Motion:

**“1. That the Native Title interests are considered to have been extinguished in respect of the area of land comprising the Northern Access Road and as such,**

- (a) The development application for the opening of the Northern Access Road can be submitted;
- (b) The works identified by the development application can proceed provided development approval is issued.
- 2. That The Crescent, Woronora, be upgraded in association with Council's 1997/98 roads construction program, using the contributions for roadworks held by Council from the subdivision of Woronora Heights, on the basis that should Council resolve in the future that The Crescent does not form part of "the Northern Access Road" these funds be replaced by general revenue funds.
- 3. That a review of environmental factors be carried out as prescribed under Part 5 of the Environmental Planning and Assessment Act.
- 4. That the above be carried out as a matter of urgency."

Councillors Rankin and McDonnell were unsuccessful in moving an amendment to this Motion which would have deleted parts 2, 3 and 4. The Motion of Councillors Redmond and White was carried and became the resolution of the Council which ensured that there was some progress made on the desired northern access road by having the upgrading of The Crescent included in the Council's 1997/98 works program.

The section of the Motion dealing with Native Title was included because the land comprised in the proposed road was Crown Land to which Native Title implications could attach.

Mr Hewitt explained to the Investigators the reasons behind the Motion for upgrading The Crescent in association with the Council's 1997/98 roads construction program. Mr Hewitt told the Investigators that there had been inquiries from Councillors concerning the progress of the development application and the environmental impact statement under the previous resolution and that Council staff had expressed concerns about the condition of The Crescent and indicated that they wished to focus on that part of the road. It was their opinion that the levy money which had been contributed for the northern access road connection could be used for this purpose. The result of this last resolution was that priority had now been given to the upgrading of The Crescent which would now go into the 1997/98 works

program ahead of work on the development application and the environmental impact statement required by the earlier resolution. The work on The Crescent did not require a development application.

Councillor Redmond told the Investigators that his Motion at this meeting had been prompted by the need to upgrade the access to Woronora Road for emergency access, in particular, fire safety, and he could not see why one section of the upgrade, namely, The Crescent, could not be given immediate attention under the Council's normal road construction program. Councillor Redmond also told the Investigators that he personally did not see any need to include a provision about reimbursing the trust fund from general revenue but other Councillors had wanted that provision included and he agreed to it in order to satisfy their concerns.

Councillor White told the Investigators that he had proposed the proviso about the transfer of funds to make sure that the work on The Crescent got done, whilst satisfying the concerns of some Councillors who favoured a northern access option which went around behind The Crescent. Councillor White also told the Investigators that, with the removal of the centre gate, the widening of the other two gates and changing the gate lock configuration on the Fire Trail the upgrading of The Crescent where currently it was not possible for two vehicles to pass, was the only outstanding matter which needed attention to make the Fire Trail suitable for emergency access. He said that the upgrades of both The Crescent and the Fire Trail were necessary regardless of whether the northern access road which finally goes ahead links up with the proposed bridge or takes an alternative route to Grande Parade.

## **REQUIREMENTS OF THE ACT**

The legislation relevant to the present complaint is contained in Chapter 14, Part 2 - Duties of Disclosure, of the Local Government Act, 1993. Section 451 deals with the obligations of Councillors with regard to meetings. It provides as follows:

**“451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which**

**the matter is being considered must disclose the interest to the meeting as soon as practicable.**

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

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

It is clear from the material in the Director-General's Report, and it is not disputed by Councillor Redmond or Councillor White, that neither of them made any disclosure at the meetings in question of the existence of a pecuniary interest in the opening of the northern access road to Woronora Heights. They deny that they had any such interest. It is also clear that they actively and directly participated in the consideration or discussion of the matter and voted on questions relating to it.

By reason of the fact that they owned homes and resided in the area they were liable to be affected by one or more of the numerous advantages and disadvantages put forward by the various protagonists on the issue of establishing northern road access to the estate. They obviously had a personal interest in the safety issues involved in the provision of emergency access whether as part of a public northern access road or as a separate issue. It is possible in such circumstances for conflict to arise between private interest and public duty in performing the functions of a Councillor where a matter is being considered at a Council meeting, but section 451 operates only where the interest of a Councillor in a matter is pecuniary. In the present case the validity of the complaint against Councillors Redmond and White turns entirely on the question whether they had an interest in the matter which was pecuniary within the meaning of the Act.

A “pecuniary interest” is described by section 442 of the Act as follows:

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

**(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448.”**

Section 443 (referred to in section 442(1)) is not relevant here but, in view of some comments by Councillors Redmond and White to the Investigators, reference should be made to that part of section 448 which states:

**“The following interests do not have to be disclosed for the purpose of this Chapter: An interest in any matter relating to the terms on which the provision of a service or the supply of goods or commodities is offered to the public or a section of the public that includes persons who are not subject to this part.”**

The Tribunal has had occasion in previous cases (which need not be detailed here) to consider the meaning of “pecuniary interest” as described in section 442 and has concluded that, whilst it is clear from its terms that the section is concerned only with interests of a financial character, that is, to do with money, such an interest may arise in many different ways. These would certainly include a potential increase or decrease in the value or marketability of land or other property. This is a matter to be considered in the present case.

The Tribunal has also held that the expression “reasonable likelihood or expectation” is not confined to probabilities but extends also to possibilities, so that a possibility of an appreciable financial gain or loss as a consequence of a decision by the Council on a matter may constitute a pecuniary interest in that matter if the possibility is not 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.

It is evident from the material in the Director-General's Report that the Investigators paid particular attention to these issues in the course of their investigation.

In the view of the Tribunal, the decision whether or not to conduct a hearing into the present complaint depends on the question whether the material contained in the Report or external evidence that might be able to be presented to the Tribunal at a hearing is or may reasonably be capable of proving that the Councillor in question had an interest in the matter which answers the description “pecuniary interest” in the sense explained above. It is necessary therefore to go now to that question.

## **DID A PECUNIARY INTEREST ARISE BECAUSE OF THE LEVY OR THE TRUST FUND?**

As pointed out earlier, Councillor Rankin's complaint linked her suggestion that there was a pecuniary interest to the levy and the trust fund.

The Investigators ascertained that the levy had been paid by the developers, not the purchasers of land. The Plebiscite argument against the opening of a northern access road which referred to the levy was clearly correct. It cannot be said that the developers recovered the levy from the purchasers in their purchase price because the purchase price would have been governed by market forces not the developer's costs.

Coincidentally it might have happened that the developers recovered the cost of the levy from the sale of lots but it would not be possible to prove that a component in the price paid by any individual purchaser for a lot represented the levy paid by the developer to the Council in respect of that lot and, even if it could be proved, it could not be said that this made the purchaser, not the developer, the contributor to the fund or gave the purchaser or any successor in title any proprietary or other legal interest in the fund or its application.

A decision by the Council to use the trust fund to pay for a northern access road would not represent a financial gain to the owners of land in Woronora Heights just because the moneys to pay for it would come from the trust fund unless it was the case that otherwise the owners would be required to pay for the road themselves, in other words, unless the decision had the effect of relieving them from a cost that they would otherwise have to bear. That was never the case here.

There does not appear to the Tribunal to be any way in which, by a decision of the Council, the moneys in the trust fund are likely to be returned or applied by way of financial gain to the landowners. Consequently, neither the payment of the levy nor the existence of the trust fund would seem to the Tribunal to be capable of providing a basis for a finding that Councillors Redmond and White had a pecuniary interest in the question whether a northern access road to Woronora Heights should be provided or the Fire Trail or The Crescent should be upgraded. The existence of the trust fund

provides a landowner with no more than moral argument that the Council ought to proceed with the work for which the fund was provided as soon as possible.

## **POTENTIAL INCREASE OR DECREASE OF PROPERTY VALUES AND MARKETABILITY IF NORTHERN ACCESS ROAD OPENED**

Proof that a northern access road would be likely to affect property values in Woronora Heights generally or, more relevantly, the values of Councillor Redmond's or Councillor White's property in Falmar Place, would have to depend on the objective facts together with the reasoned opinion of experts in property valuation or others whose knowledge and experience qualified them to offer an opinion on the matter.

In the end, it would be a matter of judgment by the Tribunal based on the evidence and material on the subject that was before the Tribunal at the time of its decision. The Tribunal would be required to apply the standard of proof laid down by section 483 of the Act, that is to say, "A finding of the Pecuniary Interest Tribunal is to be made on the balance of probabilities."

The Director-General's Report, pages 19 - 22, contains a summary of the views which were expressed to the Investigators by a variety of involved persons and valuation experts. The Tribunal has carefully examined and considered for itself all of the material in the Report on which this summary has been based. The Tribunal finds the summary to be accurate and adequate for present purposes and incorporates it as part of this Statement of Decision. The summary is as follows:

### **"Potential impact of the road on property values and marketability**

**Information was sought during both the formal interviews with Councillors White and Redmond, Mr Rayner, Mr Hewitt and Mr Marshall, as well as in the informal interviews, in relation to the reasonable likelihood or expectation of impacts on the value and marketability of the Councillors' properties as a consequence of the northern access road being put in place.**

Neither Councillor White nor Councillor Redmond acknowledged any potential impact of the northern access road on the value of their properties.

Councillor White said he did not think that there was any reasonable expectation of an appreciable financial gain from a northern access going through and that the only benefits would be a shorter travelling distance, perhaps a better business service, less traffic in Engadine, and greater safety in the event of a bushfire.

He said that there were four real estate agents living on the estate and he had never asked them whether the proposed road might have an impact on real estate prices, and he did not see that there would be any variation in property values whether the access was full public access or emergency access only.

He reiterated that the value is not an issue at all with him and he had never seen it as an issue. He commented that some people may use it for their own political arguments but he had never used it. He considered some of the arguments about property values to be emotive.

When asked if there had ever been any matter before Council which he considered may have a potential for increasing or decreasing the value of his property, Councillor White replied "No".

Councillor Redmond was asked in the context of various questions what he considered the implications of the access road, whether for full public access or for emergency access, would have for property values in the estate and on his property in particular, he responded that he was not prepared to answer the question. Nor was he prepared to answer questions on the real estate comments contained in the "Plebiscite Information Kit."

When asked if there had ever been any matter before Council which he considered may have a potential for increasing or decreasing the value of his property, Councillor Redmond replied, "I don't think so."

When asked if he had a view on what the implications would be for property values in the estate if the road was opened up, Mr Rayner responded that he thought it "could go both ways". He indicated he

thought it might be difficult to assess because property values were generally going up regardless of whether particular facilities or an access road were provided. He thought that in some cases they may go up, in other cases, if there was through traffic, they may come down.

Mr Hewitt's view was that this would be difficult to assess because the values are set by "a whole bunch of indeterminate things". He considered that there was a value in the plateau now because it is a cul-de-sac, and if Bundanoon Road becomes a through road, those values could drop because the volume of traffic would go up. However, he also noted that traffic volumes may not necessarily increase because the total number of trips could decrease. For properties off the main road it was his view that there would probably be almost no effect "because their values are really determined by the fact that they can see the city skyline and they've got river views". The fact that there was a road opened up probably means next to nothing for them. He identified a range of other factors which he considered determined property values, such as the lifestyle, the home style, the quietness, the facilities. He said there are a lot of things which make Woronora Plateau attractive including underground services and no overhead cabling.

Mr Rayner agreed that the involvement of Councillors White and Redmond had accelerated progress on the road but on the question of financial benefits through increases in property values, he said he did not know how you would measure any marginal increase in property values because of the opening of the road and whether any property value increases could be attributed to the road opening or to a new shop or community facility in the area.

On the issue of property values in the estate, Mr Marshall commented that you could probably talk to half a dozen real estate agents and they would all give you a totally different answer depending on their viewpoint and how it fits. He added that he did not think this aspect had been really pushed hard by anyone.

In summing up, Mr Marshall said that he could not see how Councillor Redmond and Councillor White could see the opening of the road as

“some means to improve or affect their property values in some way”. He said he thought that they had “just got a bee in their bonnet about this particular issue”. He commented that there is a very high property turnover in the estate. He said that, earlier, people had moved in thinking the road was going to be opened and when it did not happen they moved out. More recently the property market has been very buoyant. He noted that there were several real estate agents living in the estate and that they would probably each have different views about property values.

Mr Vincin (Valuer-General’s Office - Bankstown) advised that it would be very difficult to prove any enhancement in the value of properties in Falmar Place as a consequence of the road being opened up. He indicated that it was always easier to demonstrate detriment and it was his view that the values of properties along Bundanoon Road might decrease. He added that there could be a difference of 10-20% between the value of a property on a major road compared with one on an “inside” road. Mr Vincin pointed out that the only satisfactory way to prove any impact on value would be a comparison of sales prior to and after the access road is completed.

Mr Northey (Real Estate Agent, Engadine, and resident of the estate) did not see any particular advantage, in terms of property values, in having the road go through and did not see it as a selling point. His assessment was that most people purchasing in the estate were from the Engadine area and they saw moving to Woronora Heights as a way of upgrading to a bigger and better house while retaining access to the facility they had got accustomed to. He nevertheless expressed the view that, with increased traffic along Bundanoon Road, access to this road from “inside” streets would be a problem which could have the effect of decreasing property values. He said that for a period of 3-4 years until about December 1996 prices had been stable but since that time there had been a general trend upwards and properties do not stay on the market long. It was his view that the factor most responsible for the recent surge was probably the series of interest rate reductions.

Mr Crews (Real Estate Agent, Engadine, and resident of the estate) said there may be some positive effect on property values as a result of the

convenience of easier access. At the same time, he agreed with Mr Northey that the presence or absence of a through road is not a determining factor in people's purchasing of property in Woronora Heights. They see benefits in it being a "nice" area, with good houses and good value for money. He commented that some people would not be interested in buying, because of the isolation. He noted that some people who had bought into the estate, expecting the road to go through in the short term, had given up expecting it ever to go ahead and had sold out.

Mr Michael Barakat (Real Estate Agent, Engadine, and also a Registered Valuer) said that most people knew when they purchased in the estate that the road was planned and he did not consider that it had had a negative impact on the value of properties along Bundanoon Road. Although the road would provide a benefit in easier access to Sutherland, this may have only minor impacts on property values, both positive and negative. However, it was his view that generally, in the long term, properties would benefit from better access. He noted that properties in Engadine had been expected to decrease as a result of the opening of Anzac Avenue and this had not occurred. He commented that buyers look for different things in a property and what is seen as an advantage to one buyer might be a disadvantage to another."

There are some further comments which the Tribunal would add to those contained in the above extracts from the report.

When interviewed, Councillor White expressed himself with some force on the question whether his actions were motivated by any ideas of a potential increase in the value of his property if the road was opened. He told the investigators that he had never had the slightest interest in the value question. He said that, for him, the issue was only one of the safety and convenience of residents and that the prospect of any increase in property values had been of no concern. He said that, in his view, because there were so many unknowns, "You would need a crystal ball to find out what the effects are going to be." When he was referred to the argument relating to value contained in the For and Against documents published by the Precinct Committee for the Plebiscite, Councillor White told the Investigators that he

had played no part in their preparation and that, in his opinion, those particular arguments had no foundation or force except as purely political points leading up to the Plebiscite.

Councillor Redmond told the Investigators that he had never considered that he had a pecuniary interest in the matter and, as to his actions at the Council meetings in question, "I had absolutely no intention of declaring any form of pecuniary interest because I don't have one." However, as the Report points out in the summary quoted above, Councillor Redmond declined to answer a number of questions directed to ascertaining his views and knowledge on the implications for property values of opening a northern access road to Woronora Heights.

Because the form of Councillor Redmond's responses to the Investigators' questions suggested that Councillor Redmond's objections were to answering such questions in a departmental investigation or to the particular Investigators as distinct from in proceedings conducted by this Tribunal, the Tribunal decided to give Councillor Redmond the opportunity to provide the Tribunal with answers to some of the questions that had been asked by the Investigators before deciding whether or not to conduct a hearing into the complaint. That was done by letter from the Tribunal dated 2 October 1997 to which Councillor Redmond replied by letter dated 15 October 1997 which the Tribunal received on 20 October 1997.

Councillor Redmond's reply to the Tribunal asserted that some of the questions he had been asked were irrelevant because none of the Motions moved by him or in which he participated in Council allowed public road access; he said that they were directed to the provision of emergency access in the interests of safety. The validity of that assertion does not need to be determined here but it must be said that, whilst material in the Report lends support to Councillor Redmond's profession of concern for the safety of residents and the provision of adequate emergency access, there is also material which suggests strongly that he and Councillor White were at the same time concerned by means of their Motions and actions at the Council meetings to advance within the Council so far as possible in the existing circumstances the prospects of and the taking of preparatory steps for the

opening of a northern public access road to Woronora Heights as soon as possible in the future.

Turning to Councillor Redmond's replies to questions that related to that matter, his attention was drawn by the Investigators to the statement contained in the Plebiscite Information Kit, to the circulation of which Councillor Redmond was a leading party, against the heading, "Real Estate Agents" to the effect that real estate agents had said that home prices would "rise markedly" if the road was opened and that home sales were "sluggish" because of the current access situation. Councillor Redmond told the Tribunal in his letter that, upon the hypothesis that the road was opened, he had and still has no firm opinion as to any effect on home values, he did not believe that any information to support the statement in the Kit document had been established, he believed that the comments on the subject were an expression of opinion by a person whose identity he said that he could not recall and whose qualifications were not known to him, and that he was aware that the opinion of some people in the region was divided on the issue of property prices with many like himself having no firm opinion. He also said that he had not consulted any real estate agents and, although he could not speak of all the other persons involved in the preparation of the Kit, he could recall that no Progress Association Funds were expended on obtaining expert opinion on the matter.

On the basis of these responses, the Tribunal could only conclude that Councillor Redmond did not know of any foundation for the statements in question and that he did not believe that there was any foundation for them.

As to the statements on value contained in the Woronora Heights Precinct Committee's publication, Councillor Redmond stated in his letter to the Tribunal that he had had no involvement of any sort in the compiling or producing of that particular document and had formed no opinion about the assertions therein "because there are too many speculative variables to be considered."

One of the questions by the Investigators which Councillor Redmond had declined to answer was, "In what way would the opening of the road benefit you personally?" In his responses by the letter to the Tribunal, he

said, "I do feel however, that my credibility as a representative of my constituents would be enhanced if I were to be seen to be instrumental in any future successful move to actually open the road."

The Precinct Committee's Secretary, Mr Marshall, affirmed to the Investigators the claims of Councillors White and Redmond that they were not involved in the Precinct Committee's Plebiscite information document. He also told them that both of Councillors Redmond and White had deliberately distanced themselves from the Committee's activities regarding the conduct of the Plebiscite. He expressed the view that neither of the two Councillors regarded the road issue as a means to improve property values and, in fact, nobody involved ever really pushed the housing values issue. If that be so, and Mr Marshall was in a position to know, the assertions in the Plebiscite literature that property values would or could be affected by the opening of the road would appear to have been based on pure speculation having no probative value and useless except as political propaganda.

### **The Tribunal's Conclusion on the Property Values Issue**

For the foregoing reasons, the Tribunal concludes that there is no reasonable prospect that it could be established at a hearing on a balance of probabilities that there was a reasonable likelihood or expectation that Councillor Redmond's or Councillor White's property values would or might increase or be otherwise affected by a decision by the Council on the question whether or not to open a northern access road for general public access to Woronora Heights. The question whether the opening of a northern access road would have any effect on property values in the Woronora Heights area would have to be left by the Tribunal in the realm of speculation.

There is no material in the Report which would support the view that the upgrading of the Fire Trail with general access blocked by two padlocked gates or the upgrading of The Crescent would be likely to have any effect whatever on property values in the Woronora Heights estate.

## **REDUCTION OF VEHICLE RUNNING COSTS**

One of the arguments in the “For” document in the Precinct Committee’s Plebiscite Information Kit emphasised the convenience and time saving of having northern road access to Sutherland and some other areas. It was within that context that a statement was made that there would be a cost saving on vehicle running costs of \$386.10 per year per car for a Toyota Celica travelling to Sutherland station five days per week.

This example could only be put forward as an illustration of what might be possible in the specific case but the variables that would exist for other individual cases prevent the illustration from being treated as typical.

There is nothing in the Report which would suggest that the cost savings being postulated would apply to the travelling habits of Councillor Redmond or Councillor White or that they were interested in or concerned with the possibility of such cost savings in the actions which they took.

Subsection (2) of section 442 provides the appropriate test on the question whether a pecuniary interest could arise out of that possibility. If the interest in a matter is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision a person might make in relation to the matter, the person does not have a pecuniary interest.

In the view of the Tribunal, the possibility of vehicle cost savings which is postulated here is too insignificant to be reasonably regarded as likely to have influenced the decision of Councillor Redmond or Councillor White in the matters under consideration by the Council and would have to be rejected by the Tribunal as the basis for a finding that either Councillor had had a pecuniary interest within the meaning of the Act.

## **REMOTENESS OF INTEREST: SECTION 442(2)**

The Director-General's Report shows that on varying grounds Councillors Redmond and White and the Council's General Manager, Mr Rayner, argued or suggested to the Investigators that the Councillors could not be regarded as having the pecuniary interest because any possibility of financial advantage to them was too “remote”. In consequence of this the Director-General's Report sets out the arguments or suggestions that were put to the Investigators and comments upon some aspects of the issue of

“remoteness” which arises under section 442(2). For the purposes of the present case it is not necessary for the Tribunal to attempt a comprehensive definition of the concept of “remoteness” involved in this provision of the Act. To attempt to do so could be self-defeating in future cases the variety of circumstances of which is unpredictable. However, something needs to be said by the Tribunal because, in the Tribunal's view, it is possible from what has been stated in the Report that there may be some misconceptions.

According to the dictionary, the primary meaning of the word “remote” is “far away in place or time”: **The Australian Concise Oxford Dictionary**. A subsidiary meaning for the word is “slight” or “faint”. In the Tribunal's view, the word “remote” is used in section 442(2) in this subsidiary meaning.

In the matter of the complaint against Councillor Roberts, Hastings Council, PIT1/1995 (3 August 1995) it was necessary for the Tribunal to make some decisions about the meaning of the definition of pecuniary interest in section 442 of the Act. The Tribunal decided that the language of section 442(1), “a reasonable likelihood or expectation of appreciable financial gain or loss”, was being addressed to chances or possibilities as well as probabilities and to cases where the nexus between the Council's decision in the matter and the accrual of financial gain or loss to the person may be subject to contingencies, uncertainties and the risk of non-fulfilment. It is in that context that the word “remote” in section 442(2) finds its place.

In the Tribunal's view, the word “remote” calls for a consideration of the strength of the chances or possibilities of appreciable financial gain or loss accruing to the person in consequence of a decision which the Council might make in the matter under consideration. The strength of the chance or possibility may, according to the circumstances of each individual case, vary in degrees between strong and slight or faint; but subsection (2) of section 442 does not leave the question completely at large because it provides the relevant yardstick by which it should be measured, namely, an assessment of its capacity to influence any decision by the person in question. If the chance or possibility of financial gain or loss is not considered to be strong enough reasonably to be regarded as likely to influence the decision, the person will not have a pecuniary interest in the matter. On the other hand, if the strength

of the possibility or chance is such that it could reasonably be regarded as likely to influence a decision, then the interest in question will not be too remote to constitute a pecuniary interest in the matter.

It does not follow that the element of time (which is discussed in the Report) would not be a consideration. If the prospects of realisation of financial gain or loss as a result of a Council decision is distant in time, that of itself would not preclude a finding that there was a pecuniary interest; but the time element may, by reason of its length, increase the exposure of the chance or possibility to adverse events and contingencies to such an extent as to make the prospects of realisation too tenuous to be reasonably regarded as likely to influence a person's decision on a matter.

In relation to the argument put to the Investigators that prospects of financial gain in the present case were too remote in terms of time to constitute a pecuniary interest, the Director-General's Report listed as considerations relevant to that argument events which would have to occur before the northern access road could be opened, namely, completion and exhibition of the environmental impact statement, consent by the Council to the development application which had to be prepared, construction of the road to be completed from the Fire Trail, The Crescent and Prince Edward Park Road and removal of the obstructing fire gates. To these had to be added that the completion of the high level bridge over the Woronora River, which, under the Council's resolution of 11 June 1996 was a condition of opening the road for public access, was a matter beyond the control of the Council as it depended upon decisions and funding by the State Government. Whilst all of these matters would be relevant to an assessment of the strength of the prospects of financial gain if the Council's decision was in favour of opening the road, the Tribunal takes the view in the present case that, even assuming that the road was opened, it would, on the available evidence, be pure speculation as to whether it would have an effect upon values of property in the area. On that approach to the matter, one does not get to the question of remoteness because that question presupposes that the evidence established that some prospect of financial gain did exist. If the Tribunal had come to the conclusion that there was evidence likely to establish that there

was a prospect of financial gain to Councillor Redmond or Councillor White if the road was opened, it would then have been required to consider the question of remoteness under section 442(2).

## **ADVANTAGE NO DIFFERENT FROM THAT SHARED BY OTHERS**

Both Councillor Redmond and Councillor White contended to the Department and the Investigators that they could not have a pecuniary interest in the opening of a northern access road because any financial advantages thereby gained by them would be no different from that shared by all other persons in the area. In the Tribunal's opinion, this is a false view of the legislation. The Legislature directed its attention to that kind of situation when, in section 448, it exempted from disclosure only an interest in any matter relating to "the terms on which the provision of a service or the supply of goods or commodities is offered to the public or a section of the public that includes persons who are not subject to this Part." On a proper construction of those words, in the opinion of the Tribunal, the provision of a northern access road to Woronora Heights does not answer the description "the provision of a service or the supply of goods or commodities" referred to in the section and there is no basis in the legislation for attempting by some process of construction to extend the meaning of those words beyond their ordinary meaning.

## **POLITICAL COMMITMENT BY COUNCILLORS**

Both Councillors Redmond and White contended to the Department and the Investigators that their actions in Council were justified by the commitments they had made to the constituents of Ward D who had elected them to the Council. As mentioned earlier, both Councillors had put the opening of the northern access road and the upgrading of emergency access at the forefront of the policy on which they had sought election to the Council. Councillor White told the Investigators that if the effect of the legislation was to take the three Councillors from Ward D out of the equation, the matter would be determined by Councillors from Cronulla and Miranda and would never be resolved because those Councillors had their own issues to pursue.

When interviewed by the Investigators he said, "Now the point is the people elected me on the understanding that I would pursue the opening of that road, that was the clear understanding of what I put to them and what they've asked me to do. And I have an obligation to do that." Councillor White also said to the Investigators, "I'll be quite honest with you, my platform was to resolve the issue of this Fire Trail and I made the point to them that it's no good me carrying on in Council. I'd rather resign and have a re-election for the position so that it can be resolved and that was my position." In his letter to the Director-General in response to notice of the complaint against him, Councillor Redmond wrote:

**"The upgrading of the Fire Trail to public road standard was a major part of my election platform prior to September 1995.**

**I had overwhelming support from residents in the Greater Engadine and Woronora Heights area (that part of my Ward has approximately 20,000 people living in it). These people expect me to act upon the assurances I gave them regarding this issue. I will not be letting them down."**

When interviewed by the Investigators, Councillor Redmond said that his understanding of the Land and Environment Court decision at the time of purchasing his property was that a northern access road was to be put in at Woronora Heights as a second access. He said that he was elected to the Council on the basis of his interest in that second access road. He said, "That was one of the major parts of my platform."

Councillor Redmond was asked to state his understanding after his election to the Council of his obligations under the pecuniary interest provisions. He said:

**"My understanding of my obligations immediately after I was elected was to carry out the duties to residents that I was elected for. That was my understanding and I've done nothing less than that so far. And I've never at any time behaved in a manner that would be a benefit to myself to the exclusion of the remainder of the community. And I would have thought that that's what the legislation relates to, that there is a commonsense interpretation to that legislation and that's what it's about."**

He added, "That's my understanding of simply behaving with a degree of decency."

Councillor Redmond later repeated that philosophy but with a qualification. He said:

**"I would act upon the commitments of the residents of that area that I made prior to my election and not up to the point, not up to a point of breaking the law, which I haven't done."**

Councillor Redmond finally expressed to the Investigators his view of his position if the matter before Council was one where he believed that the outcome might result in an increase or a decrease in the value of his property by saying:

**"And what for instance if people living in your immediate area at around election time wanted somebody to go forward for them and to have a series of improvements undertaken, should that person then ask whether or not they can ultimately go to Council and do that because they might have a pecuniary interest, so then perhaps those residents should go and see Councillors that live in another Ward and ask them to put up a platform that has nothing to do with the Ward that they live in, that the Ward that those, only those people can vote in. I mean the contention that you are putting to me would result in absolute chaos in the whole of the local government system. It is a complete and utter absurdity."**

What Councillor Redmond has attempted to describe is a problem for candidates for election to Council, and their constituents, which arises from the mandatory requirements of the Legislature as expressed in the pecuniary interest provisions of the Act.

As a critic of the legislation, he is as entitled as any other citizen to predict "absolute chaos" and describe it as "a complete and utter absurdity"; but the legislation preceded his candidature and election to Council, was the law when he came to office and he, like everyone else, is bound to comply with the law as he finds it.

The arguments and views to which Councillor Redmond gave vent in the interview by the Investigators are more properly addressed to the Legislature through its elected representatives and can provide no

justification to a Councillor to ignore or decline to comply with the legislation. The argument can, of course, be used to support contentions as to the true meaning of the words used in the Act where that meaning is ambiguous or otherwise in doubt; but where the meaning is clear, the law as enacted by the Parliament must prevail.

In the present context, section 451 is expressed in mandatory terms. In all its parts, the operative word used is “must”. This means, for example, that if a Councillor personally stands to profit financially from a decision by the Council on a matter, unless exempted or excused by some other express provision of the Act, he or she must disclose that interest to the meeting and is prohibited from participation in the debate and from voting on the matter. The Councillor is not excused or exonerated from compliance because of a political commitment by which the office of Councillor was attained. That this is the policy of the law is, in the opinion of the Tribunal, plainly to be derived from the nature and form of the Act’s provisions. The implication is that a Councillor who would stand to profit financially if a commitment made to the electorate to gain election was realised will not be able to keep that commitment except by breaking the law and, thereby, becoming exposed to the possibility of suspension or disqualification, neither of which would please those who elected the Councillor.

It should not be supposed that the Legislature was not alive to the kind of problem envisaged by Councillor Redmond. The Act expressly provided a safety valve for that situation in section 458 which provides as follows:

- “458. The Minister may, conditionally or unconditionally, allow a councillor or a member of a council committee who has a pecuniary interest in a matter with which the council is concerned and who is present at a meeting of the council or committee to take part in the consideration or discussion of the matter and to vote on the matter if the Minister is of the opinion:**
- (a) that the number of councillors prevented from voting would be so great a proportion of the whole as to impede the transaction of business; or**
  - (b) that it is in the interest of the electors for the area to do so.”**

The presence of section 458 in the Act fortifies a conclusion that it was not intended that a Councillor’s political commitment to the electorate would excuse compliance if the Councillor had a pecuniary interest in a matter. It

would not excuse compliance unless the Minister saw fit to exercise the power under that section.

## **DECISION OF THE TRIBUNAL**

After reviewing all of the material and circumstances contained in and arising out of the Director-General's Report, the Tribunal has decided, for the reasons set forth in this Statement of Decision, not to conduct a hearing into Councillor Rankin's complaint.

A copy of this Statement of Decision will be furnished to Councillor Rankin and the Director-General in accordance with section 470. Copies will be provided to Councillors Redmond and White and the Sutherland Shire Council for their information.

DATED: 4 November 1997



**K J HOLLAND Q.C.  
Pecuniary Interest Tribunal**